4.4 WHAT PROCESS IS DUE UNDER THE CONSTITUTION?

The rules of the Office of Administrative Hearings (OAH) provide for considerable procedural protections for parties in contested cases. Those rules will be discussed in subsequent chapters. The Constitution, however, just as it prescribes a hearing in certain situations, may also prescribe how that hearing is to be conducted. In other words, once it has been determined that a constitutionally protected property or liberty interest exists, "the question remains what process is due."[1] The kind of hearing available to a person aggrieved by agency action, the form of the hearing, and the time at which the aggrieved party must be given a hearing are several questions that flow directly from the inquiry regarding what process is due. The fundamental requirement for due process is the opportunity to be heard "at a meaningful time and in a meaningful manner."[2]

The extent of due process that is required if a hearing is required will depend on the nature of the interest in question and the party asserting the right. The kind of hearing required may depend on whether the issue in question deals with adjudicative or legislative facts. "Adjudicative facts generally are the type of facts decided by juries. Facts about the parties, their activities, properties, motives, and intent, the facts that give rise to the controversy, are adjudicative facts."[3] In contrast, legislative facts are not particular to parties but are generalized facts that apply broadly and may be used as a basis for establishing general rules of law. [4] If the facts to be determined are adjudicative in nature, due process may require a hearing with features of a judicial trial. Legislative facts need not be determined by an adjudicative or trial-type hearing but, rather, may be determined in an informal legislative type hearing.[5]

Two cases that demonstrate the distinction between adjudicative and legislative facts are *Londoner v. Denver*[6] and *Bi-Metallic Investment Co. v. State Board of Equalization.*[7] In *Londoner*, the plaintiffs were given additional opportunity to argue their cases because the particular facts regarding the tax assessments against their land were individualized, and

[1] Morrissey v. Brewer, 408 U.S. 471, 481 (1972); *see* 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 9.4 - 9.5 (3d ed. 1994); *see, e.g.*, Sweet v. Comm'r, 702 N.W.2d 314, 320-22 (Minn. Ct. App. 2005) (concluding that appellant had a property interest in employment as a counselor in the public sector, but agency decision to disqualify appellant from working in a state-licensed program due to his criminal record did not require evidentiary hearing; because appellant's conviction was not contested, the court saw no value to an evidentiary hearing and found opportunity for written submission to contest the disqualification was sufficient).

[2] Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (quotation omitted). .

[3] *In re* Guardianship of Doyle, 778 N.W.2d 342, 348 (Minn. Ct. App. 2010) (quoting Minn. R. Evid. 201 1989 comm. cmt.; citing Kenneth C. Davis, *An Approach to Problems of Evidence in the Administrative Process,* 55 Harv. L. Rev. 364, 402 (1942) (defining adjudicative facts as "facts concerning immediate parties—what the parties did, what the circumstances were, what the background conditions were")).

[4] *See* United States v. Gould, 536 F.2d 216, 220 (8th Cir.1976) ("[l]egislative facts are established truths, facts or pronouncements that do not change from case to case but apply universally . . . .").

[5] Am. Bancorporation, Inc. v. B of Governors, 509 F.2d 29, 36-37 (8th Cir. 1974) (noting that a formal hearing is not required to resolve legislative facts related to questions of broad applicability as opposed to adjudicative facts about the parties and their activities.)

[6] 210 U.S. 373 (1908).

[7] 239 U.S. 441 (1915).

not general in nature.[8] In *Bi-Metallic,* on the other hand, the court concluded that no additional due process was necessary for the plaintiff because the state action increasing the valuation of their property in the city of Denver was legislative in nature and applied equally to all similar persons.[9]

The exact nature of the required hearing in terms of formality will vary depending on the specific situation.[10] Due process is flexible in regard to the formality of the proposed hearing. In order to determine what formality is required, it is necessary to balance the governmental interest in a summary action against the individual's interest in a meaningful hearing before adverse action can be taken.[11] Federal courts have indicated the following factors must be considered when determining whether due process has been satisfied; (1) the private interests affected, (2) the risk of an erroneous deprivation of such interests through the process and procedures used and the value of additional process or procedural safeguards, and (3) the government's interests involved, including appropriate fiscal and administrative burdens.[12] Some of the variables that courts consider when analyzing how much process is due are whether the agency action affects legal rights, whether the proceeding is adjudicative in nature, and whether the injured party is entitled to subsequent adjudicative procedures that will accord traditional safeguards.[13]

The leading case of *Goldberg v. Kelly*,[14] in addition to establishing the concept of "entitlement," demonstrates how the balancing test functions when it is applied to a specific set of circumstances. The *Goldberg* court required a pre-termination hearing for a recipient of AFDC benefits because the AFDC payments were the only means of support for the recipient; therefore, with no alternative income, any termination of benefits placed the recipient in a desperate situation which, when weighed against the government's interest of avoiding unnecessary AFDC payments, justified extensive procedural protection for the recipient[15]

In *Goldberg,* the basic essentials for due process in the pre-termination hearing were held to be:

1. timely and adequate notice detailing the reasons for the proposed action;
2. an opportunity to defend by confronting and cross-examining any adverse witnesses relied on by the agency;
3. an opportunity to present one's own arguments and evidence orally (as opposed to written submissions);

[8] *Londoner*, 210 U.S. at 386.

[9] *Bi-Metallic*, 239 U.S. at 445-46.

[10] *See* Am.Airlines v. CAB, 359 F.2d 624, 629 (D.C. Cir. 1966)..

[11] Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Hall v. Univ. of Minn., 530 F. Supp. 104, 108 (D. Minn. 1982); *see also* Martin v. Itasca Cnty., 448 N.W.2d 368, 371-72 (Minn. 1989) (stating that review of written documents by county board is sufficient procedure prior to imposing temporary leave of absence to run for elective office; notice and hearing not required).; Henry v. Minnesota Pub. Utils. Comm'n., 392 N.W.2d 209, 215 (Minn. 1986) (concluding that summary procedure for rehearing on one issue did not violate constitutional due process).

[12] Mathews v. Eldridge, 424 U.S. 319, 321 (1976); *see also* United States v. Raddatz, 447 U.S. 667, 677 (1980).

[13] Equal Emp't Opportunity Comm'n v. Johnson Co., 421 F. Supp. 652, 657 (D. Minn. 1975).

[14] 397 U.S. 254 (1970).

[15] *Id.* at 262-266.

4. assistance of retained counsel if the recipient so desires;
5. a decision that is based on legal rules and on evidence produced at the hearing;
6. a decision stating the evidence relied on and the reasons for the determination; and
7. an impartial decision maker.[16]

Similar but not identical standards have been applied to cases relating to revocation of parole,[17] revocation of probation,[18] and expulsion from college.[19]

These standards were not, however, applied where students were suspended from high school,[20] where a short order cook at a military installation was terminated for an undisclosed security violation,[21] or where a public utility attempted to terminate certain utility services.[22] A pre-termination hearing to a recipient of social security disability payments has been held not to be required.[23] Likewise, the Minnesota Court of Appeals has held that, while nursing homes have a protectable interest in not having their medical assistance payments reduced, a pre-reduction hearing is not required.[24]

Public employees with a constitutionally protected property interest in that employment are entitled to pre-termination hearings consisting of notice and an opportunity to respond.[25] A full evidentiary hearing is usually not necessary if a more complete hearing is available to the employee after the termination.[26] Rather, the pre-termination hearing "should be an initial check against mistaken decisions."[27] Notice providing an opportunity to respond may be either written or oral.[28] Informal meetings with supervisors, in which unacceptable performance is discussed, have been found to satisfy due process requirements.[29] In *Conlin v. City of St. Paul*[30] the Minnesota Court of Appeals held that an employee was afforded due process when his employer sent a letter informing him that he would be terminated in a week and that he could meet with his supervisor to discuss the matter during that week.

However, in *Winegar v. Des Moines Independent Community School District*[31], the court held that the school district violated the due process rights of a tenured high school teacher accused of child abuse where the district refused to provide the teacher with an

16 *Id*. at 267-71.
17 *Morrissey,* 408 U.S. at 484-89. .
18 Gagnon v. Scarpelli, 411 U.S. 778, 781-82, 791 (1973). .
19 Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 158-59 (5th Cir. 1961).
20 Goss v. Lopez, 419 U.S. 565, 581-84 (1975).
21 Cafeteria & Restaurant Workers Union v. McElroy, 284 F.2d 173, 182 (D.C. Cir. 1960), *aff'd* 367 U.S. 886.
22 Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 16-21 (1978).
23 Mathews v. Eldridge, 424 U.S. 319, 339-43 (1976).
24 *In re* Good Neighbor Care Ctrs., Inc. v. Minn. Dept. of Human Servs., 428 N.W.2d 397, 405 (Minn. Ct. App. 1988).
25 Cleveland Bd. of Educ. v. Loudermill 470 U.S. 532, 542 (1985).
26 *Id*. at 545.
27 *Id*.
28 *Id*. at 546.
29 Riggins v. Bd. of Regents , 790 F.2d 707, 710-11 (8th Cir. 1986).
30 418 N.W.2d 741, 744-45 (Minn. Ct. App. 1988).; s*ee also* Pelerin v. Carlton Cnty., 498 N.W.2d 33, 37 (Minn. Ct. App. 1993).
31 20 F.3d 895, 899-902 (8th Cir. 1994).

opportunity for an oral evidentiary hearing either before or after suspending him for four days and transferring him to another school. The school district had conducted two investigations, involving numerous interviews of witnesses, several meetings with the teacher in which he was allowed to present his version of the incident, and review of the teacher's written submissions. Despite this, the court concluded that a school board must provide an oral evidentiary hearing when it suspends a teacher on the basis of a finding of misconduct that can injure the teacher's reputation.[32]

In addition to the balancing test mentioned in *Mathews,*[33] courts will consider the interests of society, such as the rehabilitation of prisoners and the importance of education, when determining the sufficiency of due process in a given procedure. Likewise, courts will consider the costs and benefits of requiring due process protections. The accuracy of the decision and the fairness of the process seem to be balanced in some cases against the cost in time, effort, and impact on the program or agency. In some situations, especially when the public health and safety are concerned, the need for a hearing before agency action will be waived, and summary action by the agency will be allowed, as long as a form of compensation may be made for injury that might occur from the agency action.[34]

32 *Id*.

33 Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

34 Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 599-600 (1950); N.Am. Cold Storage Co. v. City of Chicago, 211 U.S. 306, 315-16 (1908); Reutzel v. State Dep't of Highways, 290 Minn. 88, 102-03, 186 N.W.2d 521, 529 (1971).