Flexible Due Process: How Much Process is Due in Your Hearings?

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I. The Government's Obligation to Its Citizenry

U.S. Constitution, Amendment 5
"No person shall be…deprived of life, liberty or property without **due process** of law…"

U.S. Constitution, Amendment 14
"…nor shall any state deprive any person of life, liberty or property without **due process** of law…"

Since the Constitution prevents the government from taking "life, liberty, or property" without due process of law, the threshold question is whether one of these three protected interest is at risk. This, in part, defines what "process" is "due."

II. The Original Duties of the Three Branches of Government

A. Duties of the Legislative Branch[1]

1. Make and fund laws;
2. Collect taxes, borrow and coin money and regulate commerce;
3. Maintain the military and declare war;
4. Establish and maintain roads;
5. Create the postal service and other administrative agencies and manage them via:
   a. Oversight committees;
   b. Establishing restrictive statutes to govern agencies;
   c. Audit or investigate agencies and agency administrators; and
   d. Appropriate or withhold funding for the agency.

B. Duties of the Executive Branch

1. Administer (enact) laws made by congress (sign or veto; and
2. Administrative oversight/management, *e.g.* Cabinet Meetings

C. Duties of the Judicial Branch

1. Enforce the laws created by congress and signed by president;
2. Prevent erroneous deprivation of life, liberty or property via a system providing hearings before judges in courts of law; and
3. Declare act of coequal branch of government unconstitutional.[2]

[1] See Article 1, Section 8 of the Constitution for more information.

D. Eventual Delegation of Power to Administrative Agencies

U.S. v. Curtiss-Wright Export Co., 299 U.S. 304 (1936) began trend of ruling in favor of Congress's right to delegate authority on condition that Congress provide standards to direct administrative agencies in executing governmental policies. Accord, *Misretta v. United States*, 109 S.Ct 647 (1989).

III. Privilege to Property: Creation and Evolution of Administrative Hearings

A. *McAuliffe v. City of New Bedford*, 155 Mass. 216, 29 N.E. 517 (1892): Government benefits were considered "privileges" which the government could limit or remove at will.

B. *Londoner v. Denver*, 210 U.S. 373, 28 S.Ct. 708 (1908) and *Bi-Metallic v. State Bd. of Equalization*, 239 U.S. 441, 36 S.Ct. 141 (1915) entitled the person being deprived of a government benefit to **notice** and an **opportunity** to contest the government's action.

C. Justice Oliver Wendell Holmes dissenting in *Springer v. Philippine Islands*, 277 U.S. 183 (1928):…Congress has established the Interstate Commerce Commission, which does legislative, judicial and executive acts, only softened by a *quasi*…"

D. *U.S. v. Curtiss-Wright Export Co*., 299 U.S. 304 (1936) began the Court's trend in ruling in favor of Congress's right to delegate authority to administrative agencies on condition that Congress provide standards to direct the agencies in executing governmental policies (like APA).

E. *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961): Occupational licenses, welfare payments, etc., are more than mere privileges and those deprived of them have a right to some due process protection.

F. *Goldberg v. Kelly*, 397 U.S. 254, 261-263 (1970), declared persons deprived of government benefits previously considered privileges had a property interest in those benefits warranting trial-like due process protection, completely abandoning the right-privilege distinction. The minimum procedural safeguards were:

1. Right to timely and adequate notice of the basis for the action

2. Opportunity to defend against the reason for the action

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[2] *Marbury v. Madison*, 1 Cranch 137 (1803): Federal courts were able to declare an act of a coequal branch of government unconstitutional. Scope of judicial review has expanded to cover the actions of the executive branch and all administrative agencies.

3. Opportunity to confront adverse witnesses (AKA cross-examination)

4. Opportunity to present arguments and evidence orally

5. Opportunity to cross-examine witnesses (AKA confront adverse witness)

6. Right to disclosure of opposing evidence

7. Opportunity for representation by counsel (at party's expense)

8. Right to a determination based solely on the evidence presented at the hearing

9. Right to a reasoned decision stating the evidence upon which it relied

10. Right to an impartial decision maker

However, *Goldberg v. Kelly* was not destined to remain controlling law on due process for long. Chief Justice Burger recognized this in his dissent in *Goldberg* at 284:

> "…the complexity of the administrative process as we have seen it for the past 30 years would suggest the possibility that new layers of procedural protection may become an intolerable drain on the very funds earmarked for food, clothing and other living essentials."

The next year, the Court deduced Chief Justice Burger had been right all along.

Despite the fact that *Goldberg v. Kelly* remained controlling law regarding the level of due process required in administrative hearings for one year (until *Richardson v. Perales*), t**he above requirements set forth in *Goldberg v. Kelly* are the due process standards that 45 C.F.R. § 205.10 requires to conduct TANF hearings and that 42 C.F.R. § 431-E requires to conduct Medicaid hearings.**

G. *Richardson v. Perales,* 402 U.S. 389 (1971) held that the admission of hearsay documents in a Social Security hearing, without cross-examination of the declarant of the document, did <u>not</u> violate due process. The opinion delivered by Justice Blackmun, and which 6 other justices joined, said that *Goldberg v. Kelly* had imposed "undue judicialization" on what was a only *quasi*-judicial process and would impair disbursal of government benefits to those intended as the law's beneficiaries. The Court held that it was impracticable, because of the nature and volume of administrative cases, to require all the elements of due process in *Goldberg v. Kelly* holding that the system must be "fair—and it must work."

H. *Board of Regents of State College v. Roth*, 408 U.S. 564 (1972): Roth was hired as assistant professor for a fixed one-year term with tenure only available after 4 years. He was not rehired, was not told why, and was not given an opportunity to challenge the decision not to rehire him. His action in Federal District Court alleged he was entitled to a statement of reasons and a hearing. U.S. Supreme Court held due process adheres only when life, liberty or property is at risk. Roth's need or unilateral expectation of rehire did not constitute a property right which warranted due process protection. State and federal appellate courts still maintain this position: *In re 'Ao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications*, 128 Hawai'i 228, 287 P.3d 129 (2012); *Lewis v. Jaeger*, 818 N.W.2d 165 (Iowa 2012); and *Wynkoop v. Town of Cedar Lake*, 970 N.E.2d 230 (Ind.App. 2012).

I. *Goss v. Lopez*, 419 U.S. 565 (1975): The process due depends on the interests involved. *Goss* held requiring elaborate procedures for school suspension would harm educational interests; "some type of hearing" must be held due to potential loss of opportunity for education. Informal conference between the student and the principal, held in the school office, was sufficient due process:
   1. An opportunity for confrontation (but no right to call or cross-examine witnesses and no right to counsel);
   2. Notice regarding the charges against them; and
   3. An opportunity to present his version of events.

   Due process required for limited school suspension remains the same today.[3]

IV. Procedural Due Process Today

A. *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) an analytical technique for determining the necessary level of due process required for administrative hearings. The *Mathews* balancing test:
   1. What private interest will be affected?
   2. What is the risk of erroneous deprivation of the identified private interest?
   3. What is the cost to the agency in time, resources and money for additional procedural protection?

[3] In 2012, 18-year-old high school student injured younger student with his automobile on school property and received 10-day school suspension. *Heyne v. Metropolitan Nashville Board of Public Education*, 380 S.W.3d 715, 286 Ed. Law Rep. 730 (Tenn. 2012) held: Student had a claim of entitlement to public education warranting procedural due process. But written notice of charges and, if he denies them, an explanation of the evidence against him and an opportunity to present his side of the story satisfy due process.

B. *Consiglio, M.D., v. Department of Financial and Professional Regulation*, 988 N.E.2d 1020 (Ill.App. 1 Dist. 2013): Three physicians were licensed by the state to practice medicine. Subsequent to being licensed, each of the three was convicted of battery or abuse against a patient in the course of care or treatment. Pursuant to an act passed after their convictions, their licenses were revoked without a hearing based solely on the convictions. Plaintiffs argued the act violated their procedural due process rights because it called for revocation of their licenses without a hearing. Citing the *Mathews v. Eldridge* balancing test, the court held: Due process is a flexible concept, and the procedural safeguards it requires may not be the same in all situations. It does not necessarily require a proceeding that is akin to a judicial proceeding, nor does it require a hearing in every instance a government action impairs a private interest. The risk that their medical license would be erroneously revoked under the act was low because the act operates only upon a conviction which is a matter of public record and can be established without a fact-finding hearing.

C. *Bussoletti v. Department of Public Welfare*, 59 A.3d 682 (Pa. 2012): Mentally retarded adult male living with his parents received county benefit of daily door-to-door transportation to an adult training facility despite the fact that he lived three miles from the nearest paved road. The transportation service, Pathways, had difficulty picking him up during inclement weather and the commute caused significant wear and tear on its vehicles. Pathways said it was too costly to continue door-to-door transportation services and proposed to modify his transportation providing three options: (1) meet Pathways at the paved road nearest to his home; (2) use an alternate transportation provider, Green Arc; or (3) have his parents drive him for which they would be reimbursed 51 cents per mile. Recipient objected to the change. At hearing, ALJ determined regulation allowed Recipient to select any "willing and qualified provider," Pathways was no longer willing, and Pathways acted in accordance with regulations when it proposed modifications. On appeal, Recipient contended his procedural due process rights were violated because his parents were pressured to agree to the modification, he was discouraged from filing an appeal, he was given false statements about his rights to hearing and appeal, and the ALJ refused to address the issue of the illegality of Pathways' modification proposal. The Court held Recipient was entitled to notice and an opportunity for hearing and had received both. The notice contained all the pertinent information regarding hearing and appeal and provided the appeal deadline. Recipient was heard by the ALJ, his father testified, presented evidence and cross-examined opposing witnesses and ALJ properly addressed all issues.

D. *Pishny v. Board of County Commissioners*, 47 Kan.App.2d 547, 277 P.3d 1170 (2012): Coalition of landowners sought reversal of resolution by County Board of Commissioners to allow city to annex additional land. Landowners claimed they did not receive due process at public board meeting. Court held

their due process rights were not violated because they received adequate notice of the city's intentions and notice of the public hearing and received the opportunity to be heard.

E. *Fischetti v. Village of Schaumburg*, 2012 IL App (1st) 111008, 967 N.E.2d 950, 359 Ill.Dec. 920 (2012): Vehicle owner fined $100 as the owner of a car that ran a red light at an intersection monitored by an automated camera brought action against the village, seeking declaratory judgment and administrative review. Held: "Procedural due process" does not protect persons from the loss of life, liberty or property; it is the process that protects them from the mistaken or unjustified deprivation of life, liberty or property. It includes a right to present evidence and argument, a right to cross-examine witnesses and impartiality in rulings upon the evidence which is offered.

V. Due Process and Multiple Functions Within a Single Agency

A. A board of optometrists could not adjudicate a case against a corporation because the board members would receive direct financial benefit if the ruling was adverse to the corporation. *Gibson v. Berryhill*, 411 U.S. 564 (1973).

B. *Withrow v. Larkin*, 421 U.S. 35, 95 S.Ct. 1456 (1975): Physician had license suspended by medical board and appealed. Federal district court (368 F.Supp. 796) held statutes authorizing suspension without the intervention of an independent, neutral and detached decision-maker were unconstitutional and unenforceable. The board appealed. U.S. Supreme Court held members of the medical board were not constitutionally precluded from themselves holding adversarial license suspension hearing based on the Board's own investigation and did not establish prejudice or prejudgment on the part of the board.

C. School board may fire striking teachers for violating anti-strike law even though the board was the party against which they were striking. Familiarity with the facts and prior positions on policy don't themselves disqualify. *Hortonville School Dist.1 v. Hortonville Educ. Assoc.*, 426 U.S. 482 (1976).

D. "…Pelham signed the notice of violation. Pelham was in charge of the attorneys prosecuting the alleged violations. Pelham was the Department's only witness in its case in chief. Pelham reviewed the hearing officer's findings. Pelham issued the final order. Thus, Pelham was prosecutor, witness, and ultimate judge of the facts and law. Most significantly, in this final role Secretary Pelham necessarily passed upon his own evidence. To approve the hearing officer's findings of fact and conclusions of law, he had to conclude that his own testimony was competent and substantial. Even with the best of intentions, this can hardly be characterized as an unbiased, critical review." *Ridgewood Properties, Inc., v. Dept. of Community Affairs*, 562 So.2d 322, 15 Fla. L. Weekly S367 (1990).

E. *Rand v. City of New Orleans*, --- So.3d ----, 2012 WL 6218289 (La.App. 4 Cir.), 2012-0348 (La.App. 4 Cir. 12/13/12): Administrative hearing process following a citation under city's automated traffic enforcement system (ATES), under which a hearing officer hired by the city as an independent contractor occupied inconsistent positions as both prosecutor and adjudicator, violating the due process rights of cited motorists. Due process requires that a decision-maker not have a direct or indirect financial stake which would give a possible temptation to the average person to make him/her partisan toward maintaining a high level of revenue generated by his adjudicative function.

F. *City of Pleasanton v. Board of Administration of the California Public Employees' Retirement System*, 211 Ca.App. 4th 522, 149 Cal.Rptr.3d 729 (Cal.App. 2012): Same attorney serving as both prosecutor in the hearing regarding retiree's claims and the advising staff person from the agency to the PERS Board when the board made its decision because the person did not vote or act in supervisory capacity

G. *Haygood v. Louisiana State Board of Dentistry*, 101 So. 3d 90, 2011-1327 (La.App. 4 Cir. 9/26/12): Dual role played by Louisiana State Board of Dentistry's general counsel in acting as both adjudicator over disciplinary proceedings and as advocate on behalf of Board by cross-examining witnesses, supplying objections to complaint counsel, and questioning dentist's credibility violated dentist's due process right to a fair hearing before an impartial adjudicator.

VI. Cases Illustrating Elements of Procedural Due Process

A. Adequate Notice of Basis for Action

1. *Shaw v. Valdez*, 819 F.2d 965 (1987). Complaint that right to "fair hearing" regarding unemployment compensation benefits was violated was valid due to lack of fair notice of factual and legal issues to be faced.

2. *Brock v. Roadway Express*, 481 U.S. 252, 107 S.Ct.1740 (1987). Notice is sufficient if it provides allegations and substance of relevant evidence supporting allegations (whistle-blower case did not require disclosure of identity of accusant).

3. *State ex rel. Currin v. Commission on Judicial Fitness*, 311 Or. 530, 815 P.2d 212 (Or. 1991). Disciplinary proceeding brought against judge. On judge's petition for mandamus relief, court held judge was constitutionally entitled to notice of particularity of charges against him, including names of complainants, places and dates related to allegations.

4. *In re Interest of Natasha H. & Sierra H.*, 258 Neb. 131, 602 N.W.2d 439 (1999). Due process means parties whose rights are to be affected are entitled to be heard and, in order that they may enjoy that right, they must first be notified.

5. *Calloway v. Ohio State Medical Board*, --- N.E.2d ----, 2013 WL 2247048 (Ohio App. 10 Dist. 2013): An elementary and fundamental requirement of due process in any proceeding is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

6. *Matthew M. v. Department of Children and Families*, --- A.3d ----, 2013 WL 3336908 (Conn.App. 2013): For purposes of due process, notice of an administrative hearing is not required to contain an accurate forecast of the precise action which will be taken on the subject matter referred to in the notice; it is adequate if it fairly and sufficiently apprises those who may be affected of the nature and character of the action proposed, so as to make possible intelligent preparation for participation in the hearing.

7. *Pratt v. Kansas Department of Revenue*, 48 Kan.App.2d 586, 296 P.3d 1128 (2013): Motorist was not prejudiced by arresting officer's failure to certify method of service of form notice on her following DUI arrest where motorist met filing deadlines for administrative and judicial review of driver's license suspension and her driving privileges remained intact (suspension was stayed) throughout review proceedings.

8. *City of Houston v. Carlson*, 393 S.W.3d 350 (Tex.App. 14th Dist. 2012): Substitute procedure conducted by city in lieu of statutorily-required public hearing was insufficient to satisfy procedural due process rights of condominium unit owners as to city's issuance of notice to vacate property after inspection deemed units unsafe. Hearing notices were inadequate as they did not warn owners that inaction might result in them having to vacate property and provided only six days' notice prior to hearing. City apparently made no attempt to comply with specific statutory procedures.

B. Opportunity to be Heard

1. *Armstrong v. Manzo*, 380 U.S. 545 (1965). The opportunity to be heard must be granted at a meaningful time and in a meaningful manner. What constitutes "meaningful time" is determined based on facts of each case.

2. It is not the hearing itself, that due process requires, but the ***opportunity*** to be heard: *Traverso v. People ex rel Dept. of Transp*., 384 P.2d 488 (Cal. 1992) (due process requires opportunity to be heard rather than actual hearing); *Reno v. Flores*, 113 S.Ct. 1439 (1993) (INS proceeding); *Tur v. FAA*, 4 F.3d 766 (9th Cir. 1993) (emergency revocation of pilot's license);

Banks v. Secretary of the Indiana Family and Social Services Administration, 997 F.2d 231 (7th Cir. 1993) (denial of Health care providers' reimbursement claims); *Skydiving Center v. St. Mary's Airport Commission*, 823 F.Supp. 1273 (D.Md. 1993) (revocation of school's permit to conduct parachute drops); *Odum v. University of Alaska*, 845 P.2d 432 (Alaska 1993) (employment termination of professor); *United States v. McCalla*, 821 F.Supp. 363 (E.D. Pa. 1993) (INS telephone hearing).

3. There is no right to a full evidentiary hearing in cases where there are no genuine issues of material fact to be determined. *Landesman v. Board of Regents of State of New York*, 463 N.Y.S.2d 118 (3rd App. Div., 1983).

4. When an emergency exists, the immediate protection of the public has precedence over the right to be heard; an agency may take action immediately but must provide opportunity for hearing within a reasonable time. *FDIC v. Mallen*, 486 U.S. 230 (1988); *Dixon v. Love*, 431 U.S. 105, 97 S.Ct. 1723 (1977) (driver's license taken based on driving record showing repeated convictions for traffic violations).

5. *Fillinger, R.N. v. Rhodes* (Director, Board of Nursing Examiners), 741 S.E.2d 118 (2013): Board denied R.N. opportunity to be heard in opposition to misconduct allegations where board failed to issue status reports after it had initiated administrative process upon complaints which could result in revocation or suspension of R.N's professional license and repeatedly continued scheduled hearings without giving reasons for the continuances (there was a written agreement between the Board and the complaining parties to extend time for Board's final ruling).

6. *Clark v. Louisiana State Racing Commission*, 104 So.3d 820, 2012-1049 (La.App. 4 Cir. 12/12/12): Notice of hearing complied with due process though it did not specifically notify him that the LSRC was seeking an enhanced penalty based on his prior disciplinary violations as the notice cited a rule which provided for tiered penalties and jockey did not request a more definite statement.

7. *Hansen v. Board of Registered Nursing*, 208 Cal.App.4th 664, 145 Cal.Rptr.3d 739 (2012): Expiration of the period for the nurse to challenge the default revocation of her license (before nurse received actual notice) did not violate her right to due process where the nurse failed to keep the Board informed of her current address and Board sent notice to address of record via certified mail.

8. *Myers v. Coats*, 966 N.E.2d 652 (2012): Ex-offender brought action against DOC for declaratory relief and damages on allegations Director failed to provide ex-offender with procedure to contest his erroneous listing on sex offender registry.

C. May Be Represented by Counsel

1. *Kearse v. State Health & Human Services Finance Commission*, 456 S.E.2d 892 (S.C. 1995). There is no constitutional right to counsel at the state's expense in an administrative proceeding unless the action could result in incarceration (no liberty interest at stake).

2. *Montilla v. INS*, 926 F.2d 162 (2nd Cir. 1991). The right to counsel (at petitioner's expense) is a fundamental right in an agency hearing.

3. *Father & Sons Lumber & Building Supplies, Inc. v. NLRB*, 931 F.2d 1093 (6th Cir. 1991). The administrative procedures act guaranteed the right to counsel, not the right to the *effective assistance* of counsel. See also *Loe v. Sex Offender Registry Board*, 73 Mass.App.Ct. 673, 901 N.E.2d 140 (Mass.App.Ct.2009).

4. *Moseley Grocery v. State Department of Public Health*, 928 So.2d 304 (Ala.Civ.App., 2005): DPH disqualified grocery store from participating in Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) and store appealed. Failure of DPH to notify grocery store of its right to counsel in its charge letter did not prejudice a substantial right of the grocery store where store actually had legal presentation throughout the proceeding.

5. *Watson v. Fiala*, 101 A.D.3d 1649, 957 N.Y.S.2d 523 (2012): Aside from certain narrow exceptions, the right to counsel does not extend to civil actions or administrative proceedings. Due process considerations in such cases require that a party to an administrative hearing be afforded the opportunity to be represented by counsel.

D. Opportunity to Present Evidence and Argument

1. Appellate courts have reversed where judges have limited each to party to a certain number of hours to present their cases, including time used for cross-examination. *Goelner v. Goelner*, 770 P.3d 1387 (Colo. 1989), *Rosa v. Bowen*, 677 F.Supp. 782 (1988).

2. Presentation of evidence can be accomplished by means other oral hearing without violating due process. *Mathews v. Eldridge, supra*; *FDIC v. Mallen, supra*; and *Landesman v. Bd. of Regents of New York State, supra*.

3. Refusing a final oral argument isn't error if a written argument is allowed. *Union State Bank v. Galecki*, 417 N.W.2d 60 (Wis.Ct.App. 1987).

4. *Hicks v. Kentucky Unemployment Insurance Commission*, 390 S.W.3d 167 (Kent.App. 2013): Claimant was denied subpoena duces tecum on the ground that the documents he requested were "primarily documentation the claimant should have had in his possession." However, certain information relating to the Commission's investigation and his employment file would not have been in his possession. Court held his due process rights were violated when he was not granted the administrative subpoena he requested.

5. *Hertelendy v. Great Lakes Architectural Service Systems*, 976 N.E.2d 950 (Ohio App. 8th Dist. 2012): Unemployment claimant disputed that he was hired as a fabricator rather than a driver. He wished to call two witnesses to testify regarding for which position he was hired. They were standing by to testify by telephone when the hearing said he did not believe he needed to take their testimony. Thus, they did not testify. Appellate court held their testimony was relevant and material and it was a due process violation not to take their testimony.

E. Opportunity for Cross-Examination

1. *State, Department of Motor Vehicles v. Vezeris*, 102 Nev. 232, 720 P.2d 1208 (1986): Appellant who lost driver's license following an administrative hearing for DUI argued due process rights were violated when affidavit of person who withdrew blood sample was admitted over objection at administrative hearing. Appellant asserted he had due process right to cross-examine the person who withdrew his blood. Court held only defendants in criminal proceedings may object to the use of such affidavits and that admission of affidavits over objection did not violate due process.

2. Agency did not deny petitioner the right to confront and cross-examine witnesses where affidavits were given under oath to agency investigators with statutory authority to take those statements, which were required by regulation. The petitioner failed to make any request to question any affiant, thereby forfeiting his right to cross-examine the affiants. *Valkering U.S.A. Inc. v. U.S. Dept. of Agriculture*, 48 F.3d 305 (1995).

3. Petitioner argued he was denied full, fair hearing because administrative procedures didn't provide cross-examination. Appellate court held he'd had many proceedings throughout administrative process, including appeal to superior court, and never requested right to cross-examine witnesses nor complained about unsworn testimony. *Third & Catalina Associates v. City of Phoenix*, 182 Ariz. 203, 895 P.2d 115 (1995).

4. *Bennett v. NTSB and FAA*, 55 F.3d 495 (1995.) Petitioner argued he was denied ability to cross-examine primary complainants against him. 10th Circuit, held his "invocation of the 6th Amendment is misplaced for the Confrontation Clause speaks only of 'all criminal prosecutions.' That constitutional right does not apply to civil administrative manners generally (*Hannah v. Larche*, 363 U.S. 420, 80 S.Ct. 1502 (1960)." The court further held that the petitioner

   "had been notified during the week preceding the Hearing that the O'Malleys would not be able to attend due to their vacation plans and that FAA would seek to have the O'Malleys' 'testimony, at least in the form of a declaration' available at the hearing…Bennett failed to subpoena the O'Malleys as was his right under Board's Rules of Practice. Nor did he seek to depose the O'Malleys or request a continuance either before the Hearing or afterwards. Thus having forgone the available opportunities for cross-examination, he cannot ascribe error on that ground."

5. *Youngs v. Industrial Claims Appeals Office*, --- P.3d. ----, 2013 WL 1459528 (Colo.App. 2013): Although a party in a workers' compensation hearing has a fundamental right to cross examination, that right may be restricted. Indeed, only where the restriction is severe enough to constitute a denial of the right will limitation of cross examination be overturned as an abuse of discretion.

6. *Davis v. Cumley*, 398 S.W.3d 566 (Mo.App.So.Dist. 2013): City personnel board's enforcement of time limits to present evidence and cross-examine did not violate due process rights of demoted police department employee where board, on its own, granted employee's counsel additional time for both cross-examination and for presentation of employee's evidence and where employee's counsel failed to timely object to the board's time limits, request additional time, or provide a summary of the evidence he desired, but was unable, to present.

F. Right to a Reasoned Decision Based Solely on the Record

1. *Asman v. Ambach*, 478 N.E.2d 182 (N.Y. 1985). Due process rights are denied in a proceeding in which no record is made.

2. At a licensing hearing where the issue of the licensee's competence and negligence are of a complicated nature, expert testimony is required to establish proper "competency standards" and whether they are met. Board may not rely on their own expertise to interpret the facts, and this does not come within the area of judicial notice of generally recognized technical or scientific facts. *Appeal of Schramm*, 414 N.W.2d 31 (S.D. 1987).

3. *Pida v. State, Dept. of Motor Vehicles*, 803 P.2d 229 (Nev. 1990). New hearing required when entire audio recording of original hearing is destroyed.

4. *Morales v. Merit System Protection Board*, 932 F.2d 800 (9th Cir. 1991). Unavailability of a portion of a recording, due to recorder malfunction, is not harmful error if existing record is sufficient for meaningful review and petitioner didn't argue testimony was inconsistent or misconstrued.

5. *Ortiz-Salas v. INS*, 992 F.2d 105 (7th Cir. 1993). Transcript of a record with 292 notations of "inaudible" was not a due process denial because the burden is on the appellant to prove the missing items would have made a difference in the outcome, invoking the "harmless error" rule.

6. The basic principle of exclusiveness of the record is violated when an agency decision is based upon undisclosed information. *American-Arab Anti-Discrimination Commission v. Reno*, 70 F.3d 10445 (9th Cir. 1995).

7. *State v. Dussault*, 245 P.3d 436(Alaska App. 2011): Defendant requested conditional release from Alaska Psychiatric Institute which resulted in several hearings. State filed motion to disqualify judge alleging that he engaged in improper ex parte communication with Commissioner of Department of Health and Social Service during the conditional release hearings. Court reversed judge holding communications were not authorized by law and created appearance of partiality.

8. *State Farm Insurance v. Workers' Compensation Appeals Board*, 192 Cal.App.4th 51, 120 Cal.Rptr.3d 395 (Cal.App. 2nd Dist. 2011): After on the job injury, disabled applicant received 24-hour-a-day attendant care at the rate of $30 per hour. Employer's insurer filed petitioner for writ of review. Court held applicant's prohibited ex parte communications with appointed medical examiner required that examiner's written report and testimony be stricken. Decision annulled and remanded with directions.

9. *Commission v. Dearman*, 66 So.3d 112 (Miss. 2011): Judge was publicly reprimanded, suspended for 30 days without pay and charged costs in part because she initiated and invited ex parte communication. Defendant was charged with felony larceny for stealing property, including a camera. Judge told defendant if camera was returned by a certain date, felony charges would be dropped. Judge learned through an ex parte contact that camera had been returned and reduced charge to a misdemeanor.

G. Right to be Heard by an Impartial Hearing Officer

1. A party attacking a judge's impartiality must demonstrate that the alleged bias stemmed from an extrajudicial source and resulted in an opinion reached on a basis other than what the judge learned from his participation in the case. *United States v. Grinnell Corp*., 384 U.S. 563 (1966).

2. *Cinderella Career and Finishing Schools, Inc., v. Federal Trade Commission*, 425 F.2d 583, 138 U.S.App.D.C. 152 (1970). FTC Chairman should have recused himself from participating in review of the Hearing Examiner's initial decision because he'd made public statements indicating prejudgment.

3. *Ward v. Village of Monroeville*, 409 U.S. 57 (1972). Mayor who is responsible for the city's finances cannot also be the judge presiding over the traffic court that is the city's primary source of revenue.

4. *Zalkins Peerless Co. v. Nebraska Equal Opp. Comm*., 217 Neb. 289, 348 N.W.2d 846 (1984). An administrative agency is a neutral fact-finding body when it is neither an adversary nor an advocate of a party.

5. An ALJ had lunch with counsel for one side and one witness for that same side. It created such an appearance of partiality as to taint the entire proceedings. *Wells v. Del Norte School Dist. C-7*, 735 P.2d 770 (Colo. Ct. App. 1987).

6. *Texaco Refining v. Board of Appeals of the City of Delaware City*, 579 A.2d 1137 (1989). In a tax assessment appeal, the city's attorney simultaneously represented the city as an advocate and acted as an advisor to the Board on legal matters which arose during Texaco's appeal. The appellate court held that when advocacy and advisory functions are combined, it violates the principles of due process.

7. There is a presumption that government officials will perform their function without bias. *State of Alabama ex rel Siegelman v. U.S.E.P.A.*, 911 F.2d 499 (11th Cir. 1990).

8. *Beer Garden Inc. v. State Liquor Authority of the State of New York*, 568 N.Y.S.2d 25 (1991). Petitioner's liquor license was revoked by state liquor authority (SLA). Counsel to SLA during investigation and prosecution was subsequently appointed commissioner to SLA. She did not recuse herself from voting on outcome of Petitioner's hearing. Appellate court annulled and remanded matter back to the SLA for new hearing from which this commissioner must recuse. Acting as counsel for the board and as commissioner during the course of the same proceeding blurred the separate and distinct functions of prosecution and adjudication.

9. *Davenport Pastures, LP, v. Morris County Board of County Commissioners*, 291 Kan. 132, 238 P.3d 731 (2010): Rancher applied for damages due to board's decision to vacate two roads that provided ranch access. District Court Judge awarded $30,000. Board appealed and awarded $4,050 on remand. Rancher appealed. Attorney for board was legal advisor to board, recommended appraiser that board hired as sole expert witness, examined the 3 board members during hearing, advised board members to agree on one damage figure, represented board at all court proceedings against rancher, board agreed on damage amount recommended by expert attorney recommended, and drafted board's report without knowledge of or input by rancher. Rancher's due process rights were violated as multiple roles played by attorney for board created probability of bias that rose to an unconstitutional level.

10. *Absmeier v. Simi Valley Unified School District*, 196 Cal.App.4th 311, 126 Cal.Rptr.3d 237 (2011): District's personnel director was dismissed and challenged termination. School board appointed hearing officer to hear challenge "to ensure impartiality." Hearing officer subsequently moved from area "terminated all work and further consideration of the matter." Board hired law firm to review record transcript and exhibits and provide Board with a report and recommendation. Law firm filed 46-page decision which contained findings of fact. Law firm weighed evidence and resolved conflicts in testimony in favor of the district and ruled dismissal should be upheld. Court held law firm had conflict of interest in dual roles as legal counsel and substitute ALJ and could not balance its duty of loyalty to the board with the obligation to be a neutral fact finder. Due process was violated due to law firms bias in favor of board.

VII. Rule of Necessity

A. Where there is only one person in the agency authorized to conduct hearings, the hearing official need not recuse himself/herself. The wording used by the ALJ in the decision, by itself, is not sufficient to show bias or lack of impartiality. *Colfor v. NLRB*, 835 F.2d 164 (6th Cir. 1988).

B. The decision of a biased agency will be upheld under the rule of necessity if the evidence would have entitled an objective decision-maker to arrive at the same result. *Gay v. Sommerville*, 878 S.W.2d 124 (Tenn.App. 1994).

VIII. Due Process and Post-Deprivation Review

In instances where the imposition of the administrative sanction is the result of a criminal conviction, it is not a violation of due process to offer a hearing only after the sanction has been imposed.

A. *Brown v. State, Dept. of Children and Families*, 341 Wis.2d 449, 819 N.W.2d 827 (Wisc.App. 2012): The constitutional requirement of procedural due process is met if a state provides adequate post-deprivation remedies. A state post-deprivation remedy is considered adequate, as required by constitutional guarantee of procedural due process, unless it can readily be characterized as inadequate to the point that it is meaningless or nonexistent and thus, in no way can be said to provide due process relief.

B. Where there is little risk of an erroneous deprivation, a post-deprivation review is sufficient. Failure to grant a pre-deprivation hearing did not violate due process. *Mackey v. Montrym*, 443 U.S. 1, 99 S.Ct. 2612 (1979).

C. *Dixon v. Love*, 431 U.S. 105, 97 S.Ct. 1723 (1977) held that summary suspension or revocation of driving privileges, based on official records of the license of a motorist who has been repeatedly convicted of traffic offenses, with a full administrative hearing available only after the suspension or revocation has taken effect, comport with due process because, under the *Eldridge* criteria:
   1. The nature of the private interest involved is not so great as to require a departure from the ordinary principle that something less than an evidentiary hearing is sufficient prior to adverse administrative action;
   2. The risk of erroneous deprivation absent a prior hearing is not great and Additional procedures would not significantly reduce the number of erroneous deprivations; and
   3. The requirement of a pre-termination hearing would impede the public interests of administrative efficiency as well as highway safety.

IX. Due Process and Ex Post Facto Laws

***ex post facto* law** – Law passed after occurrence or commission of act which retrospectively changes legal consequences of act; law that changes or inflicts greater punishment than the law that existed when the deed was committed.

Enhancement of an administrative sanction typically does not violate the constitutional proscription against *ex post facto* laws as they are civil sanctions rather than criminal punishments.

A. *Consiglio v. Department of Financial and Professional Regulation*, 988 N.E.2d 1020 (Ill.App. 1 Dist., 2013): Provision in law revoking the licenses of health care workers who had been convicted of batteries against patients before the effective date of the provision did not violate the constitutional proscriptions against ex post facto laws, as the revocations constituted civil sanctions, not criminal punishments.

B. The driver's license suspension of a habitual offender of motor vehicle laws is for public safety, not for punishment of the offender**.** *State v. Moret*, 486 N.W.2d 589, 591 (Iowa 1992).

C. Driver's license revocation for operating while intoxicated is not intended as punishment but designed solely for the protection of the public. *State v. Blood*, 360 N.W.2d 820, 822 (Iowa 1985).

D. Ex post facto prohibition applies only to penal and criminal actions, not to civil actions. *State v. Taggart*, 186 Iowa 247, 254, 172 N.W. 299, 301 (1919).

X. Mick's Seven FALSE Syllogisms Often Offered as "Due Process" Arguments In Administrative Hearings

1. Criminal activity can only be proved by proof beyond a reasonable doubt (*e.g.* teacher faces revocation of teaching license for allegedly molesting student.) *Santana v. City of Hartford*, 94 Conn.App. 445, 894 A.2d 307 (Conn.App., 2006).

2. Acquittal of a crime precludes imposition of an administrative sanction and eliminates the right to proceed with the administrative hearing regarding the sanction if the sanction was prompted by the same event as the criminal acquittal (*e.g.* acquittal on criminal charge of driving under the influence precludes revocation of driver's license for implied consent or operating under the influence). *Miller v. Epling*, 229 W.Va. 574, 729 S.E.2d 896 (W.Va. 2012); *State v. Lemmer*, 736 N.W.2d 650 (Minn. 2007).

3. "Fraud" in administrative hearings must be proved by clear and convincing evidence. (This is not true unless your state supreme court says so. The issue is actually one of legislative intent.)[4] *DeNuptiis v. Unocal Corp*., 63 P.3d 272 (Alaska, 2003); *Coleman v. Anne Arundel County Police Dept*., 369 Md. 108, 797 A.2d 770 (Md.App., 2002).

4. *Miranda* warnings are required before evidence of a person's admitted wrong-doing can be used in an administrative hearing. *State, Department of Motor Vehicles v. McLeod*, 106 Nev. 852, 801 P.2d 1390 (1990).

5. Evidence obtained by a search is inadmissible in an administrative proceeding unless the search was conducted pursuant to a warrant or due to exigent circumstances; *i.e.* Fourth Amendment exclusionary rule is applicable to administration hearing. *Martin v. Kansas Department of Revenue*, 285 Kan. 625, 176 P.3d 938 (2008); *Chase v. Neth*, 269 Neb. 882, 697 N.W.2d

[4] States known to require "clear and convincing" burden of proof to prove fraud in administrative hearings: Hawai'i and Washington.

675 (Neb. 2005); *George v. Dept. of Fire*, 637 So.2d 1097 (La.App. 4 Cir., 1994); *Gikas v. Zolin*, 6 Cal.4th 841, 863 P.2d 745 (Cal. 1993); *Grames v. Illinois State Police*, 254 Ill.App.3d 191, 625 N.E.2d 945 (Ill.App. 4 Dist., 1993).

6. The Confrontation Clause of the U.S. Constitution means that the Petitioner in civil, administrative hearing has the right to face-to-face cross-examination of anyone presenting any sort of evidence against him. *N.J. Div. of Youth & Family Servs. v. V.K.*, 236 N.J.Super. 243, 252, 565 A.2d 706 (N.J.App.Div. 1989).

7. It is a violation of the double-jeopardy clause of the Constitution to impose an administrative sanction subsequent to sentencing for a criminal offense if the administrative action and criminal charge stemmed from the same event. *Dept. of Financial and Professional Regulation v. Consiglio*, M.D., 988 N.E.2d 1020 (Ill.App. 1 Dist., 2013); *Vancleave v. Arkansas Dept. of Health and Human Services*, 98 Ark. App. 299, 254 S.W.3d 770 (Ark. App. 2007); *State v. Kirby*, 133 N.M. 782, 70 P.3d 772 (N.M.App., 2003); *State v. Hansen*, 249 Neb. 177, 542 N.W.2d 424 (Neb. 1996); *State v. Higa*, 79 Hawai'I 1, 897 P.2d 928 (1995); *Johnson v. State*, 95 Md.App. 561, 622 A.2d 199 (Md.App.,1993).