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Procedural Due Process in Pennsylvania: How the Commonwealth Court Clarified an Ambiguous Concept

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PROCEDURAL DUE PROCESS IN PENNSYLVANIA: HOW THE COMMONWEALTH COURT CLARIFIED AN AMBIGUOUS CONCEPT

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I. INTRODUCTION

There are two constitutional sources of procedural due process protections in Pennsylvania: the Pennsylvania Constitution,[1] which not only contains several provisions relating to procedural due process, but also contains a guarantee of appeal to a court of record from an administrative agency;[2] and the United States Constitution.[3] The Commonwealth Court of Pennsylvania has been

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[1] PA. CONST. art. I, §§ 1, 11. The Pennsylvania Constitution provides in article I, section 1: "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness." PA. CONST. art. I, § 1. And in article I, section 11:

> All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.

PA. CONST. art. I § 11. This article does not address due process in criminal cases, the subject of Pennsylvania Constitution article 1, section 9, because criminal cases are not within the jurisdiction of the commonwealth court.

[2] PA. CONST. art. V, § 9.

> There shall be a right of appeal in all cases to a court of record from a court not of record; and there shall also be a *right of appeal* from a court of record or *from an administrative agency to a court of record or to an appellate court*, the selection of such court to be as provided by law; and there shall be such other rights of appeal as may be provided by law.

PA. CONST. art. V, § 9 (emphasis added).

[3] U.S. CONST. amend. XIV, § 1. Amendment XIV, section 1 of the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State*

instrumental in interpreting and applying the procedural due process guarantees in those two constitutions.[4]

The commonwealth court has been a powerful force in building a coherent body of law in the area by filling in the blanks of the often general holdings of the Supreme Court of Pennsylvania and by explaining how those general holdings would apply to specific situations.[5] These functions were particularly important in the procedural due process area because there is no fixed content or definition to procedural due process.[6] An important attribute of procedural due process is the foundational notion, created by the Supreme Court of the United States,[7] that, above all else, procedural due process is a *flexible* concept, not a "technical" one "with a fixed content unrelated to time, place and circumstances."[8] In procedural due process cases, this attribute places the focus on fundamental fairness as applied in *each* particular factual situation.[9]

In spite of this characteristic, the commonwealth court has made impressive progress in creating a coherent body of procedural due process law in Pennsylvania. The first step that the court took was to affirm a basic definition of the specific parts of procedural due process.[10] Soon after its creation, the commonwealth court held that procedural due process requires notice and an opportunity to be heard before an unbiased tribunal

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deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id. (emphasis added).

[4] *See* Snyder v. Dep't of Transp., 977 A.2d 55, 57 (Pa. Commw. Ct. 2009) (citing Soja v. Dep't of Transp., 455 A.2d 613 (Pa. 1982)).

[5] *See, e.g.*, Lawson v. Dep't of Pub. Welfare, 744 A.2d 804, 806-07 (Pa. Commw. Ct. 2000).

[6] *Id.* (citing Commonwealth v. Thompson, 281 A.2d 856 (Pa. 1971)).

[7] Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (stating that due process is "not a technical conception with a fixed content" (quoting Cafeteria & Rest. Workers Union v. McElroy, 367 A.2d 886, 895 (1961))).

[8] *See* Gilbert v. Homar, 520 U.S. 924, 930 (Pa. 1997) (quoting *McElroy*, 367 U.S. at 895). The Supreme Court of Pennsylvania elaborated the flexibility concept soon after *Mathews* in *Pa. Coal Mining Ass'n v. Ins. Dep't*, 370 A.2d 685, 691 (Pa. 1977).

[9] *Pa. Coal Mining Ass'n*, 370 A.2d at 691 (citing Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

[10] *See Lawson*, 744 A.2d at 806-07 (citing *Thompson*, 281 A.2d at 858).

with jurisdiction.[11] Then the court began to refine the conditions necessary to invoke procedural due process protections and the nature of those procedural protections.[12]

II. STATE ACTION

Arising under the due process clauses of the Federal Fourteenth Amendment[13] and the Pennsylvania Constitution, procedural due process protection requires state action.[14] Distinguishing when state action has occurred in particular situations does not have an "easy answer."[15] In clarifying this concept, the commonwealth court has made a major contribution.[16] For example, in *Staino v. Pennsylvania State Horse Racing Commission*,[17] a patron ejected from a racetrack argued that the licensing and heavy regulation of horse racing established a "close nexus" between the regulated race track and the state, which was tantamount to state action.[18] The commonwealth court held that close or extensive state regulation does not convert private action into state action.[19] However, where a state agency and a private entity totally 'intertwine' in numerous ways, such that the private entity is performing actions that are normally taken by government

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[11] Firefighters Local No. 60 v. City of Scranton, 937 A.2d 600, 606 (Pa. Commw. Ct. 2007) (citing Krupinski v. Vocational Tech. Sch., 674 A.2d 683, 685 (Pa. 1996)).

[12] *See* Snyder v. Dep't of Transp., 977 A.2d 55, 57 (Pa. Commw. Ct. 2009) (citing Soja v. Pa. State Police, 465 A.2d 613 (Pa. 1982)).

[13] U.S. CONST. amend. XIV, § 1.

[14] *See* Jackson v. Metro. Edison Co., 419 U.S. 345, 349-51 (1974); Burton v. Wilmington Parking Auth., 365 U.S. 715, 725-26 (1961).

[15] *Jackson*, 419 U.S. at 349-50. The Supreme Court of Pennsylvania adopted the reasoning of the *Metropolitan Edison* case in *Brush v. Penn State University,* 414 A.2d 48, 52 (Pa. 1980). However, the Supreme Court of Pennsylvania opined in *Hartford Accident & Indemnity Co. v. Insurance Commissioner*, 482 A.2d 542, 549 (Pa. 1984), that state action is not necessary for a procedural due process claim arising under the Pennsylvania Constitution.

[16] *See* Staino v. Pa. State Horse Racing Comm'n, 512 A.2d 75, 77-78 (Pa. Commw. Ct. 1986).

[17] *Id.*

[18] *Id.* at 77 (quoting *Jackson*, 419 U.S. at 351).

[19] *Id.*

agencies, the connections form such a close nexus that they convert the private acts into state action.[20]

III. FEDERAL DUE PROCESS

The commonwealth court adjudicates cases involving government action under which parties assert procedural due process claims arising under the Federal Constitution and under the Pennsylvania Constitution.[21] In 1970, the Supreme Court of the United States decided *Goldberg v. Kelly*[22] and began the so-called "due process revolution."[23] *Goldberg* held that, in addition to protecting interests traditionally identified as "rights" under existing law, procedural due process would be applicable to liberty and property "interests," which were defined as those matters as to which the claimant had a "statutory entitlement."[24] Government benefits and contract interests that were defined by statute were now entitled to the protection of procedural due process.[25]

Two subsequent cases[26] explained that, in order to have a statutory entitlement to a government benefit or relationship sufficient to invoke procedural due process protections under *Goldberg*, a claimant must have a "legitimate claim of entitlement" to it and not a mere "unilateral expectation" or an "abstract need or desire."[27] Legitimate entitlements are usually created by state statute, contract, or custom.[28] Entitlement exists if there is a

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[20] Pa. Bar Ass'n v. Ins. Dep't, 607 A.2d 850 (Pa. Commw. Ct. 1992).

[21] *See, e.g.*, Snyder v. Dep't of Transp., 977 A.2d 55, 57 & n.5 (Pa. Commw. Ct. 2009).

[22] Goldberg v. Kelly, 397 U.S. 254 (1970).

[23] *See* Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362, 1439-40 n.288 (2010); Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1268 (1975); Doug Rendleman, *The New Due Process: Rights and Remedies*, 63 KY. L.J. 531, 532 (1975).

[24] *Goldberg*, 397 U.S. at 261-62.

[25] *Id.* at 262 & n.8 (quoting Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965)).

[26] Perry v. Sindermann, 408 U.S. 593 (1972); Bd. of Regents of State Colls. v. Roth, 408 U.S. 564 (1972).

[27] *Perry*, 408 U.S. at 602; *Roth*, 408 U.S. at 577.

[28] *Roth*, 408 U.S. at 577-78.

"mutually explicit understanding"[29] arising out of the statutory language, the contract, or the behavior that supports the claim of entitlement:

> [R]easonable expectation of entitlement is determined by . . . language of the statute conferring the benefit . . . framed in mandatory terms and whether statute imposes substantive constraints on official discretion to award the benefit . . . [T]he existence of a policy–written or otherwise–is not enough to create a property interest. *The terms of that policy must constrain the discretion of the official to suspend the benefit.*[30]

The test has two steps.[31] In order to invoke the procedural protections of federal due process, as a first step, the claimant must establish that she has a property or liberty right or interest.[32] After the claimant establishes such a right or interest, as a second step, the court examines the procedures that the state employed to terminate the interest for fundamental fairness;[33] that is, was there adequate notice and opportunity to be heard before a fair, unbiased tribunal?[34]

The commonwealth court has refined this test and explained how it should be applied.[35] For a professor seeking promotion to a higher rank, if there is no statute, contract, or regulation that guarantees promotion, then promotion is ordinarily a matter of discretion of the university.[36] Language in a collective bargaining agreement does not create a property interest if it "merely defines a

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[29] *Perry*, 408 U.S. at 601.

[30] Med Corp. v. City of Lima, 296 F.3d 404, 409, 411 (6th Cir. 2002) (emphasis added) (citing *Perry*, 408 U.S. at 601; Lucas v. Monroe Cnty., 203 F.3d 964, 978 (6th Cir. 2000); Morley's Auto Body, Inc. v. Hunter, 70 F.3d 1209, 1214 (11th Cir. 1995)).

[31] *See Roth*, 408 U.S. at 577.

[32] *See id.*

[33] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985).

[34] Fire Fighters Local No. 60 v. City of Scranton, 937 A.2d 600, 606 (Pa. Commw. Ct. 2007).

[35] *See, e.g.*, Levine v. Dep't of Educ., 468 A.2d 1216, 1218-19 (Pa. Commw. Ct. 1984) (providing an example of specific application of procedural due process proceedings).

[36] *Id.* at 1218 (quoting Clark v. Whiting, 607 F.2d 634, 641 (4th Cir. 1979)).

grievance procedure."[37] On the other hand, where the applicable employment statute recites that teachers may be terminated only for "immorality, incompetency, intemperance, cruelty, persistent negligence, mental derangement . . . [or] persistent and wilful violation of the school laws," a property interest was created because the statutory language limited the substantive discretion of the state to terminate.[38]

IV. LICENSES

The Supreme Court of Pennsylvania, relying on the Supreme Court of the United States case of *Bell v. Burson*,[39] recognized that procedural due process protections are applicable to deprivation of a driver's license.[40] However, in *Bell*, the Supreme Court of the United States also insinuated that a driver's license is a "privilege" entitled to due process protection.[41] In *Pennsylvania Game Commission v. Marich*,[42] the Supreme Court of Pennsylvania explained that a driver's license is a privilege, but one that is protected by procedural due process; therefore, it cannot be

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[37] Sasko v. Charleroi Area Sch. Dist., 550 A.2d 296, 299 (Pa. Commw. Ct. 1988).

[38] Andresky v. W. Allegheny Sch. Dist., 437 A.2d 1075, 1077 (Pa. Commw. Ct. 1981) (quoting 24 PA. STAT. ANN. § 11-1122 (West 1996)).

[39] Bell v. Burson, 402 U.S. 535 (1971).

[40] Pa. Game Comm'n v. Marich, 666 A.2d 253, 257 (Pa. 1995) (citing Brewster v. Dep't of Transp., 503 A.2d 497 (Pa. 1984)).

[41] *Bell*, 402 U.S. at 539.

> Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment.

Id. (citing Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969); Goldberg v. Kelly, 397 U.S. 254 (1970)). "*This is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a 'right' or a 'privilege.*' " *Id.* (citing Sherbert v. Verner, 374 U.S. 398 (1963); Slochower v. Bd. of Higher Educ., 350 U.S. 551 (1956)) (emphasis added).

[42] Pa. Game Comm'n v. Marich, 666 A.2d 253 (Pa. 1995).

terminated without notice and an opportunity to be heard.[43] The commonwealth court has recognized that a professional license is also a privilege,[44] and it is one that is also protected by procedural due process.[45] This includes physicians' licenses,[46] other health profession licenses,[47] teaching certificates,[48] real estate brokers' licenses,[49] and the like. The court has even held that, based on the statutes involved, a street vendor's license once issued is entitled to procedural due process protection[50] and that a one-year lottery ticket sales license is protected as well.[51] The court does not acknowledge the inconsistency between stating that a license is a privilege and, at the same time, a property interest.[52] Later commonwealth court cases reconcile this tension.[53]

An early commonwealth court case recognized the holding of *Bell*, that a driver's license is a species of property in Pennsylvania,

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[43] *Marich*, 666 A.2d at 256. This explanation was not the holding of the *Marich* case because it involved a duck hunting license. *Id.* at 254. However, the Pennsylvania Supreme Court in *Marich* drew heavily upon *Bell v. Burson. Id.*

[44] *See* Plowman v. Dep't of Transp., 635 A.2d 124, 126 (Pa. 1993) (citing Maurer v. Boardman, 7 A.2d 466, 472-73 (Pa. 1939).

[45] Shah v. State Bd. of Med., 589 A.2d 783, 788 (Pa. Commw. Ct. 1991). For this writer, denominating a driver's license as a "privilege," but also holding that it is protected by procedural due process, creates a seeming inconsistency or contradiction. *See Plowman*, 635 A.2d at 126. If a matter is a privilege, it may be terminated at any time for any reason. *See McElroy*, 367 U.S. at 895.

[46] *Shah*, 589 A.2d at 788; Khan v. State Bd. of Auctioneer Exam'rs, 842 A.2d 936, 941 n.3 (2004) (citing Lyness v. State Bd. of Med., 605 A.2d 1204, 1208 (Pa. 1992)).

[47] Firman v. Dep't of State, 697 A.2d 291, 295 (Pa. Commw. Ct. 1997) (quoting *Shah*, 589 A.2d at 789).

[48] Slater v. Dep't of Educ., 725 A.2d 1248, 1250 (Pa. Commw. Ct. 1999) (citing Petron v. Dep't of Educ., 726 A.2d 1091, 1094 (Pa. Commw. Ct. 1999)).

[49] *See Khan*, 842 A.2d at 944.

[50] Kaehly v. City of Pittsburgh, 687 A.2d 41, 43 (Pa. Commw. Ct. 1996).

[51] Lee v. Dep't of Revenue, 492 A.2d 451, 453-54 (Pa. Commw. Ct. 1985).

[52] *See generally* Ercolani v. Dep't of Transp., 922 A.2d 1034, 1036-37 (Pa. Commw. Ct. 2007) (demonstrating how the court uses the phrases interchangeably).

[53] *See* Snyder v. Dep't of Transp., 977 A.2d 55, 59-60 (Pa. Commw. Ct. 2009) (Simpson, J., concurring in part, dissenting in part).

while briefly explaining how a driver's license could also constitute a privilege.[54]

In *Department of Transportation v. Abraham*,[55] the court relied on *Bell* and acknowledged that a driver's license is a property interest protected by procedural due process.[56] However, the court also explained how a license is also a privilege.[57] Judge Mencer reasoned that the state owns the highways and thus has the power to limit or condition the use of the highways through driver licensing, as expressed by the legislature through statutes.[58] Other cases added that the driver's license is a property *interest,* not a property right, so it can be *conditioned* on a civil penalty for refusal.[59] In later cases, the commonwealth court followed these explanations about how to resolve the conflict between holding that a license is a privilege and holding that it is a property interest.[60]

In *Oliver v. Department of State*,[61] the court held that there is no vested right to an occupational license; "rather, it is a conditional right subject to the police power of the state to protect and preserve the public health."[62] In another case, *Reisinger v. State Board of Medical Education & Licensing*,[63] the court also sought to reconcile the power to regulate versus the right to procedural due process by explaining that the practice of medicine is a conditional property right subject to the police power of the

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[54] Dep't of Transp. v. Abraham, 300 A.2d 831, 833 (Pa. Commw. Ct. 1973) (citing Bell v. Burson, 402 U.S. 535, 539 (1971); *In re* Parker & Burch Licenses, 54 Pa. D. & C.2d 142, 144 (1971)).

[55] *Id.*

[56] *Id.* (citing *Bell*, 402 U.S. at 539).

[57] *Id.* (quoting *In re Parker*, 54 Pa. D. & C.2d at 144-45).

[58] *Id.* at 832-33 n.1 (citing Maurer v. Boardman, 7 A.2d 466, 472 (Pa. 1939)).

[59] Krall v. Dep't of Transp., 682 A.2d 63, 64 (Pa. Commw. Ct. 1996); Dep't of Transp. v. Quinlan, 408 A.2d 173 (Pa. Super. Ct. 1979); Grindlinger v. Dep't of Transp., 300 A.2d 95 (Pa. Commw. Ct. 1973).

[60] *See, e.g.*, Oliver v. Dep't of State, 404 A.2d 1386, 1387 (Pa. Commw. Ct. 1979); Reisinger v. State Bd. of Med. Educ. & Licensure, 399 A.2d 1160, 1164 (Pa. Commw. Ct. 1979).

[61] *Oliver*, 404 A.2d at 1386.

[62] *Id.* at 1387 (citing Watson v. Maryland, 218 U.S. 173, 176 (1909)).

[63] Reisinger v. State Bd. of Med. Educ. & Licensing, 399 A.2d 1160 (Pa. Commw. Ct. 1979).

state to protect the public by setting reasonable standards for grant of a license and for oversight and regulation of practice thereafter.[64] In *Lencovich v. Bureau of Professional & Occupational Affairs*,[65] the commonwealth court held that a nursing license is a privilege, a position that is consistent with earlier precedent.[66] Although holding that the license is a privilege, Judge Cohn-Jubelirer explained that it cannot be taken away without meeting the protections of procedural due process.[67] She explained the privilege aspect of licensure by reference to the conditional aspect of licensing: When one applies for and accepts a license, the recipient agrees to abide by the rules and regulations of the agency, which may include the physical and mental examination involved in *Lencovich*; and the continuing ability to practice a particular profession or occupation (or driver's license) is an "ongoing" statutory condition of licensure.[68] It may well be that this dual description of a license contributed to the continuing difficulty with irrebuttable presumptions in Pennsylvania.[69]

V. GOVERNMENT EMPLOYMENT

The common law rule in Pennsylvania is that employment with the government is at will; employees may be summarily dismissed for any reason.[70] Employment protection under procedural due process principles will exist if there is a legitimate expectation of continued employment.[71] But, in Pennsylvania, such

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[64] *Reisinger*, 399 A.2d at 1164 (citing *Watson*, 218 U.S. 173; Stuart v. Wilson, 211 F. Supp. 700, 701-02 (N.D. Tex. 1962); N.J. Chiropractic Ass'n v. State Bd. of Med. Exam'rs, 79 F. Supp. 327, 337 (D.N.J. 1948)).

[65] Lencovich v. Bureau of Prof'l & Occupational Affairs, 829 A.2d 1238 (Pa. Commw. Ct. 2003).

[66] *Id.* at 1240; *see also* Yurick v. Dep't of State, 402 A.2d 290 (Pa. Commw. Ct. 1979) (osteopathic license); State Dental Council & Examining Bd. v. Friedman, 367 A.2d 363 (Pa. Commw. Ct. 1976) (dental license).

[67] *Lencovich*, 829 A.2d at 1240.

[68] *Id.*

[69] *See infra* notes 173-226.

[70] Stumpp v. Stroudsburg Mun. Auth., 658 A.2d 333, 335 (Pa. 1995) (citing Geary v. U.S. Steel Corp., 319 A.2d 174, 175 (Pa. 1974)).

[71] *Id.* (citing Stumpp v. Stroudsburg Mun. Auth., 646 A.2d 734, 736 (Pa. Commw. Ct. 1994)).

expectation may be created only by a statute that *explicitly* confers tenure in public employment as part of a comprehensive scheme[72] or by a contract with a state entity that has the authority to enter into such a contract.[73] The commonwealth court observed that:

> [T]enure in public employment, in the sense of having a claim to employment which precludes dismissal on a summary basis, is, where it exists, a matter of legislative grace and where the legislature has intended that tenure should attach to public employment, it has been very explicit in so stating.[74]

Later commonwealth court cases have emphasized that, in order to create an expectation of continued employment, statutory language must be clear and explicit.[75] However, once the legislature confers tenure on an employee, any procedure for termination must then meet procedural due process standards.[76]

VI. PUBLIC EDUCATION

Article III, section 14 of the Pennsylvania Constitution states that "[t]he General Assembly shall provide for the maintenance and support of a thorough and efficient system of public [schools]."[77] The commonwealth court has interpreted this language to create a duty in the Commonwealth to create an "efficient system of public education to which every child has a right."[78] The court explained that a statute, the Public School Code,

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[72] Davenport v. Reed, 785 A.2d 1058, 1063 (Pa. Commw. Ct. 2001); *Stumpp*, 658 A.2d at 335.

[73] Sasko v. Charleroi Area Sch. Dist., 550 A.2d 296, 297 (Pa. Commw. Ct. 1988).

[74] Mahoney v. Phila. Hous. Auth., 320 A.2d 459, 460 (Pa. Commw. Ct. 1974) (alteration in original) (citations omitted) (quoting Scott v. Phila. Parking Auth., 166 A.2d 278, 281 (Pa. 1960)) (internal quotation marks omitted).

[75] Bolduc v. Bd. of Supervisors, 618 A.2d 1188, 1190-91 (Pa. Commw. Ct. 1997); *see also* Sacco v. Twp. of Butler, 863 A.2d 611, 614 (Pa. Commw. Ct. 2004); Turner v. Pub. Util. Comm'n, 683 A.2d 942, 945 (Pa. Commw. Ct. 1996).

[76] Williams v. City of Pittsburgh, 531 A.2d 42 (Pa. Commw. Ct. 1987).

[77] PA. CONST. art. III, § 14.

[78] Phila. Fed'n of Teachers v. Bd. of Educ., 414 A.2d 424, 426 (Pa. Commw. Ct. 1980) (citing Danson v. Casey, 382 A.2d 1238, 1245 (Pa. Commw. Ct. 1978)).

carries out this constitutional command and implements the students' right to public education.[79] Because the right to public education is clear, there are only two areas where questions of the applicability of procedural due process protections arise: special education and athletics.[80]

The Supreme Court of Pennsylvania has held that a school district must provide special education for gifted and disabled children.[81] Refining that basic position, the commonwealth court has held that, for gifted children, a school district must only provide compensatory education that is consistent with education available in the curriculum of the school district and is not required to create a special curriculum.[82]

In *O'Leary v. Wisecup*,[83] the commonwealth court explained how the Pennsylvania Constitution's assignment to the legislature of the duty to create a system of education affected special education.[84] In *O'Leary*, Judge Blatt opined that the right to education is a statutory right or interest,[85] a position consistent with *Goldberg*. She concluded that because a state statute created the interest, its extent was also defined by the statute.[86] The

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[79] *Phila. Fed'n of Teachers*, 414 A.2d at 426 (quoting 24 PA. STAT. ANN. § 13-1301 (West 1992) ("Every child, being a resident of any school district, between the ages of six (6) and twenty-one (21) years, may attend the public schools in his district, subject to the provisions of this act.")).

[80] *See* Centennial Sch. Dist. v. Dep't of Educ., 539 A.2d 785, 786 (Pa. 1988); Adamek v. Pa. Interscholastic Athletic Ass'n, 426 A.2d 1206 (Pa. Commw. Ct. 1981) (citing Dallam v. Cumberland Valley Sch. Dist., 391 F. Supp. 358 (M.D. Pa. 1975)).

[81] *Centennial*, 539 A.2d at 791.

[82] *See* Brownsville Area Sch. Dist. v. Student X, 729 A.2d 198, 200-01 (Pa. Commw. Ct. 1999).

[83] O'Leary v. Wisecup, 364 A.2d 770 (Pa. Commw. Ct. 1976).

[84] *Id.* at 774 (quoting Rosenstein v. N. Penn Sch. Dist. 342 A.2d 788, 791 (Pa. Commw. Ct. 1975)).

[85] *Id.* at 773.

[86] *O'Leary*, 364 A.2d at 773 (citing Goss v. Lopez, 419 U.S. 565, 573 (1974)). *Goss* is a case decided under the authority of *Goldberg*. *Goss*, 419 U.S. at 573. The reference to *Goss* makes clear that Judge Blatt is also referring to property *interests* created under the *Goldberg-Roth-Perry* line of cases. *See O'Leary*, 364 A.2d at 773 (citing *Goss*, 419 U.S. at 574). *Goss* was the Supreme Court of the United States case that recognized that the effect of state statutes, creating a universal system of education in the state, were the kinds of state

constitutional language in article III, section 14 imposes a duty on the legislature to create a system of education;[87] but it was the *statute* that the legislature enacted to carry out this constitutional command that creates the students' property interest.[88] As a result, the terms of the *statute* define the students' property interest.[89] In *Lisa H. v. State Board of Education*, this meant that there was no procedural due process-protected right to be admitted to a gifted student program that was not conferred by the Pennsylvania Public Education Code, the regulations of the Department of Education, or the involved school district.[90] Thus, there was no constitutional or statutory right or entitlement under *Goldberg*, *Roth*, or *Perry*.[91]

The other area in which the commonwealth court has clarified education law is in connection with the rights of students to participate in sports and other extracurricular activities.[92] The court has held, in several cases, that there is no student right to participate in student athletics, even though there is an acknowledged right to public education.[93] In the leading case, *Adamek v. Pennsylvania Interscholastic Athletic Ass'n*,[94] the issue before the court was whether the claimant possessed a property interest or a right to participate in athletic activities.[95] The commonwealth court held that he did not:

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legislative action that created a property interest in students in that state which was subject to procedural due process protection. *Goss*, 419 U.S. at 572-73 (citing Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972)).

[87] PA. CONST. art. III, § 14.

[88] *O'Leary*, 364 A.2d at 773.

[89] *See id.*

[90] Lisa H. v. State Bd. of Educ., 447 A.2d 669, 673 (Pa. Commw. Ct. 1982).

[91] *Id.* at 672, 674.

[92] *See, e.g.*, Mifflin Cnty. Sch. Dist. v. Monsell, 504 A.2d 1357, 1358 (Pa. Commw. Ct. 1986); Pa. Interscholastic Athletic Ass'n v. Greater Johnstown Sch. Dist., 463 A.2d 1198, 1200 (Pa. Commw. Ct. 1983); Adamek v. Pa. Interscholastic Athletic Ass'n, 426 A.2d 1206, 1207 (Pa. Commw. Ct. 1981).

[93] *Mifflin*, 504 A.2d at 1359; *Johnstown*, 463 A.2d at 1201-02; *Adamek*, 426 A.2d at 1208.

[94] Adamek v. Pa. Interscholastic Athletic Ass'n, 426 A.2d 1206 (Pa. Commw. Ct. 1981).

[95] *Id.* at 1207.

> [T]he property interest in education created by the state is participation in the entire process. The myriad activities which combine to form that educational process cannot be dissected to create hundreds of separate property rights, each cognizable under the Constitution. Otherwise, removal from a particular class, dismissal from an athletic team, a club or any extracurricular activity, would each require ultimate satisfaction of procedural due process.[96]

The point is well taken: schools would be forced to create cumbersome due process procedures for minor cases, and courts would be swamped with numerous appeals from school decisions over everyday, trivial matters.[97]

VII. REPUTATION

Unlike the Federal Constitution, the Pennsylvania Constitution expressly protects reputation: "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and *reputation*, and of pursuing their own happiness."[98]

The Supreme Court of Pennsylvania[99] and the commonwealth court[100] have held that, based on the Pennsylvania Constitution's language, a citizen's interest in reputation is a fundamental right entitled to the protections of procedural due process.[101] Before an

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[96] *Adamek*, 426 A.2d at 1208 (quoting Dallam v. Cumberland Valley Sch. Dist., 391 F. Supp. 358, 361 (M.D. Pa. 1975)).

[97] *See id.*

[98] PA. CONST. art. I, § 1 (emphasis added).

[99] *See* Hatchard v. Westinghouse Broad. Co., 532 A.2d 346, 350-51 (Pa. 1987).

[100] Pa. Bar Ass'n v. Commonwealth, 607 A.2d 850, 856 (Pa. Commw. Ct. 1992).

[101] *Hatchard*, 532 A.2d at 350-51; *Pa. Bar Ass'n*, 607 A.2d at 856. This is a major difference from the federal case law on reputation as set forth in *Paul v. Davis*, 424 U.S. 693 (1976). The Federal Constitution does not contain an express protection of reputation, and the facts in *Paul* occurred in Kentucky, which also had no protection of reputation in its constitution. *Id.* at 711-12. In *Paul*, the Supreme Court of the United States held that, in order for procedural due process to apply, there must be damage to reputation plus damage to some

attorney's name could be placed on a suspected fraud list because her client was suspected of fraud, the state was required to give the attorney notice and an opportunity to be heard.[102]

In *Simon v. Commonwealth*,[103] the claimants sought to contest publication by the Pennsylvania Crime Commission of their names as persons connected to organized crime.[104] The commonwealth court reasoned that not only does article I of the Pennsylvania Constitution create a right to protection of reputation, but article I, section 11 of the Pennsylvania Constitution also expressly provides a remedy for injury to reputation: "All courts shall be open; and every man for an injury done him in his lands, goods, person or *reputation* shall have remedy by due course of law and right and justice administered without sale, denial or delay."[105] In the *Simon* case, Judge Kelley's opinion distinguished federal precedent which held that reputation is not a protected interest on the basis of these constitutional provisions.[106] He held that the private right in reputation is fundamental; therefore, procedural due process protections were available.[107] The notice to the claimant under the statutory provision for the Crime Commission did not give prepublication notice.[108] Since publication of the names was the state action that caused the reputational harm, the availability of a hearing after the damage was done, which was part of the Crime Commission statute, did not satisfy procedural due process requirements.[109] Moreover, giving notice prior to publication would not be burdensome for the state.[110]

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other protected interest. *Id.* A claim based solely on damage to reputation was thus held to be insufficient to invoke procedural due process protections. *Id.* at 712.

[102] *Pa. Bar Ass'n*, 607 A.2d at 857.

[103] Simon v. Commonwealth, 659 A.2d 631 (Pa. Commw. Ct. 1992).

[104] *Id.* at 634.

[105] PA. CONST. art. I, § 11 (emphasis added).

[106] *Simon*, 659 A.2d at 637-39 (distinguishing Hannah v. Larche, 363 U.S. 420, 451 (1960) from Dixon v. Pa. Crime Comm'n, 347 F. Supp. 138, 141-42 (M.D. Pa. 1972)).

[107] *Id.* at 639 (citing Hatchard v. Westinghouse Broad. Co., 532 A.2d 346, 350 (Pa. 1987)).

[108] *Id.* (citing 37 PA. CODE § 123.11 (2010)).

[109] *Simon*, 659 A.2d at 639.

[110] *Id.*

VIII. TYPE OF HEARING

Once it has been established that procedural due process protections are available to the claimant, a second question must be asked: Which procedural protections are due to the claimant? In *Mathews v. Eldridge*,[111] the Supreme Court of the United States held that in assessing the adequacy of procedures involving state deprivation of a citizen's property interest, the analysis involves weighing: (1) "the private interest that will be affected by the [state] action"; (2) the risk of erroneous deprivation of that private interest through the procedures that the state presently uses, and the probability that the additional procedure sought by claimant will significantly improve the accuracy of the state procedure; and (3) the government interest, which includes the nature of the government function and the added expense of the additional procedure sought.[112]

The commonwealth court has applied and clarified the *Mathews* test in many cases. One of the earliest cases held that a city ordinance that applied rent withholding without notice and a hearing violated *Mathews*; the private interest was strong because it involved a property right (as distinguished from a property interest), and the risk of erroneous deprivation was high.[113]

In *Firman v. Department of State*,[114] the commonwealth court gave an extended explanation of the operation of *Mathews* in Pennsylvania.[115] The claimant pleaded guilty in Maryland to fraudulently obtaining narcotic painkillers and possessing contraband drugs.[116] Pennsylvania is a signatory to an interstate compact with Maryland that treats Maryland convictions for license disciplinary purposes as if they occurred in Pennsylvania.[117] The court found that the private and public

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[111] Mathews v. Eldridge, 424 U.S. 319 (1976).
[112] *Id.* at 335.
[113] Manna v. City of Erie, 366 A.2d 615, 618 (Pa. Commw. Ct. 1976).
[114] Firman v. Dep't of State, 697 A.2d 291 (Pa. Commw. Ct. 1997).
[115] *Id.* at 295-96.
[116] *Id.* at 293.
[117] *Id.* at 295.

interests were both important.[118] However, the risk of erroneous deprivation was "negligible" because the Board considered the petition of the state, the defendant's answer (which did not deny the conviction), and the certified record of claimant's conviction in the foreign state.[119] In a case that followed *Firman*, the commonwealth court reached a different conclusion on closely similar facts.[120]

In *Bhattacharjee v. Department of State*,[121] a physician pleaded guilty in federal court to one count of dispensing 1600 doses of a prescription drug.[122] The commonwealth court held that the claimant was entitled to a hearing.[123] The court's *Mathews* analysis was that the private interest was substantial.[124] However, on the other *Mathews* factors, there were significant differences.[125] In *Bhattacharjee*, the claimant sought an opportunity to present the defenses that his conduct was acceptable to a significant portion of the medical community; that it was consistent with standards of medical practice; and that, unlike the claimant in *Firman*, he was not accused of drug addiction, which reduced the intensity of the public interest.[126] The commonwealth court concluded that because he was given no opportunity to be heard on these defenses, there was a substantial risk of erroneous deprivation.[127] The court remanded the case to the Department of State for further proceedings, as was appropriate.[128] The commonwealth court's

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[118] *Firman*, 697 A.2d at 295-96 (quoting Brock v. Roadway Express, Inc., 481 U.S. 252, 263 (1987)) (citing Casella v. State Bd. of Med., 547 A.2d 506, 508 (Pa. Commw. Ct. 1988)).

[119] *Id.* at 296.

[120] Bhattacharjee v. Dep't of State, 808 A.2d 280, 284 (Pa. Commw. Ct. 2002).

[121] Bhattacharjee v. Dep't of State, 808 A.2d 280 (Pa. Commw. Ct. 2002).

[122] *Id.* at 282.

[123] *Id.* at 285.

[124] *Id.* at 283 (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

[125] *Id.* at 284 (citing Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 547 (1985)).

[126] *Id.* (discussing Denier v. State Bd. of Med., 683 A.2d 949, 954 (Pa. Commw. Ct. 1996); Horvat v. Dep't of State Prof'l & Occupational Affairs, 563 A.2d 1308, 1309 (Pa. Commw. Ct. 1989)).

[127] *Bhattacharjee*, 808 A.2d at 284 (citing *Loudermill*, 470 U.S. at 547).

[128] *Id.* at 285.

holding was consistent with the focus of procedural due process on the opportunity to be heard on factual issues to prevent error.[129]

IX. FLEXIBLE NOTICE

Once the right to procedural due process protections has been established through the finding of a property right or interest, step two of the analysis requires the court to examine the state procedures to ascertain if notice and an opportunity to be heard before a fair and unbiased tribunal have been afforded to the claimant.[130] As a general rule, the requirement of notice means that an individual against whom the state is acting must be given information about the charges adequate to prepare his or her defense.[131] The notice given must contain all the charges against the claimant.[132] Notice serves the function of informing the parties of the action and providing the opportunity to make objections.[133] While the notice must be sufficient to enable preparation of a defense, it is not required to have the specificity of an indictment.[134] If the claimant is informed with reasonable certainty of the charges against him or her, that is sufficient.[135] The language

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[129] *Bhattacharjee*, 808 A.2d at 284-85 (citing Lyness v. Bd. of Med., 605 A.2d 1204, 1207 (Pa. 1992)).

[130] *See* Antonini v. W. Beaver Area Sch. Dist., 874 A.2d 679, 686 (Pa. Commw. Ct. 2005) (citing Burger v. Bd. of Sch. Dirs., 839 A.2d 1055, 1062 (Pa. 2003)).

[131] Straw v. Pa. Human Relations Comm'n, 308 A.2d 619, 621 (Pa. Commw. Ct. 1973).

[132] McClelland v. State Civil Serv. Comm'n, 322 A.2d 133, 136 (Pa. Commw. Ct. 1974) (citing Begis v. Indus. Bd. of Dep't of Labor & Indus., 308 A.2d 643, 645 (Pa. Commw. Ct. 1973)).

[133] Pa. Bar Ass'n v. Commonwealth, 607 A.2d 850, 856 (Pa. Commw. Ct. 1992) (citing Pa. Coal Mining Ass'n v. Ins. Dep't, 370 A.2d 685, 692-93 (Pa. 1977)).

[134] State Civil Sev. Comm'n v. D'Amico, 335 A.2d 846, 848 (Pa. Commw. Ct. 1975) (citing City of Pittsburgh Civil Serv. Comm'n v. Beaver, 315 A.2d 672, 674 (Pa. Commw. Ct. 1974)).

[135] Benjamin v. State Civil Serv. Comm'n, 332 A.2d 585, 587 (Pa. Commw. Ct. 1975) (citing Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 287 A.2d 161, 166 (Pa. Commw. Ct. 1972)).

must convey sufficient warning of the prohibited conduct according to normal reasoning and understanding.[136]

An unreasonable delay in giving notice, so that an accused's defense is impaired, is unconstitutional.[137] If the notice is confusing, such as stating that charges would be considered by a supervisor and instead they are considered by a board at a meeting where the claimant was unaware that the charges would be considered, then the notice is inadequate.[138] Since the standard for procedural due process is flexible, in each case adequacy of notice will depend on the description of the issue or charges, the type of investigation or proceeding being conducted, the violations alleged, and the particular facts of each case.[139]

X. OPPORTUNITY TO BE HEARD

The commonwealth court has explained that the opportunity to be heard is an essential, fundamental principle of procedural due process.[140] The opportunity to be heard has been defined as the right to be heard "at a meaningful time and in a meaningful manner."[141] Before a right or interest protected by procedural due process can be terminated, the state must establish the basis for the deprivation at a hearing where the claimant has the opportunity to hear the state witnesses on relevant issues, cross-examine them, and present his or her own witnesses and evidence.[142] This means, for example, that a state employee who is receiving Heart & Lung Act benefits for a job-incurred disability is entitled to a hearing in

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[136] *Pittsburgh Press*, 287 A.2d at 166-67 (citing Commonwealth v. Acquaviva, 145 A.2d 407, 410 (Pa. Super. Ct. 1958)).

[137] *See* Dep't of Transp. v. Maguire, 539 A.2d 484, 485 (Pa. Commw. Ct. 1988) (citing Dep't of Transp. v. Lyons, 453 A.2d 730, 731 (Pa. Commw. Ct. 1982)).

[138] *See* City of Harrisburg v. Pickles, 492 A.2d 90, 95 (Pa. Commw. Ct. 1985).

[139] *Pittsburgh Press*, 287 A.2d at 166 (citing Armour Transp. Co. v. Pa. Pub. Util. Comm'n, 10 A.2d 86, 90 (Pa. Super. Ct. 1939)).

[140] Shah v. State Bd. of Med., 589 A.2d 783, 788 (Pa. Commw. Ct. 1991) (citing Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 543 (1985)).

[141] Squire v. Dep't of Pub. Welfare, 696 A.2d 255, 257-58 (citing Mathews v. Eldridge, 424 U.S. 319, 333 (1976)).

[142] *Squire*, 696 A.2d at 258-59.

which the employer-state must establish the basis for terminating benefits *before* termination; merely sending a letter of termination is inadequate, even though the employee has a right to a full hearing after termination.[143]

XI. TIMING OF HEARING

One problem that has recurred in answering what process is due is the timing of the claimant's opportunity to be heard.[144] Can the hearing be held *after* the termination of the benefit? In the federal arena, this question has been answered in the case of *Cleveland Board of Education v. Loudermill.*[145] Applying the *Mathews* test in an employee termination case where the job was covered by civil service guarantees, the Court held that the private interest in employment is significant.[146] Since employment disputes are often factual, the opportunity for the employee to present his side of the case before actual termination is important in order to reach an accurate decision.[147] In termination cases, the government interest is not weighty because giving the employee a pretermination opportunity to respond may be structured in a fashion that does not add a significant burden.[148] According to *Loudermill*, in order to accommodate the private and public interests, all that is required is "some kind of hearing" *before* termination.[149] *Loudermill* held that prior to termination: "The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story."[150]

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[143] *Id.* at 259 (citing Civil Serv. Comm'n v. Goldman, 621 A.2d 1142, 1145 (Pa. Commw. Ct. 1993)).

[144] *See Loudermill*, 470 U.S. at 544.

[145] *Id.*

[146] *Id.* at 543.

[147] *Id.*; *cf.* Califano v. Yamasaki, 442 U.S. 682, 686 (1979) (stating that an employee may have a justifiable reliance on fault overpaid claims due to personal circumstances).

[148] *Id.* 470 U.S. at 544.

[149] *Id.* at 542 (citing Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 569-70 (1972)).

[150] *Loudermill*, 470 U.S. at 546 (referencing Arnett v. Kennedy, 416 U.S 134, 170-71 (1974)).

The commonwealth court has interpreted and clarified the application of this test in numerous Pennsylvania cases. In *Adamovich v. Department of Public Welfare*,[151] an employee of a state hospital was terminated by action of the hospital director.[152] He had an opportunity to have a complete formal hearing before the Civil Service Commission after termination.[153] However, prior to termination, he had communication with his supervisor, who had extensive knowledge of the work of the claimant and many discussions with him about the quality of and deficiencies in his work.[154] This contact and exchange constituted an informal pretermination hearing procedure consistent with the *Loudermill* requirements.[155] In the leading case of *Firman*, the commonwealth court explained that this exception is part of the idea that procedural due process is flexible.[156] With medical professionals who are seriously impaired, the Pennsylvania statute provides for an immediate, automatic, temporary suspension with notice but without a hearing; however, the medical board must hold a formal hearing within thirty days.[157] Impaired healthcare providers are great dangers to the public such that immediate action by the state is justified,[158] even though there is a substantial private interest in the healthcare provider's livelihood.[159] Therefore, the commonwealth court has held that, so long as the claimant has access to the material on which the charges are based and a prompt opportunity to respond, there is no violation of procedural due process principles.[160]

Nevertheless, the commonwealth court has carefully scrutinized claims in which opportunity to be heard has been

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[151] Adamovich v. Dep't of Pub. Welfare, 504 A.2d 952 (Pa. Commw. Ct. 1986).

[152] *Id.* at 954.

[153] *Id.* at 955.

[154] *Id.* at 956.

[155] *Id.* at 956-57 (quoting *Loudermill*, 470 U.S. at 533).

[156] Firman v. Dep't of State, 697 A.2d 291, 295 (Pa. Commw. Ct. 1997) (citing Mathews v. Eldridge, 424 U.S. 319, 334 (1976)).

[157] 63 PA. STAT. ANN. § 422.40(a) (West 2010).

[158] *Firman*, 697 A.2d at 296 (citing Cassella v. State Bd. of Med., 547 A.2d 506, 512 (Pa. Commw. Ct. 1988)).

[159] *Id.*

[160] *Id.* at 295 (citing Arnett v. Kennedy, 416 U.S. 134, 170 (1974)).

denied.[161] In *Bhattacharjee*, a physician pleaded guilty to federal felony charges of prescribing opioid drugs beyond the amount permitted by federal statute.[162] The Pennsylvania medical licensing statute provides for an automatic suspension or revocation of a medical license for conviction of a felony without a separate hearing.[163] However, in his appeal, the physician claimed a denial of his opportunity to be heard because he had several defenses: (1) that the charges to which he pleaded guilty would not constitute a felony under Pennsylvania law; (2) that the physician himself was not addicted, nor was he prescribing for addicts; and (3) that his pain prescriptions were "accepted by a segment of the medical profession."[164] The commonwealth court held that he was denied an opportunity to be heard, which violated the requirements of procedural due process.[165] The claimant had no opportunity to present these defenses, some of which were factual in nature, and the court found that there was a likelihood of erroneous deprivation.[166]

Where a statute or regulation provides for automatic suspension of a driver's license, there is no violation of procedural due process if there is also a provision in the law for a prompt posttermination hearing.[167] In state employee termination cases, there is no violation of procedural due process so long as there is a brief or truncated hearing at which the employee receives notice of the charges, a summary of the employer's evidence, an opportunity to respond, and a prompt posttermination hearing.[168]

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[161] Bhattacharjee v. Dep't of State, 808 A.2d 280, 285 (Pa. Commw. Ct. 2002) (citing Commonwealth v. Thompson, 281 A.2d 856, 858 (Pa. 1971)).

[162] *Id.* at 282.

[163] 63 PA. STAT. ANN. § 422.40(b) (West 2010).

[164] *Bhattacharjee*, 808 A.2d at 282.

[165] *Id.* at 285.

[166] *Id.* at 282, 284 (citing Shah v. State Bd. of Med., 589 A.2d 783, 788 (Pa. Commw. Ct. 1991)).

[167] Dep't of Transp. v. Quinlan, 408 A.2d 173, 175 (Pa. Commw. Ct. 1979) (citing Mackey v. Montrym, 443 U.S. 1, 19 (1979)).

[168] Adamovich v. Dep't of Pub. Welfare, 504 A.2d 952, 957 (Pa. Commw. Ct. 1986) (citing Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 544 (1985)).

XII. IRREBUTTABLE PRESUMPTION

One problem that has occurred in connection with procedural due process is the irrebuttable presumption.[169] This problem arises when a state agency enacts a regulation or undertakes administrative action that immediately suspends a license on the basis that some ongoing condition of the license holder creates a serious, ongoing problem that merits immediate suspension without a hearing (and frequently sets a term for the suspension).[170] The case of *Clayton v. Department of Transportation*[171] is a good example.

In *Clayton*, under the terms of a Department of Transportation (DOT) regulation, upon the physician's notification of the driver's license holder's epileptic seizure, DOT immediately suspended the patient's license for one year without a hearing.[172] Moreover, under the terms of that regulation, a driver could not seek to prove his or her competency to drive until the one-year suspension period had expired.[173] After the claimant, Clayton, suffered a seizure, his license was suspended.[174] He claimed that procedural due process entitled him to an opportunity to show that his epilepsy was controlled so that his license could be restored before the one-year automatic suspension had run.[175] The commonwealth court, in an opinion authored by Judge Craig, held that the DOT regulation constituted an irrebuttable or conclusive presumption that violated the claimant's right to procedural due process; it denied him the opportunity to be heard on the issue of his recovery from his illness until a full year had expired.[176] In *Clayton*, the court reasoned that the private interest in retaining a driver's license, based on *Bell* and

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[169] Clayton v. Dep't of Transp., 684 A.2d 1060, 1064 (Pa. 1996).

[170] *See id.* at 1060-61.

[171] Clayton v. Dep't of Transp., 684 A.2d 1060 (Pa. 1996).

[172] *Id.* at 1060-61. The regulation provided: "*General.* A person suffering from epilepsy may not drive unless their personal physician reports that the person has been free from seizure for a period of at least [one] year immediately preceding, with or without medication." 67 PA. CODE § 83.4(a) (2010).

[173] *Clayton*, 684 A.2d at 1061.

[174] *Id.* at 1060-61.

[175] *Id.* at 1061.

[176] Dep't of Transp. v. Clayton, 630 A.2d 927, 931, 932 (Pa. Commw. Ct. 1993).

Pennsylvania precedent, was an "important"[177] one protected by procedural due process.[178] The Supreme Court of Pennsylvania affirmed[179] on the basis of *Bell*.[180]

Clayton is a major case in this area.[181] However, the commonwealth court has decided irrebuttable presumption cases that preceded, and were consistent with, *Clayton*.[182] In an interesting 1985 case, *Petron v. Department of Education*,[183] the Commonwealth conceded that occupational and driver's licenses are property interests.[184] A regulation provided that whenever a teacher was charged with a felony, his teaching certificate would be automatically suspended.[185] Because a subsequent hearing would give the opportunity to the claimant to argue that the conviction did not involve moral turpitude, the Department argued that this was sufficient to satisfy the claimant's procedural due process rights.[186] The claimant argued that this "hearing" was not sufficient because he had been admitted into an ARD program, during which all proceedings on the criminal charges are postponed by statute and could only be revived if the claimant violated the terms of the ARD program.[187] The commonwealth court held that the regulation, as applied to the claimant, violated

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[177] *Clayton*, 630 A.2d at 931 (citing Bell v. Burson, 402 U.S. 535 (1971)).

[178] *Id.* (quoting *Bell*, 402 U.S. at 539).

[179] *Clayton*, 684 A.2d at 1065.

[180] *Id.* at 1064-65 (citing *Bell*, 402 U.S. at 539). The Supreme Court of Pennsylvania disagreed with part of the commonwealth court's *Clayton* opinion that, as a first step, characterized the interest involved as substantive or procedural because of the confusion on that subject in the Supreme Court of the United States opinions. *Id.* at 1062-63.

[181] *See* John L. Gedid, *Major Constitutional and Administrative Decisions of 1996: Progress of the Supreme Court of Pennsylvania*, 6 WIDENER J. PUB. L. 595, 596-97 (1997).

[182] *See, e.g.*, Petron v. Dep't of Educ., 726 A.2d 1091, 1094 (Pa. Commw. Ct. 1999).

[183] Petron v. Dep't of Educ., 726 A.2d 1091 (Pa. Commw. Ct. 1999).

[184] *Id.* at 1093.

[185] *Id.* at 1091-92 & n.3 (citing 24 PA. CONS. STAT. § 2070.5(a)(11) (2006)).

[186] *Id.* at 1093-94.

[187] *Id.* at 1093 & n.9 (citing PA. R. CRIM. P. 314, 316, 318, 319, 320 (West 2007)).

procedural due process protections.[188] Although the public interest in the safety and well-being of children in the public schools is an important public interest, so is the private interest in earning a livelihood.[189] Therefore, the claimant was entitled at least to a truncated *Loudermill*-type pretermination hearing.[190]

After the Supreme Court of Pennsylvania clarified the law in *Clayton*, the commonwealth court created a coherent body of law on irrebuttable presumptions.[191] In driver's license cases, one important distinction that the court has drawn is between minimum standards for qualification to drive that deal with permanent conditions and irrebuttable presumptions that deal with treatable conditions.[192] The former situation arose in *Byers v. Department of Transportation*.[193] There, a DOT regulation prescribed minimum field of vision requirements for drivers to be eligible for a license.[194] The claimant, at an eye examination, was found to be blind in one eye, so DOT issued a recall for his license based on the field of vision regulation.[195] The claimant, at the hearing, sought to show that he had learned to compensate for the disability.[196] The claimant's evidence was excluded as irrelevant

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[188] *Petron*, 726 A.2d at 1093.

[189] *Id.* at 1094 (citing FDIC v. Mallen, 486 U.S. 228, 240-41 (1988)).

[190] *See id.* at 1093-94 & n.8 (citing Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 534 (1985); Firman v. Dep't of State, 697 A.2d 291, 295 (Pa. Commw. Ct. 1997)) (showing that a hearing is a due process requirement that must be fulfilled prior to deprivation of an individual's property).

[191] *See, e.g.*, Peachey v. Dep't of Transp., 979 A.2d 951, 956 (Pa. Commw. Ct. 2009); Byers v. Dep't of Transp., 735 A.2d 168, 170 (Pa. Commw. Ct. 1999); *Petron*, 726 A.2d 1091 (illustrating the commonwealth court's contributions to defining irrebuttable presumptions in procedural due process adjudications).

[192] *Byers*, 735 A.2d at 171. This analysis is also based on the nature of the analysis in Pennsylvania of licenses constituting privileges and property interests discussed above in connection with licensing. *See supra* notes 55-69 and accompanying text.

[193] Byers v. Dep't of Transp., 735 A.2d 168 (Pa. Commw. Ct. 1999).

[194] *Byers*, 735 A.2d at 169. 67 PA. CODE § 83.3(e) provides that "[a] person shall have a combined field of vision of at least 120° in the horizontal meridian, excepting the normal blind spots." 67 PA. CODE § 83.3(e) (2010).

[195] *See id.* at 169.

[196] *Id.*

on the basis that he could introduce evidence only under the provisions of the field of vision regulation.[197]

Although this regulation appeared to create an irrebuttable presumption, the court in *Byers* reasoned that *Clayton* did not intend to render unconstitutional all DOT control over driver health[198]:

> [W]e do not read the *Clayton* decision as degrading *all* qualifications promulgated by the Department's regulations to the status of guidelines. Otherwise, carried to its logical extreme, the argument that *Clayton* stands for such a proposition would allow those without any capacity to see to argue their competency to drive.[199]

The court reasoned that this case was conceptually different from the regulation involved in *Clayton*, which dealt with a temporary disability.[200] The regulation creating the presumption in this case dealt with a condition that is "constant, objectively measurable and . . . permanent."[201] In this situation, where the legislature has given express authority to DOT to create regulations for the issuance of operator's permits consistent with public safety, such regulation is not an unconstitutional irrebuttable presumption.[202]

On the other hand, in some cases involving claimant seizures or temporary unconsciousness, recent commonwealth court decisions carefully define the scope of the *Clayton* precedent.[203] In one case,[204] the Commonwealth sought to distinguish the *Clayton* precedent on irrebuttable presumptions on the basis that the claimant had suffered two seizures, while Clayton only suffered

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[197] *Byers*, 735 A.2d at 169-70, 72 (citing 67 PA. CODE § 83.3(d)).

[198] *Id.* at 171.

[199] *Id.*

[200] *Id.* at 171.

[201] *Id.*

[202] *Id.* at 171 (citing Dare v. Dep't of Transp., 682 A.2d 413, 415-16 (Pa. Commw. Ct. 1996)).

[203] Peachey v. Dep't of Transp., 979 A.2d 951, 956-57 (Pa. Commw. Ct. 2009).

[204] *Id.*

one.[205] Holding that the basis of the *Clayton* decision was the regulation's effect of cutting off consideration of improvement of the claimant's disability–limiting his opportunity to be heard on that issue–the court rejected the Commonwealth's position as a misreading of *Clayton*.[206]

In a major recent case, the commonwealth court applied irrebuttable presumption analysis to a procedural due process challenge by public school students to the action of the Philadelphia School Board in assigning them to disciplinary classes without an opportunity to be heard.[207] In *D.C. v. Philadelphia School District*,[208] regulations of the Philadelphia School District channeled public school students returning from juvenile delinquency incarceration into alternative education classes, instead of the regular public classrooms.[209] This assignment took place without a hearing.[210] The classes into which the students were assigned were known to be disciplinary and to be primarily or exclusively for disruptive students.[211] Students assigned to those classes argued that the transfers were disciplinary and that this procedure violated the due process protections of the Federal and Pennsylvania Constitutions because they were subjected to disciplinary action without an opportunity to be heard on the issue of rehabilitation while in juvenile incarceration.[212] In addition, they argued that placement in disciplinary classes injured their reputations, which are expressly protected under the Pennsylvania Constitution article I, section 1 and section 11.[213]

The commonwealth court agreed.[214] In an opinion authored by Judge Smith-Ribner, the court held that the procedures for

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[205] *Peachey*, 979 A.2d at 956 (citing Dep't of Transp. v. Clayton, 684 A.2d 1060, 1060 (Pa. 1996)).

[206] *Id.* (referencing *Clayton*, 684 A.2d at 1065).

[207] D.C. v. Sch. Dist. of Phila., 879 A.2d 408, 409-10, 416 (Pa. Commw. Ct. 2005).

[208] *Id.*

[209] *Id.* at 409-10 (citing 42 PA. CONS. STAT. § 21-2134 (2006)).

[210] *Id.* at 420-21.

[211] *Id.* at 415.

[212] *Id.* at 415, 416.

[213] *D.C.*, 879 A.2d at 416 (citing PA. CONST. art. 1, §§ 1, 11; R. v. Dep't of Pub. Welfare, 636 A.2d 142, 149 (Pa. 1994)).

[214] *Id.* at 417.

assignment of some returning students[215] denied them the opportunity to be heard at a meaningful time under *Mathews* and *Goss v. Lopez.*[216] For another group of students, the practice created an irrebuttable presumption under the *Clayton* and *Goss* cases.[217] The court reasoned that *Goss* requires effective notice and some kind of informal hearing for a disciplined student prior to placement in the special class, in order to guard against erroneous deprivation.[218] If a juvenile has reformed during his or her incarceration, he or she must be given the opportunity to show that he or she can function without disruption or problem in a regular classroom.[219] Foreclosing consideration of that issue constitutes an irrebuttable presumption and a denial of a fair opportunity to be heard.[220]

XII. FAIR TRIAL, FAIR TRIBUNAL

The commonwealth court made its greatest contribution in this area by defining the elements of a fair trial before a fair tribunal.[221] A major problem in the fair hearing area has been the commingling of prosecutorial and adjudicative functions.[222] In *Gardner v. Repasky*,[223] the Supreme Court of Pennsylvania held that commingling of prosecutorial and adjudicatory functions created the appearance of bias; "strict" standards of judicial bias were applicable to administrative agencies; and actual bias does not

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[215] *D.C.*, 879 A.2d at 410. For some students, there was a right to an informal hearing, but that hearing would not occur until at least four weeks after reassignment to the remedial, disciplinary facility. *Id.* at 420.

[216] Goss v. Lopez, 419 U.S. 565 (1975).

[217] *D.C.*, 879 A.2d at 418-19 (citing *Goss*, 419 U.S. at 583-84; Dep't of Transp. v. Clayton, 684 A.2d 1060, 1064 (Pa. 1996)). For one group of students, there was no hearing available at any time. *Id.* at 420.

[218] *Id.* at 418-19 (citing *Goss*, 419 U.S. at 583).

[219] *Id.* (referencing 24 PA. CONS. STAT. § 21-2134 (2006)).

[220] *Id.*

[221] *See generally* Gardner v. Repasky, 252 A.2d 704 (Pa. 1969) (introducing the commonwealth court's attempt to define explicit elements of a fair trial).

[222] Gerald Gornish, *Due Process in Administrative Agency Hearings in Pennsylvania: The Commingling of Functions Under* Feeser *and* Dussia, 15 DUQ. L. REV. 581, 588-90 (1977).

[223] Gardner v. Repasky, 252 A.2d 704 (Pa. 1969).

have to be shown, because "even the appearance of bias" is proscribed.[224] *Gardner* set the tone in this area, and after that decision, the commonwealth court refined and explained how to apply fair hearing standards to agency litigation.[225] Many cases involving commingling emphasized that the nature of procedural due process is flexible[226] and "incapable of exact definition,"[227] meaning that the need for procedural protections must be analyzed ad hoc, as the "particular situation demands."[228]

In an early case, *Donnon v. Civil Service Commission*,[229] the commonwealth court held that a borough solicitor who prosecuted a case and then assisted the Commission at trial with rulings on evidence, was in violation of the fair hearing requirement, even in the absence of a showing of bias.[230] However, shortly thereafter, the commonwealth court held that where the agency separates the investigatory, prosecutorial, and adjudicative functions so that they are not combined in one person or office, there is no violation of the fair hearing requirement.[231] In 1975, the commonwealth court opined that the standard for fair hearing under the Pennsylvania Constitution was stricter than the federal standard.[232] The fair hearing requirement is crucially important because: "[T]he most critical function in the prosecution and adjudication of administrative cases is in the resolution of disputed facts because the findings of fact which result from administrative proceedings

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[224] *Gardner*, 252 A.2d at 706 (quoting Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 150 (1968)).

[225] *See, e.g.*, State Dental Council & Examining Bd. v. Pollock, 318 A.2d 910, 914 (Pa. 1974) (citing *In re* Murchinson, 349 U.S. 133, 136 (1965)); Donnon v. Civil Serv. Comm'n, 283 A.2d 92, 93 & n.1 (Pa. Commw. Ct. 1971) (examining the application of the hearing standards after *Gardner*).

[226] Telang v. Bureau of Prof'l & Occupational Affairs, 751 A.2d 1147, 1150 (Pa. 2000) (quoting Mathews v. Eldridge, 424 U.S. 319, 334 (1976)).

[227] Sch. Dist. of Phila. v. Pa. Milk Mktg. Bd., 683 A.2d 972, 978 (Pa. Commw. Ct. 1996) (quoting Plowman v. Plowman, 597 A.2d 701, 705 (Pa. Super. Ct. 1991)).

[228] *Telang*, 751 A.2d at 1150 (quoting *Mathews*, 424 U.S. at 334).

[229] Donnon v. Civil Serv. Comm'n, 283 A.2d 92 (Pa. Commw. Ct. 1971).

[230] *Id.* at 93-94.

[231] Wasniewski v. State Civil Serv. Comm'n, 299 A.2d 676, 678-79 (Pa. Commw. Ct. 1973).

[232] English v. Ne. Bd. of Educ., 348 A.2d 494, 496 (Pa. Commw. Ct. 1975).

are subject to only limited appellate review."[233] In *Insurance Department v. American Bankers Insurance Co.*,[234] the court held that if the hearing examiner was the immediate departmental supervisor of the employee prosecuting the case, that relationship creates an appearance of bias that violates the fair hearing requirement.[235]

In 1977, the commonwealth court decided *Bruteyn v. State Dental Council & Examining Board*,[236] an important case that identified several distinct aspects of the fair hearing requirement.[237] In *Bruteyn*, a dentist's license suspension case, the same deputy attorney general who prosecuted the case advised the Dental Board on matters during the investigatory phase and on evidentiary matters at the hearing.[238] In an opinion authored by President Judge Bowman, the court held that this activity created the appearance of bias.[239] He identified two different requirements of the fair hearing requirement: fair tribunal and fair trial.[240] With regard to a fair tribunal, mere commingling of functions does not constitute a violation as long as these functions are "adequately separated"[241] by having the prosecutorial and the adjudicative functions carried out by "distinct" administrative departments with no "direct affiliation" with each other.[242] With regard to the fair trial aspect, Judge Bowman recognized that it is long established that the duty of a prosecutor is to build the strongest case possible

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[233] Pa. Human Relations Comm'n v. Thorp, Reed & Armstrong, 361 A.2d 497, 501 (Pa. Commw. Ct. 1976). Because there were no disputed facts in the *Thorp* case, the court held that there was no violation of procedural due process; the only issues involved were questions of law. *Id.* at 501-02.

[234] Dep't of Ins. v. Am. Bankers Ins. Co., 363 A.2d 874 (Pa. Commw. Ct. 1976).

[235] *Id.* at 875.

[236] Bruteyn v. State Dental Council & Examining Bd., 380 A.2d 497 (Pa. Commw. Ct. 1977).

[237] *See id.* at 500.

[238] *Id.* at 499.

[239] *Id.* at 502.

[240] *Id.* at 500 (quoting *In Re* Murchinson, 349 U.S. 133, 136 (1954)) (citing Withrow v. Larkin, 421 U.S. 35, 46 (1975)).

[241] *Id.* at 501 (citing State Dental Council & Examining Bd. v. Pollock, 318 A.2d 910, 914-15 (Pa. 1974)).

[242] *Bruteyn*, 380 A.2d at 500-01 (quoting *Pollock*, 318 A.2d at 915).

for the prosecution.[243] However, "[t]his is manifestly at odds with the impartiality required of the adjudicator. When the prosecutor as an individual is permitted in some manner to fulfill the role of the fact finder[,] one of the necessary elements of a fair trial is lacking."[244]

In 1992, the Supreme Court of Pennsylvania decided *Lyness v. State Board of Medicine*,[245] a fair hearing case.[246] The claimant, a physician whose license to practice medicine had been revoked, argued that when a single agency or board conducts both prosecution and adjudication of a case, there is a per se violation of the fair hearing requirement of procedural due process.[247] The supreme court held that it was not a per se violation as long as the agency conducted prosecution and adjudication separately.[248] The court placed the source of the fair hearing requirement of procedural due process squarely in the Pennsylvania Constitution.[249] The agency must erect "walls of division" between the two functions that eliminate the appearance or threat of unfairness.[250] No such walls existed in *Lyness*, and the supreme court reversed the action of the agency.[251] The commonwealth court's fair hearing opinions, noted above, which forbade commingling of prosecutorial and adjudicative functions in an agency, predated the *Lyness* case by many years, and still their holdings were identical[252]

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[243] *Bruteyn*, 380 A.2d at 501.

[244] *Id.* at 501.

[245] Lyness v. State Bd. of Med., 605 A.2d 1204 (Pa. 1992).

[246] *Id.* at 1204.

[247] *Id.* at 1206.

[248] *Id.* at 1209-11 (quoting State Dental & Examining Bd. v. Pollock, 318 A.2d 910, 915 (Pa. 1974)).

[249] *Id.* at 1207 (quoting Commonwealth v. Thompson, 281 A.2d 856, 858 (Pa. 1971)).

[250] *Id.* at 1209.

[251] *Lyness*, 605 A.2d at 1211.

[252] *See* Bruteyn v. State Dental Council & Examining Bd., 380 A.2d 497, 502 (Pa. Commw. Ct. 1977); Dep't of Ins. v. Am. Bankers Ins. Co., 363 A.2d 874, 876 (Pa. Commw. Ct. 1976); Human Relations Comm'n v. Thorp, Reed & Armstrong, 361 A.2d 497, 503 (Pa. Commw. Ct. 1976); Donnon v. Civil Serv. Comm'n, 283 A.2d 92, 94 (Pa. Commw. Ct. 1971).

Following *Lyness*, the Supreme Court of Pennsylvania held, in *Stone & Edwards Insurance, Inc. v. Insurance Department*,[253] that a *Lyness* commingling claim must involve actual commingling during the hearing or proceedings, and not what appears on paper.[254] In *Stone*, *because* there was an "absence of any actual commingling" in the procedure followed by the department, there was no fair hearing violation.[255] *Hetman v. State Civil Service Commission*[256] was similar.[257] The court acknowledged that the statute and regulations involved appeared to create commingling of prosecutorial and adjudicative functions; however, there was no violation of fair hearing principles because an examination of the record demonstrated that separation of those functions actually occurred prior to and during the hearing.[258] The court stated that "*actual* commingling [must] exist[] before a violation of an individual's due process rights can be found."[259]

A closely related and important effect of this holding is that the claimant in a commingling case does not have to prove bias, which is notoriously difficult to prove, but only actual commingling.[260] When a board serves as the fact finder in a case, there is no commingling if members of the board who participated in the prosecution are excluded from the board adjudication.[261] The claimant's burden of proof is to establish that board members who participated in the prosecutorial phase of the proceeding participated in the adjudicatory phase.[262] However, it is not enough

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[253] Stone & Edwards Ins. Agency, Inc. v. Dep't of Ins., 648 A.2d 304 (Pa. 1994).

[254] *Id.* at 308.

[255] *Id.*

[256] Hetman v. State Civil Serv. Comm'n, 714 A.2d 532 (Pa. Commw. Ct. 1998).

[257] *See id.* at 535-36 (citing *Stone*, 648 A.2d at 307).

[258] *Id.*

[259] *Id.* at 536.

[260] *See* Day v. Civil Serv. Comm'n, 948 A.2d 900, 905 (Pa. Commw. Ct. 2008) (quoting *Stone*, 648 A.2d at 307); Shapiro v. State Bd. of Accountancy, 856 A.2d 864, 881 (Pa. Commw. Ct. 2004) (quoting *Stone*, 648 A.2d at 308).

[261] Cooper v. State Bd. of Med., 623 A.2d 433, 436 (Pa. Commw. Ct. 1993).

[262] Phila. Lodge No. 5, Fraternal Order of Police v. Pa. Lodge, Fraternal Order of Police, 660 A.2d 192, 200 (Pa. Commw. Ct. 1995).

to allege that two attorneys (one a prosecutor and one an adjudicator) work in the same office; instead, it must be shown that there are no walls of division between those performing prosecutorial functions and those performing adjudicatory functions.[263]

In an interesting case, *LaStella v. Bureau of Professional & Occupational Affairs*,[264] the commonwealth court recognized an exception to the fair hearing concept.[265] Relying on precedent,[266] the commonwealth court explained that in a license application proceeding, the board relies on information in the claimant's application when it denies a license.[267] If the board then denies the license, there is no denial of a fair hearing because the board did not institute any prosecutory or disciplinary action against claimant that could be commingled.[268] There can be no commingling when the basis for the factual determination of the board is an application of the claimant himself and not a prosecution.[269]

XIII. CONCLUSION

For forty years, the commonwealth court has continuously built a body of law on procedural due process that is coherent and ensures fundamental fairness.[270] The court has refined the federal *Goldberg* test[271] and eliminated confusion in this area. For example, the court has explained in several cases how a driver's license can constitute a privilege and an interest protected by the guarantee of a fair hearing before termination, a feat that neither

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[263] Marchionni v. SEPTA, 715 A.2d 559, 564 (Pa. Commw. Ct. 1998) (citing *Stone*, 648 A.2d at 308).

[264] LaStella v. Bureau of Prof'l & Occupational Affairs, 954 A.2d 769 (Pa. Commw. Ct. 2008).

[265] *See id.* at 775.

[266] *Id.* (citing Barran v. State Bd. of Med., 670 A.2d 765, 771 (Pa. Commw. Ct. 1996)).

[267] *Id.* (quoting *Barran*, 670 A.2d at 771).

[268] *Id.* (quoting *Barran*, 670 A.2d at 771).

[269] *Id.* at 775.

[270] *See Commonwealth Court*, UNIFIED JUD. SYS. OF PA., http://www.aopc.org/T/Commonwealth (last visited Dec. 10, 2010); *see, e.g.*, *LaStella*, 954 A.2d at 774.

[271] Levine v. Dep't of Educ., 468 A.2d 1216, 1218 (Pa. Commw. Ct. 1984).

the state nor federal supreme courts accomplished.[272] In the area of reputation, the court did not employ the concept sometimes invoked by the state supreme court that, in this area, state law would march in lockstep with federal law.[273] Recognizing the express protection of due process in the Pennsylvania Constitution, the commonwealth court has carefully extended the protections of procedural due process to reputational damage.[274] In the area of timing of a hearing, the commonwealth court has made a major contribution[275] by clarifying and taming the irrebuttable presumption doctrine. In a series of cases, the court clarified the law in this area, particularly with respect to driver's licenses.[276] In doing so, the court struck the proper balance between the need of the state to regulate for public safety on the highways, and the necessity of giving individual licensees the opportunity to be heard, where appropriate.[277] Moreover, with respect to other kinds of licenses and to reputation, the commonwealth court exercised the same balanced approach between the needs of the state to regulate and fairness toward citizens.[278]

Without a doubt, the commonwealth court has made its greatest contribution in the area of fair trial before a fair tribunal. Both before and after the landmark *Lyness* case, the commonwealth court carefully protected the rights of litigants against commingling of prosecutorial and adjudicatory functions before administrative agencies. The commonwealth court is a unique Pennsylvania institution that has made extensive, important contributions in the area of procedural due process and, thereby, ensured fair agency procedure for the citizens of this Commonwealth.

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[272] Pa. Game Comm'n v. Marich, 666 A.2d 253, 257 (Pa. 1995); Brewster v. Dep't of Transp., 503 A.2d 497, 498 (Pa. Commw. Ct. 1986).

[273] *See* Hatchard v. Westinghouse Broad. Co., 532 A.2d 346, 351 (Pa. 1987).

[274] Simon v. Commonwealth, 659 A.2d 631, 639 (Pa. Commw. Ct. 1995).

[275] *See* Adamovich v. Dep't of Pub. Welfare, 504 A.2d 952, 958 (Pa. Commw. Ct. 1986).

[276] *See* LaStella v. Bureau of Prof'l & Occupational Affairs, 954 A.2d 769, 774 (Pa. Commw. Ct. 2008).

[277] Byers v. Dep't of Transp., 735 A.2d 168, 171 (Pa. Commw. Ct. 1991) (quoting Dep't of Transp. v. Clayton, 684 A.2d 1060, 1065 (Pa. 1996)).

[278] *LaStella*, 954 A.2d at 774.