**Chapter 17  
Due process**

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**Introduction**

“Due process of law” is a principle of federal constitutional law that gives every person in the United States the right to present reasons why the government should not deprive the person of life, liberty, or property. Due process of law plays a prominent role in modern public safety administration.

The reach of due process of law underwent an explosive expansion in 1970 following the ruling by the Supreme Court of the United States in the case of *Goldberg v. Kelly,* 397 U.S. 254 (1970), which recognized a due process right to notice and a hearing before a government agency could terminate an individual’s welfare benefits.

Today, under certain circumstances (which in some cases are difficult to determine), due process of law can be required from a state or municipal agency, a volunteer fire department, a private ambulance company, and perhaps even a medical director. Due process of law extends to employment terminations, licensure and certification terminations, disciplinary actions, and the withdrawal of medical authorization and credentialing. It may also be required in a quality assurance or quality improvement review.

Even in situations where due process of law is not legally mandated, it is a procedure that can serve to determine facts while instilling confidence in the process both in participants and observers.

In addition to the constitutional doctrine of due process of law, there are several federal statutes that protect individuals from unfair treatment such as the Family Medical Leave Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1966. Employees may have additional individual employment rights under state statutes and employment contracts. Rights under such laws and contracts provide substantial benefits, and they must be complied with in any employment or licensing action involving EMS providers. Such additional rights, however, are not the subject matter for this chapter.

This chapter will outline due process of law. It will briefly review the elements of due process of law that can affect the administration of EMS and the circumstances in which they are or may be required. Needless to say, when dealing with issues of providing and instituting due process of law, consult competent legal counsel.

**Law in the federal system**

First a word about the sources of laws that require and define due process of law.

**Case law**

Many of the requirements of due process of law in the United States arise from the written decisions of judges in various courts.

In the federal system, the Supreme Court of the United States sits at the top of the judicial hierarchy, and its rulings are law throughout the United States. At the next level down are the US Courts of Appeals. There are 11 numbered courts, plus the US Court of Appeals for the DC Circuit, and the US Court of Appeals for the Federal Circuit, which has jurisdiction in specific subject areas not likely to involve EMS. The rulings of the US Courts of Appeal are the law in the circuits in which they sit unless overruled by the Supreme Court. In the next lower tier of the federal judiciary are the US District Courts. There are 89 of them – at least one in each state. Their rulings are primarily limited to the particular cases involved, but they often serve as precedent for other cases in the same district.

In addition to the federal system, each state has its own state court system with a hierarchy of courts unique to that particular state. State courts have a hierarchy similar to the federal courts. The opinion of a state’s highest appellate court is law in that state.

The cases discussed and quoted in this chapter come from among all these various courts. The reasoning and conclusions are of interest from an analytical perspective. The extent to which they represent current law in a particular jurisdiction depends on their location and place in the judicial hierarchy, and whether the opinion continues in force or has been overruled by a higher court or abandoned by a subsequent opinion.

**State legislation**

Most contested cases involving EMS issues will take place before a state agency, such as a Department of Health.

Every state has adopted a law known as an administrative procedures act that to some degree will provide for due process procedures in contested hearings in the cases to which those acts apply [1]. Compliance with those procedures will be required. Those procedures can also provide a template for due process procedures that can be instituted in situations in which they are not required by law.

State administrative law proceedings generally can provide an expeditious, inexpensive, and yet thorough review of the important issues in a matter without the potentially prolonged procedures involved in court proceedings. Among other things, certain rules of evidence can be relaxed. As an example, hearsay evidence, a written or oral statement made by someone not testifying, may be admissible in an administrative proceeding if it helps resolve an issue and is credible and the rules so provide [2]. Such an approach allows the issue to be heard in a less formal format without being bound by the complex rules of evidence surrounding hearsay. At the same time a party who challenges a piece of evidence has the ability to present contrary evidence.

Judicial review of administrative proceedings is usually quite limited. Ordinarily a ruling in an administrative proceeding will not be retried in a court on appeal. Generally any review by a court is limited to a determination of whether there was substantial evidence in the administrative proceeding to support the result.

In addition to the state administrative procedures acts, many state constitutions have requirements for due process of law or its equivalent. There may also be other state statutes and regulations that detail due process requirements such as notice, hearing procedure, right to counsel, and similar subjects that may apply in specific cases. Those statutes and regulations must, of course, be complied with, and in some cases may provide more or different rights than the case law on the subject.

**Due process of law**

The present-day elements of due process of law have evolved to their current form from principles dating from medieval times combined with over 200 years of judicial interpretation by courts in the United States [3].

The legal doctrine of due process of law in the United States is perhaps most directly derived from the 39th chapter of the English Magna Carta of 1215:

*No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We [the King] proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land* [4]. (translated from Latin)

The term “due process of law” appears twice in the Constitution of the United States. The Fifth Amendment prohibits the federal government from depriving any person “of life, liberty, or property, without due process of law,” and the Fourteenth Amendment prohibits states from depriving any person of life, liberty, or property without due process of law. However, there is no definition of the term “due process” in the Constitution. As Supreme Court Justice John Marshall Harlan II observed:

*Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court’s decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. [Poe v. Ullman, 367 U.S. 497, 542 (1961)]*

**Due process – procedural versus substantive**

Although it may appear that due process of law clearly refers to a process or procedure, there are in fact two separate components to the due process of law doctrine. One component is “procedural due process of law,” which deals with the process of procedural fairness. The second component is referred to as “substantive due process.” The differences between the two are explained by the Supreme Court as:

*… [the] Due Process Clause protects individuals against two types of government action. So-called “substantive due process” prevents the government from engaging in conduct that “shocks the conscience,”… or interferes with rights “implicit in the concept of ordered liberty,”… When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner… . This requirement has traditionally been referred to as “procedural” due process.* [*U.S. v. Salerno,* 481 U.S. 739, 746 (1987)]

To establish a violation of substantive due process an individual must show that:

1. the challenged action affects a fundamental right
2. substantial infringement of state law prompted by personal or group animus, or
3. government action is legally irrational in that it is not sufficiently related to any legitimate state interest. [Steinberg v. District of Columbia, 901 F. Supp. 2d 63, 67-73 (D.D.C. 2012)]

This chapter will primarily deal with the procedural aspects of due process of law. Some liberty interests related to employment are not protected by substantive due process in any event [5].

**Elements of due process**

The basic ingredients available for procedural due process of law were culled from existing court opinions and collected in 1975 in an article entitled “Some Kind of Hearing” written by Henry J. Friendly, a former Chief Judge of the US Court of Appeals for the Second Circuit. The inspiration for the title was a quotation from Supreme Court Justice Byron White:

*The Court has consistently held that some kind of hearing is required at some time before a person is finally deprived of his property interests.* [*Wolff v. McDonnell,* 418 U.S. 539, 557–558 (1974)]

Judge Friendly set forth the requirements for procedural due process in relative order of importance as:

*An unbiased tribunal;*

*Notice of the proposed action and the grounds asserted for it;*

*An opportunity to present reasons why the proposed action should not be taken;*

*The right to call witnesses;*

*The right to know the evidence against you;*

*The right to have decision based only on the evidence presented; Counsel;*

*A record of the proceeding;*

*A statement of reasons for the action taken* [6].

Not all of these elements are required in any given situation. Due process is a flexible concept that varies with the particular situation, or as the Supreme Court put it:

*Once it is determined that due process applies, the question remains what process is due.* [*Morrissey v. Brewer,* 408 US 471, 481 (1972)]

Generally, a decision on how many and which of the historical elements (or perhaps some new ones) to implement and how to implement them is based on:

*…consideration of three distinct factors: First, the private interest that will be affected by the official action;*

*second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;*

*and finally, the Government’s interest, including the function involved and the fiscal and administrative*

*burdens that the additional or substitute procedural requirement would entail.* [*Mathews v. Eldridge*, 424 US 319, 335 (1976)]

**Governmental action**

The doctrine of procedural due process of law has a major limitation: it only applies to action taken by a government.

For example, in ruling that the University of Nevada–Las Vegas basketball coach could not complain that he did not receive due process from the National Collegiate Athletic Association (which was found to be a private organization and hence not involved in state action), the Supreme Court of the United States noted:

*Embedded in our … [constitutional due process]*  
*jurisprudence is a dichotomy between state action, which is subject to scrutiny under the … Due Process Clause, … and private conduct, against which … [constitutional due process law] affords no shield, no matter how unfair that conduct may be… . As a general matter the protections of [due process] do not extend to “private conduct abridging individual rights.*” [*National Collegiate Athletic Ass’n v. Tarkanian,* 488 U.S. 179, 191 (1988)]

Although a person may have a right under the Constitution, what remedy does the person have if the right is violated? An important federal statute addresses that problem: the Civil Rights Act of 1871, 42 USC §1983 (“Section 1983”). That statute provides that a person who is deprived of a constitutional right by a person acting under color of state law can sue the “state actor”:

*Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State …, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress …*

Although the issue is not entirely free from doubt in some cases, for our purposes at least, state action under Section 1983 and state action under the Fourteenth Amendment have the same meaning [7].

Clearly a state or local government is engaged in state action. However, private parties, such as volunteer fire and ambulance companies, private ambulance companies, and even medical directors can be so closely entwined with governmental action as to be engaged in state action and thereby required to provide procedural due process. The analysis for determining whether a private party is engaged in state action for purposes of the Fourteenth Amendment is summarized by the United States Court of Appeals for the Sixth Circuit in *Wolotsky v. Huhn,* 960 F.2d 1331, 1335 (6th Cir. 1992) as:

*The principal inquiry in determining whether a private party’s actions constitute “state action” under the Fourteenth Amendment is whether the party’s actions may be “fairly attributable to the state.” … The Supreme Court has set forth three tests to determine whether the challenged conduct may be fairly attributable to the state … These tests are*

*… [(1)] The public function test [which] requires that the private entity exercise powers which are traditionally exclusively reserved to the state, such as holding elections, … , or eminent domain, …*

*… [(2)] The state compulsion test [which] requires that a state exercise such coercive power or provide such significant encouragement, either overt or covert, that in law the choice of the private actor is deemed to be that of the state… .*

*… [(3)] the symbiotic relationship or nexus test, [under which] the action of a private party constitutes state action when there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself.*

If any of these criteria are satisfied by a person or entity, then state action exists and due process is required. Court opinions discussing this issue routinely engage in elaborate and detailed analysis of the evidence. In many cases predictability of the outcome is uncertain. However, many proceedings that will involve  EMS providers and EMS agencies will involve direct governmental regulation and/or licensing and certification that constitute state action and thus will unquestionably involve the right to procedural due process of law.

**Ambulance companies**

Whether a volunteer or private ambulance company is engaged in state action and required to provide due process of law depends on the particular facts and circumstances under which the company operates [8]. The courts that take up this analysis describe it as perplexing and difficult.

The Supreme Court has avoided ruling on the issue:

*We express no view as to the extent, if any, to which a city or State might be free to delegate to private parties the performance of … [fire protection] and thereby avoid the strictures of the Fourteenth Amendment.* [*Flagg Brothers, Inc. v. Brooks,* 436 U.S. 149, 164 (1978)]

Determining whether an ambulance company is engaged in Fourteenth Amendment state action generally involves a review of all of the elements of all of the tests against all of the evidence in a particular case.

Was the entity a private organization or corporation? How much funding did it receive from a governmental entity? Who owned the property that the organization used? What oversight did a governmental entity exert? Was the entity performing a governmental function? Was the entity performing a function that was traditionally an exclusive governmental function?

Who was the entity’s staff employed by? What is the legal requirement for providing the service?

The results of this analysis have produced the following.

* Six cases have found volunteer fire companies to be engaged in state action [9].
* Two cases have held it is a question of fact whether a volunteer fire company has engaged in state action without deciding the issue [10].
* Four cases have found volunteer fire companies not to be engaged in state action [11].
* One case has found an ambulance company engaged in state action [12].
* Six cases have found rescue squads and ambulance companies not to be engaged in state action [13].

An interesting feature of the opinions holding that rescue squads and ambulance companies are not engaged in state action is a reluctance to find that emergency medical transport is traditionally an exclusive state function despite the fact that there are several cases that hold that providing EMS is a governmental function associated with the protection of health, safety, and welfare [14].

One court remarked in 1983 that “Rescue squads are more akin to private functions that the State may be just beginning to assume than to public functions that are traditionally governmental” [*Eggleston v. Prince Edward Volunteer Rescue Squad, Inc.*, 569 F. Supp 1344, 1351(D. Va. 1983), aff ’d 742 F. 2d 1448(4th Cir 1984)]. Perhaps after 25 years they have now become traditional.

**Medical directors**

One case has held that the medical director of an ambulance service of a state-created hospital was engaged in state action in connection with his failure to sponsor a paramedic employed by the ambulance service [*Baxter v. Fulton-Dekalb Hosp. Auth.*, 764 F. Supp. 1510, 1516 (N.D.Ga.1991)]. Although the medical director did have an employment contract with the state, state action was found in part because state law required that an ambulance service have a medical director:

*(a) To enhance the provision of emergency medical care, each ambulance service shall be required to have a medical adviser. The adviser shall be a physician licensed to practice medicine in this state and subject to approval by the medical consultant of the Emergency Health Section of the Division of Physical*

*Health of the Department of Human Resources… .*

*(b) The duties of the medical adviser shall be to provide medical direction and training for the ambulance service personnel in conformance with acceptable emergency medical practices and procedures. Code of Georgia, § 31-11-501(a).*

**Medical review committees**

Medical review committees are a unique and valuable tool for conducting quality assurance and quality improvement reviews of EMS practices and procedures. They also are effective in conducting investigations into particular EMS events for purposes of disciplinary and credentialing procedures.

Under laws in many states the proceedings of a properly constituted and operating medical review committee are confidential. Such confidentiality allows searching and through inquiry into events while shielding sensitive medical information from disclosure. Because such medical review committees are formed and function under state statutes and regulations, their actions can be held to constitute state action and therefore be subject to procedural due process:

*This court has held that “the requirement of due process of law extends to administrative as well as judicial proceedings… .” Since the medical review committee is formed and functions pursuant to the terms of the regulatory act, it is a creature of the state, and like an administrative agency, is subject to due process rereview. The question then becomes the nature of the due process that is required in this setting.* [*Rudolph v. Pennsylvania Blue Shield,* 553 Pa. 9, 14, (Pa. 1998)]

Medical review committees are one area that state administrative procedure acts may not cover. If not, and absent other statutory or regulatory requirements, it may be necessary to develop an appropriate process. Guidance in this area can be gleaned from the procedures suggested (but not required) for physician quality review procedures contained in the Health Care Quality Improvement Act of 1986 (United States Code: Title 42, The Public Health and Welfare; Chapter 117, Encouraging Good Faith Professional Review Activities; Subchapter I, Promotion of Professional Review Activities).

**National accreditation entities**

Action by private national credentialing agencies such as the National Registry of EMTs is probably not considered to be governmental action, notwithstanding the reliance that most states place on their credentialing of EMS providers [15].

**An opportunity to present reasons why the proposed action should not be taken**

The overarching principle of procedural due process of law is giving the party against whom action is proposed a fair and full opportunity to challenge the basis for the action and to present that party’s own evidence.

Generally a hearing of some sort will be required to provide an opportunity to present both sides of an issue.

*… one may not be excluded by state action from a business, profession or occupation in a manner or for reasons which contravene the due process clause of the Fourteenth Amendment of the Constitution of the United States, and that due process means that there must be given notice of time and place of hearing, a reasonable definite statement of the charge or charges, the right to produce witnesses and to examine adverse witnesses and to have a full consideration and determination according to evidence before the body with whom the hearing is held.* [*Application of Levine,* 97 Ariz. 88, 91 (Ariz. 1964)]

The form and procedure of the hearing process can be customized.

“*Due process is not necessarily judicial process.”… Nor does it entail one set “of inflexible procedures universally applicable to every imaginable situation.*” [*Webb v. State ex rel. Arizona Bd. of Medical Examiners,* 202 Ariz. 555, 558 (Ariz. App. Div. 1, 2002)]

Many states have statutes allowing hearings by electronic means [16]. Consideration in the proper circumstances should be given to conducting all or part of a hearing by video conferencing or some other suitable means that will save resources and expand the participants who may be available to provide information [17].

Whatever its form, the hearing must give the parties a fair opportunity to present their own evidence and examine the evidence against them.

A critique of the requirements for a proper hearing comes from an EMS case [*Ciechon v. Chicago*, 686 F.2d 511 (7th Cir.1982)]. In that case the City of Chicago terminated a paramedic for her actions following 26 runs in 27 hours on duty during a heavy snowstorm that required her ambulance to park a block away from the patient’s apartment. In the face of heavy criticism from the patient’s family, the City terminated the paramedic despite evidence that was equivocal at best regarding the care she provided.

*Due process of law fundamentally requires a fair proceeding… . Fairness is insured by procedural safeguards which require proper notice and an opportunity to be heard… . Fairness also dictates that the procedure itself not be abused or misused. No matter how complete the panoply of procedural devices which protect a particular liberty or property interest,… due process also requires that those procedures be neutrally applied… . Even if the procedures themselves are legitimate, it is impermissible to employ those procedures vindictively or maliciously so as to deny a particular individual due process… . The record in this case demonstrates that the City misused its otherwise legitimate disciplinary procedures in a single-minded effort to discharge … [the paramedic] for her role in this unhappy sequence of events, and it thereby violated her right to due process of law.*

In *Baxter v. Fulton-Dekalb Hosp. Auth.*, 764 F.Supp. 1510 (N.D.Ga.1991), a paramedic was terminated based on allegations that he failed to properly document the care he provided to a patient. Following a hearing and appeal it was determined that he had not incorrectly documented the care. However, the medical director disagreed with the outcome of the hearing and appeal and refused to allow the paramedic to practice under his direction. The court found that the refusal to reinstate the paramedic was “*a deprivation of the paramedic’s constitutionally protected interest in continued employment without granting the paramedic any process of law.*”

The more recent EMS case of Rinehart v. Green- field [18] further illustrates the concept of a meaningful hearing. In that case a firefighter/paramedic responded to a call for a choking infant who was not breathing and in asystole when the paramedic arrived. The infant did not survive, but there was no issue regarding the care provided by the paramedic concerning the treatment of the infant.

However, there was an issue concerning the pressure release valve on the artificial respiration equipment. A dispute arose over whether the paramedic should have noted a problem with the valve in her patient care report. As a result of the ensuing dispute over the issue, the medical director revoked her privileges to practice under his medical direction. The firefighter/paramedic was employed by the City of Greenfield, which required that fire- fighters be capable of providing paramedic care. The City fired the firefighter/paramedic when the medical director withdrew her credentialing.

The City was required to give the firefighter/paramedic a hearing before termination. At the hearing, no evidence was allowed concerning the revocation of paramedic privileges by the medical director. The only issue addressed was whether the privileges had been revoked, not whether they had been revoked for a valid reason. In ruling that the firefighter/paramedic did not receive due process, the Court stated:

*Under the City’s theory, it did not matter whether … [the medical director] was right or wrong, prudent or hasty, fair or arbitrary. All that mattered was that he decided he did not want … [the firefighter/paramedic] to work as a paramedic or an EMT under his supervision. Under that theory, the Board of Works had nothing meaningful to decide. The Board’s hearing on … [the firefighter/paramedic’s] case was an empty formality. It was not a meaningful opportunity to be heard. Unless … [the medical director] changed his mind, nothing that … [the firefighter/paramedic] might show in the hearing could possibly have changed the decision to terminate her*. [*Rinehart v. City of Greenfield,* 2007WL 1100756, 10 (S. D. Ind., 2007)]

**Life, liberty, or property**

Courts make a distinction between life, liberty, and property interests [19].

A life interest is primarily limited to capital cases and perhaps related clemency proceedings and has rarely if ever been applied outside of those areas.

A liberty interest is described by the Supreme Court of the United States as:

*… the term [liberty interest under the Fourteenth Amendment] … denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized … as essential to the orderly pursuit of happiness by free men.* [*Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 104 (1923)]

A property interest arises when there is an interest in or right to “property” under law – generally state law. The interest in or right to the “property” must be reasonably definite and not limited by discretion. There must be an algorithm with no discretionary choices that will lead to the vesting of the right or interest.

An interest in employment, a license, or a certification can qualify as a property interest under appropriate circumstance.

The claims in the case of Med Corp. v. City of Lima, 296 F.3d 404, 411 (6th Cir. 2002), which holds that a private ambulance company has no property interest in being dispatched for 9-1-1 calls, illustrate the difference between a property interest and a liberty interest.

Emergency 9-1-1 calls in Lima, Ohio, were received by a dispatch system located at the city police department. Depending on the type of call received, the calls were then dispatched to either the city paramedic service or one of several private ambulance companies licensed to operate in the city. The private ambulance companies were dispatched on 9-1-1 calls based on an unofficial unwritten policy of dispatching private ambulance companies on a rotating basis.

One private ambulance service had difficulty locating addresses within the city and was suspended from being dispatched on 9-1-1 calls for one week. The private ambulance company filed suit against the city alleging deprivation of property and liberty interests without due process of law in violation of the Fourteenth Amendment. The company claimed that the suspension was a deprivation of its property interest in receiving 9-1-1 dispatches and in the property interest in its ambulance license.

The United States Court of Appeals for the Sixth Circuit ruled that the private ambulance service did not have a property interest in being dispatched for 9-1-1 calls because dispatching a private ambulance to 9-1-1 calls was discretionary with the city. There was no policy, law, or mutually explicit understanding that conferred the right to receive 9-1-1 calls on the private ambulance service and that limited the discretion of the city.

The suspension did not amount to a loss of the private ambulance company’s property interest in its ambulance license because the extent to which the ambulance service might lose business through the loss of 9-1-1 calls would not render its license valueless.

**Employment and licenses as a property interest**

Employment relationships present a continuum of certainty. There are gradations of security – tenure, a contract for a fixed term, an employee at will, an employee serving “at the pleasure of.” Which of these qualify as property interests for procedural due process?

*To create a property interest, the state-law rule or understanding must give the recipient “a legitimate claim of entitlement to [the benefit].” … For example, an employee may possess a property interest in public employment if she has tenure, a contract for a fixed term, an implied promise of continued employment, or if state law allows dismissal only for cause or its equivalent.* [*Darr v. Town of Telluride, Colo,* 495 F.3d 1243, 1251 (2007)]

Government employment that can be terminated at the will of the employer will not qualify [20]. However, where there are rights to continued employment, governmental employment will qualify as a due process property interest [21].

The same criteria apply to an EMS provider’s license or certification. Does the EMS provider have a legitimate claim of entitlement to the license or certification?

*Where the state confers a license to engage in a profession, trade, or occupation, not inherently inimical to the public welfare, such license becomes a valuable personal right which cannot be denied or abridged in any manner except after due notice and a fair and impartial hearing before an unbiased tribunal. Were this not so, no one would be safe from oppression wherever power may be lodged, one might be easily deprived of important rights with no opportunity to defend against wrongful accusations. This would subvert the most precious rights of the citizen.* [*Devous v. Wyoming State Bd. of Medical Examiners,* 845 P.2d 408, 415 (1993)]

Practically speaking, this means an EMS provider, having qualified for and having been awarded a license or certification, is entitled to procedural due process in connection with a proceeding revoking or limiting the license or certification.

It also means that in certain circumstances due process applies to applying for a license. In a seminal case on licensing, the Supreme Court ruled that a person cannot be prevented from being licensed for invalid reasons reasons *[Schware v. Bd. of Bar Exam. of N. M.,* 353 U.S. 232, 239 n. 5 (1957)].

However, an EMS provider is not entitled to procedural due process in obtaining a license if the provider does not meet legitimate criteria. In Lockhart v. Mathew the United States District Court for the Virgin Islands ruled that a former EMT whose license had expired and who could not lift the required 100 pounds required for licensure did not have a due process interest in an EMT license [*Lockhart v. Mathew,*203 F. Supp. 2d 403 (D. Virgin Islands 2002)].

Progressive disciplinary actions such as warnings,reprimands, reassignment, suspensions, and reassignment that fall short of revocation present another issue. When does the action become so insignificant that due process is not required? It depends.

Some cases hold that a violation of constitutional rights is never insignificant [22]. Others hold that a suspension of 3 days does not amount to a due process interest [23] while a 5-day suspension may raise a due process interest [24].

Placing a provider on probation may require procedural due process [25].

A transfer with no pay change will generally not amount to a deprivation of a due process property interest [26]. A warning probably does not raise due process interest [27], nor does a letter of reprimand that does not result in a loss of rank or pay [*Lowe v. Kansas City Bd. of Police Com’rs*. 841 F 2d 857, 858 (8th Cir. 1988)].

**The liberty interest**

A liberty interest in employment arises when an employment action is taken that damages the employee’s ability to obtain other employment. To the extent that charges of immorality, dishonesty, alcoholism, or incompetence affect the employee’s “occupational liberty interest” then the employee may have a liberty interest that requires due process of law [28].

Damage to reputation alone does not ordinarily present a due process interest [29]. Statements regarding a provider’s job performance or competence ordinarily do not rise to a level of stigma which creates a liberty interest [*Fox v. Cheltenham Twp. Auth*., 2012 U.S. Dist. LEXIS 83903 (E.D. Pa. June 18, 2012)].

The Healthcare Integrity and Protection Data Bank (HIPDB) became operational in 2000, under the Health Insurance Portability and Accountability Act of 1996 (HIPAA). Under that statute, state and federal agencies are required to report licensing and certification actions, including revoctions, reprimands, censures, probations, suspensions, and any other loss of license, or the right to apply for or renew a license, whether by voluntary surrender, nonrenewability, or otherwise such action to the HIPDB. One reported opinion suggests that reporting to the HIPDB may not raise a due process liberty interest [30].

**Impartiality of tribunal**

The first item on Judge Friendly’s schedule of the elements of due process is review by an unbiased forum. One court has phrased the issue as:

… *it is axiomatic that due process* … *requires that the forum be fair and impartial. Without that, the guarantee of notice, a hearing, and the right to be heard would be no more than an illusion.* [*Rudolph v. Pennsylvania Blue Shield,* 553 Pa. 9, 14 (Pa., 1998)]

In many jurisdictions, practical necessity results in the agency that initiates a disciplinary proceeding also judging whether the violation occurred. This is an economic necessity in many instances, and the Supreme Court of the United States has not found that the procedure violates due process in situations where the body effectively segregates the investigative, prosecutorial, and adjudicatory functions:

… *an agency employee performed the actual investigation and gathering of evidence in this case and* … *an assistant attorney general then presented the evidence to the Board at the investigative hearings. While not essential to our decision upholding the constitutionality of the Board’s sequence of functions, these facts, if true, show that the Board had organized itself internally to minimize the risks arising from combining investigation and adjudication, including the possibility of Board members relying at later suspension hearings upon evidence not then fully subject to effective confrontation.* [*Withrow v. Larkin,* 421 U.S. 35, 55 (1975)]

Government officials serving on a tribunal are presumed to be conscientious and fair-minded, and earlier involvement in the investigation should not disqualify them. Any issue of bias must be raised at the hearing or as soon as it is discovered. Otherwise it will be considered waived. [*Harrell v. City of Gastonia,* 392 Fed. Appx. 197, 204-205 (4th Cir. N.C. 2010)]

**Notice**

The first element of due process that a provider would ordinarily encounter in a matter would be notice of the proceedings against him or her. Generally the notice should advise the provider of the grounds for the action proposed to be taken, the type of action that is proposed, and the provider’s rights (which may include the right to present evidence, to attend a hearing, to be represented by counsel, to subpoena witnesses, and other essential elements of the proceeding).

The notice should be:

… *reasonably calculated to apprise [the provider] of the proceeding and to afford him an opportunity to present his case.* … *Due process does not require that notices of administrative proceedings ‘be drafted with the certainty of a criminal pleading,’ as long as the notice is sufficient for persons whose rights may be affected to understand the substance and nature of the grounds upon which they are called to answer.* [*Massand v. Medical Professional Mut. Ins. Co.,* 420 Mass. 690 (Mass., 1995)]

A notice must state all the facts and circumstances on which the proposed discipline is based. Additional incidents cannot be introduced at the hearing. In *Ellins v. Department of Health,* 505 So. 2d 74, 8 (La.App. 4 Cir., 1987), a paramedic was charged with a single incident of allowing a BLS provider to care for a patient on whom the paramedic had performed ALS procedures. At her termination hearing the city introduced evidence of other incidents of misconduct. The court reversed the termination of the paramedic stating:

*We find the hearing officer committed a reversible error in permitting the introduction of evidence concerning* … *[the paramedic’s] record of absences which was not the basis of her dismissal. While the rules of evidence may be somewhat relaxed at a Civil Service hearing, the lapse of formalities must not permit a violation of the employee’s rights to a fair hearing with notice of the charges against her.*

A practical problem associated with notice is communicating the notice to the party who is the subject of the proceeding.

The surest way for notice to be effective is to deliver a copy in writing to the individual to whom it is directed and to maintain proof of such delivery. Hand delivery to the individual followed up with an affidavit by the person serving the notice works well.

Other generally accepted methods are certified or registered mail delivery with a return receipt signed by the person to whom the notice is directed.

**Time for hearing**

A procedural due process hearing should ordinarily take place before the provider is deprived of a protected property interest. However, where the public health, safety, and welfare may be significantly at risk, action may be taken before a due process hearing provided an opportunity for a hearing is given promptly after the action is taken:

*Not even an informal hearing, however, must precede a deprivation undertaken to protect the public safety. Starting with a case that authorized summary confiscation of potentially contaminated food products, North Am. Cold Storage Co. v. City of Chicago, 211 U.S. 306, 29 S.Ct. 101, 53 L. Ed. 195 (1908), the Supreme Court has consistently held that “the necessity of quick action by the State” justifies a summary deprivation followed by an adequate post-deprivation remedy.* [*Caine v. Hardy,* 943 F.2d 1406, 1412 (C.A.5 1991)]

A summary proceeding on the record in advance of the action or within a very short time afterward should be provided in such a case so that there is reasonable assurance that the situation presents a sufficient threat to the public health, safety, and welfare to warrant the revocation of a property interest before a hearing. Such a procedure could include the presentation of the evidence upon which the action is based to one or two officials who are independent from the prosecutorial personnel presenting the matter. The summary procedure should also be specified in advance in the statute, regulations, or rules that spell out the due process procedures that apply. Any procedural irregularities in a summary proceeding may be irrelevant if the suspended party has access to a timely post suspension hearing [*Questcare, LLC v. Poynter,* 2013 U.S. Dist. LEXIS 29803 (E.D. Ky. Mar. 4, 2013)].

The summary suspension of EMTs alleged to have falsified training records and issuing cards for training that never took place has been upheld where there were adequate post-suspension hearing provisions in place [*Musgrave v. Commonwealth Dep't of Pub. Health,* 2012 U.S. Dist. LEXIS 76542, 3-4 (D. Mass. June 1, 2012)].

**Standard of proof**

In making the decision to deprive a provider of a property interest, the pivotal facts supporting the decision will need to be established. The side that must prove the pivotal facts in order to prevail bears the burden of proof of the issue. For example, it must be established that a provider committed a prohibited act in order to take disciplinary action against the provider. If there is no proof of the prohibited act, there will be no disciplinary action taken.

In a case where there are conflicting accounts, a decision must be made by the body or individual charged with determining the facts. How much proof on an issue is required?

The highest burden of proof in a contested matter is “proof beyond a reasonable doubt,” which is the standard that applies to criminal prosecutions. Although that degree of proof in an administrative proceeding could be required by statute or regulation, generally that is never a workable standard in an administrative due process proceeding.

The available choices are “a preponderance of the evidence” or “clear and convincing evidence.” A preponderance of the evidence generally means that a matter is more likely than not. It is sometimes described as if the evidence for and against a matter is placed on a balance scale, if the scale tips ever so slightly to one side or the other, then the side to which it tips has the preponderance of the evidence. Clear and convincing evidence is somewhat more than a preponderance of the evidence and something less than beyond a reasonable doubt

Absent a statute or regulation to the contrary, most courts have held that requiring that facts be established by a preponderance of the evidence is sufficient for due process purposes in medical disciplinary proceedings [31]. However, some courts maintain that the higher “clear and convincing” standard of proof is necessary to comport with due process for medical disciplinary proceedings [32].

**Right to counsel**

There is no procedural due process right to counsel before a government agency:

… *the constitutional right to effective assistance of counsel reaches only criminal or quasi-criminal proceedings and does not extend to administrative license revocation proceedings.* [*Plumer v. Maryland,* 915 F.2d 927, 931-32 (4th Cir.1990)]

However, many administrative procedure acts and agency rules provide the right to representation by counsel, and any such requirements must be followed. The government, however, has no obligation to provide counsel in an administrative proceeding to an individual who cannot afford one, as would be required in a criminal proceeding.

Although there is some authority that legal counsel may be prohibited in certain administrative proceedings (e.g. student discipline) [33], such a prohibition is not recommended.

… *the absence of an attorney may create a due process violation if the defect “impinged upon the fundamental fairness of the hearing in violation of the fifth amendment,*” … *and there was substantial prejudice* … [*Ogbemudia v. I.N.S*., 988 F. 2d 595, 598 (C.A. 5 1993)]

**Conclusion**

Due process of law stands as a cornerstone of individual rights in the United States. It presents benefits for both parties in a dispute. It can and must function in the appropriate circumstances of the administration of EMS. In the words of Supreme Court Justice Felix Frankfurter:

*No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.* [*Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 171–172 (1951)]

**Acknowledgment**

Mr Magee and Ms Sette are the Assistant Attorneys General for the Maryland Institute for Emergency Medical Services Systems. This chapter reflects their personal views, not necessarily the opinions of the Maryland Attorney General.

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3. 3 32 Fed. Prac. & Proc. Judicial Review § 8127
4. 4 Howard AED. The bridge at Jamestown: the Virginia Charter of 1606 and constitutionalism in the modern world. *U Rich L Rev* 2007; 42: 9, 10. The actual use of the term “due process’ apparently first appears in an English statute in 1354 “[N]o man of what estate or condition that he be, shall be put out of land or tenement, nor taken nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of the law.” *Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 28 (1991).
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