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An Overview of the Parole Revocation Process in Pennsylvania

Timothy P. Wile*

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The author emphasizes that the views, opinions and analyses in this article are his own and do not necessarily reflect the views or policy of either the Commonwealth Court of Pennsylvania or the Public Defender's Office of Montgomery County. The author also wishes to express his sincere appreciation to Kristen W. Brown, Esquire, for her assistance and encouragement in the preparation of this article.

I. Introduction

This article is an overview of the parole revocation process in Pennsylvania. While the article will deal primarily with parole cases coming under the exclusive jurisdiction of the Pennsylvania Board of Probation and Parole, the principles of due process and relaxed evidentiary rules are equally applicable to probation revocation hearings in Common Pleas Courts and those parole cases involving parolees having sentences of less than two years not coming under the

Parole Board's jurisdiction.[1]

Probation and parole hold a significant place within the framework of the criminal justice system. This was underscored by a 1985 study released by the Bureau of Justice Statistics, an agency of the United States Department of Justice. According to that study, one out of thirty-five adult men in the United States is either on probation, under parole supervision, or incarcerated. Of the more than 2.3 million men and 323,000 women in custody or under the supervision of corrections authorities at the end of 1984, 1.7 million were on probation and 268,500 were on parole.[2] Pennsylvania currently has over 91,700 persons under probation of parole supervision of which 16,000 are under the supervision of the Pennsylvania Board of Probation and Parole.[3]

Parole has proven to be a cost-effective method of rehabilitating prisoners. In 1986, it cost $12,950.00 to keep a person in a state prison while the cost of supervising that person in the community was approximately one-tenth of that amount.[4] In addition, as a parolee, the prisoner can be a taxpaying member of the community and a family provider as opposed to being a ward of the Commonwealth.

A. Concept of Parole

Parole is a fundamental public policy in Pennsylvania which provides a prisoner with an opportunity to start anew in society and may be a determinative step in a prisoner's rehabilitation, adjustment, and restoration to social and economic life.[5] The concept of parole contemplates that when a trial court has determined that a convicted offender should be imprisoned, the optimum duration of that imprisonment can be best determined by an independent board. That board should be well-acquainted with the prisoner's crime and skilled in evaluating the prisoner's willingness to resume a constructive place in the community. Through the use of parole, the Commonwealth realistically faces the fact that a prisoner, unless con-

1. *See* PA. STAT. ANN. tit. 61, § 314 (Purdon 1964) and PA. R. CRIM. P. 1409. The Parole Board has the exclusive power to grant and revoke the paroles of prisoners who have a maximum sentence of two years or more. *See* PA. STAT. ANN. tit. 61, § 331.17 (Purdon Supp. 1986); Commonwealth *ex rel.* Tate v. Burke, 364 Pa. 179, 71 A.2d 241 (1950).

2. *Probation, Parole Being Used More*, The Philadelphia Inquirer, Feb. 24, 1986, at 12-A, col. 1.

3. 1985 PA. BD. OF PROBATION & PAROLE ANN. REP. 26.

4. 1986 PA. DEPT. OF CORRECTIONS ANN. REP. 30; 1977-1978 PA. BD. OF PROBATION & PAROLE BIANN. REP. 6.

5. Commonwealth v. Butler, 458 Pa. 289, 297, 328 A.2d 851, 856 (1974). *See also* PA. STAT. ANN. tit. 61, § 331.1 (Purdon 1964).

demned to death or under a sentence of life imprisonment, will someday be unconditionally released from prison. The prisoner's chances of becoming a useful citizen at that time are best when there has been a transitional period of conditional freedom under sympathetic, yet objective, supervision.[6]

The essence of parole is a release from prison, before the completion of sentence, upon the condition that the prisoner abide by certain rules during the balance of the sentence.[7] While on parole, the prisoner remains in the legal custody of the Commonwealth until the expiration of the maximum term of the prisoner's sentence.[8] The prisoner is considered to be still serving that sentence, albeit outside of prison walls. A grant of parole therefore differs from a pardon in that parole does not excuse the prisoner nor eliminate the sentence of the trial court.[9]

B. Pennsylvania Board of Probation and Parole

The General Assembly of Pennsylvania created the Pennsylvania Board of Probation and Parole, hereinafter referred to simply as the Parole Board, in 1941 as a part of a comprehensive revision of the parole system in the Commonwealth.[10] The Parole Board is structured as an independent administrative agency of the Commonwealth directly responsible to the Governor.[11] The Parole Board is comprised of five members with at least six years experience in the parole or probation field, of which at least one year must be in a supervisory or administrative capacity, who are nominated by the Governor and approved by a majority vote of the Pennsylvania Senate.[12]

The Parole Act vests the Parole Board with the exclusive statewide jurisdiction to grant, supervise, or revoke parole for prisoners serving sentences with a maximum term of two years or more.[13] Section 4 of the Parole Act, as modified by the 1986 amendments to the Parole Act, allows the Parole Board to exercise its authority to grant

6. Note, *A Survey of the Law of Probation and Parole in Pennsylvania*, 30 TEMPLE L.Q. 309 (1957).

7. Morrissey v. Brewer, 408 U.S. 471, 477-78 (1972).

8. 37 PA. CODE § 63.3 (1986); Commonwealth *ex rel.* Johnson v. Bookbinder, 213 Pa. Super. 335, 247 A.2d 664 (1968).

9. Hendrickson v. Pennsylvania State Board of Parole, 409 Pa. 204, 185 A.2d 581 (1962), *cert. denied*, 374 U.S. 817 (1963).

10. *See* PA. STAT. ANN. tit. 61 §§ 331.1-331.34 (Purdon Supp. 1986).

11. PA. STAT. ANN. tit. 61, § 331.2 (Purdon Supp. 1987).

12. *Id.*

13. PA. STAT. ANN. tit. 61, § 331.17 (Purdon Supp. 1986).

or revoke a parole through two-person panels comprised of at least one Parole Board member and one hearing examiner, although a majority vote of a quorum is required to conduct any other business.[14]

Section 17 of the Parole Act[15] is the specific section whereby the General Assembly vested the Parole Board with the exclusive jurisdiction to parole and revoke the paroles of prisoners subjected to a maximum sentence of two years or more. This broad grant of authority to the Parole Board has been upheld against constitutional challenges in both Pennsylvania[16] and federal courts.[17] Therefore, once the trial court imposes a sentence with a maximum term of two years or more, the court loses its power to parole the offender or revoke a parole previously granted, and any attempt to do so by the court is void ab initio.[18]

For administrative purposes, pursuant to its statutory authority,[19] the Parole Board has divided the Commonwealth into ten parole districts.[20] Each district has its own supervisor who is in charge

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14. PA. STAT. ANN. tit. 61, § 331.4 (Purdon Supp. 1987); 1986 Pa. Legis. Serv. No. 7, 16, 17 (Purdon). The 1986 amendments to the Parole Act are contained in Act No. 1986-134, which was signed by Governor Richard Thornburgh on October 9, 1986. Throughout the remainder of this Article, the 1986 amendments will be referred to simply as "Act 134." *See generally* Wile, *Annual Survey of Significant Developments in the Law — Probation and Parole*, 58 PA.B.A.Q. 119, 120 (1987) [hereinafter Wile, *1987 Probation and Parole Survey*].

15. PA. STAT. ANN. tit. 61, § 331.17 (Purdon Supp. 1986).

16. Bachman v. Jeffes, 488 F. Supp. 107 (M.D. Pa. 1980); Commonwealth v. Button, 332 Pa. Super. 239, 481 A.2d 342 (1984); Commonwealth *ex rel.* Savage v. Hendrick, 179 Pa. Super. 601, 118 A.2d 233 (1956); Commonwealth *ex rel.* Koffel v. Pennsylvania Board of Parole, 72 Dauph. 314 (Pa.C.P. 1959).

17. Gahagan v. Pennsylvania Board of Probation and Parole, 444 F. Supp. 1326 (E.D. Pa. 1978).

18. Commonwealth v. Bigley, 231 Pa. Super. 492, 331 A.2d 802 (1974); Tillman v. Pennsylvania Board of Probation and Parole, 48 Pa. Commw. 325, 409 A.2d 949 (1980). The Parole Board may also obtain exclusive paroling jurisdiction over prisoners subject to several consecutive sentences, each of which have maximum terms of less than two years. Under 42 PA. CONS. STAT. ANN. § 9757 (Purdon 1982), consecutive sentences are automatically aggregated into a single sentence. Gillespie v. Department of Corrections, ___ Pa. Commw. ___, 527 A.2d 1061 (1987). If the aggregated sentence has a maximum term of two years or more, the Parole Board obtains exclusive parole authority over the prisoner. Ambrek v. Clark, 287 F. Supp. 208 (E.D. Pa. 1968).

19. PA. STAT. ANN. tit. 61, § 331.10 (Purdon Supp. 1986).

20. The ten parole districts, and the counties which they encompass, are as follows: Allentown (Berks, Bucks, Lehigh, Montgomery, Northampton and Schuylkill); Altoona (Bedford, Blair, Cambria, Clearfield, Fulton, Huntingdon, Mifflin and Somerset); Butler (Armstrong, Beaver, Butler, Clarion, Elk, Indiana, Jefferson and Lawrence); Chester (Chester and Delaware); Erie (Crawford, Erie, Forest, McKean, Mercer, Venango and Warren); Harrisburg (Adams, Cumberland, Dauphin, Franklin, Juniata, Lancaster, Lebanon, Perry and York); Philadelphia (Philadelphia); Pittsburgh (Allegheny, Fayette, Greene, Washington and Westmoreland); Scranton (Carbon, Columbia, Lackawana, Luzerne, Monroe, Pike, Susquehanna, Wayne and Wyoming); and Williamsport (Bradford, Cameron, Centre, Clinton, Lycoming, Montour, Northumberland, Potter, Snyder, Sullivan, Tioga and Union). 1982 PA. BD. OF PROBATION & PAROLE ANN. REP. 24.

of parole operations, including supervision of parole agents in that district.[21] In addition to easing the administration of the parole system, the districts provide an additional level of control over the parolee since one of the general conditions of parole requires parolees to remain in the parole district to which they have been paroled; parolees are not to leave that district without the prior permission of the parole supervision staff.[22]

C. Granting Parole

The United States Supreme Court has held that there is no federal constitutional right to a grant of parole and that the question of whether a prisoner has any entitlement, either constitutional or otherwise, to parole is a matter of state law.[23] Pennsylvania law has been consistently interpreted as giving prisoners no right, constitutional or otherwise, to a grant of parole upon the expiration of the minimum term of their sentences.[24] The only right a prisoner has is to submit an application for parole and to have that application fairly considered by the Parole Board.[25] The Parole Board is not required to consider a prisoner for parole in the absence of a parole application, even if the prisoner's minimum term has expired.[26]

The Parole Act requires the Parole Board to acquaint itself with the circumstances of the prisoner's crime as well as the prisoner's character, mental characteristics and environment.[27] The sentencing court transmits to the Parole Board a full and complete copy of the record upon which the sentence is based with recommendations re-

21. PA. STAT. ANN. tit. 61, § 331.11 (Purdon Supp. 1986).

22. 37 PA. CODE § 63.4(1) (1986).

23. *Compare* Jago v. Van Curen, 454 U.S. 14 (1981) (no recognized right to parole provided by Ohio law) *with* Board of Pardons v. Allen, 482 U.S. ____, 96 L.Ed.2d 303 (1987) (provisions of Montana parole law create an expectancy of release on parole and thus a liberty interest) and Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979) (expectancy of parole provided by Nebraska law entitled inmates to due process protection).

24. Commonwealth *ex rel.* Rawlings v. Botula, 260 F. Supp. 298 (W.D. Pa. 1966); Commonwealth v. Brittingham, 442 Pa. 241, 275 A.2d 83 (1971); Commonwealth v. Gooslin, 280 Pa. Super. 384, 421 A.2d 775 (1980); Blair v. Pennsylvania Board of Probation and Parole, 78 Pa. Commw. 41, 467 A.2d 71 (1983), *cert. denied*, 466 U.S. 977 (1984); Barlip v. Pennsylvania Board of Probation and Parole, 45 Pa. Commw. 458, 405 A.2d 1338 (1979). *But see* Comment, *Federal Parole Decisionmaking: Judicial Review for the Fortunate and Few*, 85 DICK. L. REV. 501 (1981) (discusses the need for increased judicial oversight of the United States Parole Commission's exercise of its discretion in the paroling decision).

25. Krantz v. Pennsylvania Board of Probation and Parole, 86 Pa. Commw. 38, 483 A.2d 1044 (1984); Banks v. Pennsylvania Board of Probation and Parole, 4 Pa. Commw. 197 (1971).

26. Weyand v. Pennsylvania Board of Probation and Parole, 94 Pa. Commw. 32, 503 A.2d 80 (1986); PA. STAT. ANN. tit. 61, § 331.22 (Purdon 1964).

27. PA. STAT. ANN. tit. 61, § 331.19 (Purdon Supp. 1986).

garding parole.[28] In addition, the Department of Corrections and county corrections authorities are required to grant the Parole Board access to prisoners coming under their jurisdiction and furnish it with reports concerning the conduct of those prisoners.[29]

The Parole Act empowers the Parole Board to release prisoners on parole when it would be in the prisoners' best interests and the interests of the Commonwealth would not be injured.[30] The Parole Board evaluates the following five factors in making its paroling decision: 1) the extent of risk to the community; 2) the nature of the offense and the prisoner's prior criminal history; 3) the prisoner's job potential and employment; 4) the prisoner's emotional and family stability; and 5) the prisoner's adjustment to prison.[31] Whenever the Parole Board denies a parole application, it is required to notify the prisoner in writing and provide the reasons for that denial.[32]

Pennsylvania appellate courts have recognized that the granting of parole is a purely administrative function of the Parole Board.[33] Accordingly, the Pennsylvania judiciary has given broad deference to the expertise and discretion of the Parole Board in granting or denying parole applications and will not review a Parole Board order denying a parole application.[34] The Pennsylvania Commonwealth Court has stated that it will not review the Parole Board's exercise of its discretion in acting on a parole application as long as the Parole Board has acted within its grant of authority.[35]

II. Federal Due Process Guarantees

The federal courts have held that the issue of whether a prisoner has a constitutionally recognized right in the possibility of parole is dependent upon state law. For example, in *Jago v. Van Curen*[36] the United States Supreme Court held that Ohio parole statutes grant no such rights, while in *Greenholtz v. Nebraska Penal*

28. PA. STAT. ANN. tit. 61, § 331.18 (Purdon 1964).
29. PA. STAT. ANN. tit. 61, § 331.20 (Purdon 1964).
30. PA. STAT. ANN. tit. 61, § 331.21 (Purdon 1964).
31. 1977-1978 PA. BD. OF PROBATION & PAROLE BIANN. REP. 6.
32. PA. STAT. ANN. tit. 61, § 331.22 (Purdon 1964).
33. Rivenbark v. Pennsylvania Board of Probation and Parole, 509 Pa. 248, 501 A.2d 1110 (1985).
34. Reider v. Pennsylvania Board of Probation and Parole, ___ Pa. Commw. ___, 514 A.2d 967 (1986) (en banc); LaCamera v. Pennsylvania Board of Probation and Parole, 13 Pa. Commw. 85, 317 A.2d 925 (1974) (en banc).
35. Barnhouse v. Pennsylvania Board of Probation and Parole, 89 Pa. Commw. 512, 492 A.2d 1182 (1985); LaCamera v. Pennsylvania Board of Probation and Parole, 13 Pa. Commw. 85, 317 A.2d 925 (1974) (en banc).
36. 454 U.S. 14 (1981).

Inmates[37] the Supreme Court found that Nebraska law creates a constitutionally recognized right entitling inmates applying for parole to due process protection. While the Pennsylvania Parole Act has not been construed by the United States Supreme Court, federal courts have held that Pennsylvania law grants no constitutionally recognizable right to a grant of parole upon the expiration of a prisoner's minimum sentence.[38]

While a prisoner in Pennsylvania has no constitutionally recognized or protected interest in the expectation of being granted parole, once parole has in fact been granted and executed by the prisoner's release from incarceration, the new parolee obtains a constitutionally protected liberty interest under the fourteenth amendment[39] in the limited freedom that parole provides.[40] That limited freedom may not be taken away or revoked by the Commonwealth except for a breach of the conditions of parole followed by an orderly process that satisfies certain minimal due process requirements of notice and an opportunity to be heard.[41]

The liberty interest recognized under the fourteenth amendment vests only upon the prisoner's actual release from incarceration. A prisoner who has an unexecuted grant of parole has no such liberty interest, and the Commonwealth may constitutionally rescind that grant of parole at any time prior to the prisoner's release from confinement without providing notice or a due process hearing.[42]

In *Morrissey v. Brewer,*[43] the United States Supreme Court set general guidelines for parole revocation procedures that provide the due process protections which parolees are entitled to prior to having their paroles extinguished. That decision involved the case of John Morrissey who was sentenced in 1967 to not more than seven years in prison as a result of his guilty plea to the charge of false drawing

37. 442 U.S. 1 (1979).

38. *See, e.g.*, Commonwealth *ex rel.* Rawlings v. Botula, 260 F. Supp. 298 (W.D. Pa. 1966).

39. U.S. CONST. amend. XIV.

40. Morrissey v. Brewer, 408 U.S. 471, 482 (1972).

41. *Id.* at 484-85.

42. Jago v. Van Curen, 454 U.S. 14 (1981); Franklin v. Pennsylvania Board of Probation and Parole, 83 Pa. Commw. 318, 476 A.2d 1026 (1984). The release from confinement that results in the vesting of a protected liberty interest does not mean release from all confinement. A prisoner subject to sentences in different jurisdictions may be granted parole on the first and begin serving the sentence imposed by another jurisdiction. Thus, while the prisoner is still confined, he is no longer confined on the original sentence, having been administratively paroled to commence service of the other sentence. This "constructive parole" is sufficient to vest a liberty interest in the prisoner despite his continued confinement. *See* Green v. Pennsylvania Board of Probation and Parole, 101 Pa. Commw. 132, 515 A.2d 1006 (1986).

43. 408 U.S. 471 (1972).

or uttering of checks. He was paroled from the Iowa State Penitentiary in June 1968 but arrested in his home town seven months later as a parole violator and confined to the county jail. The following week, the Iowa Board of Parole, acting upon its review of Morrissey's parole officer's report,[44] revoked his parole and returned him to the penitentiary. At no time was he afforded a hearing on the asserted parole violations.[45] After exhausting his state remedies, Morrissey filed a habeas corpus action in federal district court. The district court denied the writ finding that the State's failure to provide a hearing prior to parole revocation did not violate due process.[46] On appeal, the Eighth Circuit Court of Appeals affirmed by a four to three vote. The majority held that since parole was only a corrective device authorizing the service of a sentence outside of the penitentiary, the parolee was still in custody. Therefore, prison authorities must have broad discretion in making revocation decisions, and courts should retain their traditional reluctance to interfere with disciplinary matters properly under the control of state prison authorities.[47]

The Supreme Court reversed and held that the liberty of a parolee, however limited and indeterminate, includes many of the core values of unqualified liberty and termination inflicts a grievous loss upon the parolee and often upon others. The Court stated that, by whatever name, liberty is valuable and must be seen as being within the protection of the fourteenth amendment. The termination of that liberty calls for some orderly process, however informal.[48]

The Court went on to note that the State has no interest in revoking parole without some formal procedural guarantees. Society has a stake in whatever may be the chance of restoring the parolee to a normal and useful life within the law. Thus, society has an interest in not having parole revoked because of erroneous information or because of an erroneous evaluation of the need to revoke parole. Society has a further interest in treating the parolee with basic fairness to enhance the chance of rehabilitation by avoiding reactions to

44. Morrissey's parole officer's report indicated that Morrissey had violated his parole by buying a car under an assumed name and operating it without permission, giving false statements to police concerning his address and insurance company after a minor accident, obtaining credit under an assumed name, and failing to report his place of residence. The report further indicates that Morrissey admitted the truth of these allegations to his parole officer. 408 U.S. at 473.

45. *Id.* at 472-73.

46. *Id.* at 474.

47. *See* Morrissey v. Brewer, 443 F.2d 942 (8th Cir. 1971).

48. 408 U.S. 471, 482 (1972).

arbitrariness.[49] In analyzing what process is due a parolee, the Court observed that there are two important stages in a typical parole revocation process — the arrest of the parolee with a preliminary hearing and the final revocation hearing.[50]

A. The Preliminary Revocation Hearing

The *Morrissey* Court envisioned the parole preliminary hearing to be a minimal inquiry conducted at or near the place of the asserted parole violation or the arrest of the parolee. The preliminary hearing should be held as promptly as convenient while information regarding the asserted parole violation is fresh and available. The Court saw the parole preliminary hearing as critical in determining whether probable cause or reasonable grounds exist to believe the parolee violated the conditions of parole.[51] Additionally, the Court held that this preliminary determination should be made by someone not directly involved in the case in order to assure an objective determination.[52]

The Court then went on to set down the following requirements that due process required at the parole preliminary revocation hearing: 1) notice to the parolee of (a) the time and place of the hearing, (b) the specific parole violations that are asserted, and (c) that the purpose of the hearing is to determine whether reasonable ground exists to believe that the parolee committed the asserted parole violations; 2) the opportunity for the parolee to appear and speak in his own behalf as well as to present relevant witnesses, documents or letters; 3) upon the request of the parolee, persons having adverse information upon which the revocation of parole is to be based are to be made available to the parolee for confrontation and cross-examination, unless the hearing officer determines that the informant would be subject to the risk of harm if the informant's identity were disclosed; and 4) a written summary of the hearing that specifies the reasons for the determination and the evidence relied upon in reaching that determination shall be prepared by the hearing officer who shall make the reasonable ground determination whether or not to hold the parolee in custody for a final decision of the parole board and such finding shall be sufficient to warrant the parolee's continued detention.[53] Although the Court indicated that the hearing of-

49. *Id.* at 483-84.
50. *Id.* at 484-85.
51. *Id.* at 485, *citing* Goldberg v. Kelly, 397 U.S. 254, 267-71 (1970).
52. *Id.* at 485-86.
53. *Id.* at 486-87.

ficer's report should include the evidence relied upon and the reasons for the hearing officer's determination, the Court specifically rejected the notion that the hearing officer make formal findings of fact and conclusions of law because no interest would be served by requiring formalism at this stage of the revocation process.[54]

B. The Final Revocation Hearing

The second stage of the typical parole revocation process envisioned by the *Morrissey* Court is the final revocation hearing. At this hearing, the parole authority would make the final decision as to whether parole would be revoked. At this stage the contested facts surrounding the alleged violation of parole are evaluated, and the parole authority must consider whether the facts warrant revocation of parole.[55] This revocation hearing must be tendered within a reasonable time after the parolee has been taken into custody for the asserted parole violations.[56]

While preferring to leave the specifics to the individual states, the Court did set forth the following minimum requirements of due process with respect to the revocation hearing:

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of the evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied upon and the reasons for revoking parole.[57]

The *Morrissey* Court also stressed that the parole revocation hearing is not the equivalent of a criminal prosecution; consequently, the Court relaxed evidentiary rules which permit admission of evidence such as letters, affidavits, and other material not ordinarily admissible in an adversary criminal trial.[58] The Court emphasized that the parole revocation hearing does not provide a forum for a parolee to

54. *Id.* at 487, *citing* Goldberg v. Kelly, 397 U.S. at 271.
55. *Id.* at 488.
56. *Id.* While the Court did not specify what it considered to constitute a "reasonable" time in which a parolee must be tendered a final revocation hearing after being taken into custody, the Court did express the opinion that a period of two months was not unreasonable.
57. *Id.* at 489.
58. *Id.*

relitigate a criminal conviction if that is the asserted violation of parole.[59]

C. *Right to Counsel*[60]

While providing minimal due process standards for parole revocations, the *Morrissey* Court specifically did not address the issue of whether due process mandates that parolees be allowed the assistance of counsel, either privately retained or publicly appointed, in resisting the revocation of their paroles.[61] That issue was reached by the Court the following year in *Gagnon v. Scarpelli*.[62]

A probationer, Gerald Scarpelli, was sentenced in Wisconsin to fifteen years in prison following his guilty plea to the charge of armed robbery. The trial court suspended that sentence, however, and placed him on seven years probation. Scarpelli was permitted to have his probation transferred to Illinois where he was accepted for supervision on August 5, 1965. The next day, he and an accomplice were arrested during the commission of a burglary. After being advised of his rights, Scarpelli confessed to the burglary.[63] Thereafter, Wisconsin revoked his probation without a hearing on the basis of the report submitted by Illinois authorities, and he was incarcerated and began serving the fifteen year sentence previously imposed by the trial court.

In December 1968, Scarpelli commenced a habeas corpus action in federal district court in which he asserted that the revocation of his probation without the benefit of a hearing or assistance of counsel violated his due process rights. The district court agreed that the lack of a prior hearing and assistance of counsel violated his due process rights and granted the writ.[64] On appeal, the Seventh Circuit Court of Appeals affirmed by finding that due process requires states to provide an indigent prisoner with appointed counsel at probation revocation hearings.[65]

While the Supreme Court agreed that Wisconsin violated Scarpelli's due process rights by revoking probation without a hearing, it disagreed with the Seventh Circuit's conclusion that due pro-

59. *Id.* at 490.

60. *See generally* Wile, *The Right to Counsel Under Pennsylvania Law in State Parole Revocation Hearings*, 91 DICK. L. REV. 151 (1986) [hereinafter Wile *Right to Counsel*].

61. 408 U.S. 471, 489 (1972).

62. 411 U.S. 778 (1973).

63. *Id.* at 780.

64. Scarpelli v. Gagnon, 317 F. Supp. 72 (E.D. Wis. 1970).

65. Gunsolus v. Gagnon, 454 F.2d 416 (7th Cir. 1971).

cess requires appointment of counsel for indigent prisoners at probation violation hearings. The *Gagnon* Court found that there is no absolute right to be provided with appointed counsel at parole or probation revocation hearings under either the sixth[66] or the fourteenth[67] amendments, thus expanding its holding to include parolees as well as probationers. In rejecting the per se rule favored by the Seventh Circuit, the Court reasoned that the question of whether an indigent parolee or probationer has a constitutional right to appointed counsel should be decided on a case-by-case basis. If the parolee's right to counsel does rise to a constitutional magnitude, the basis of that right will be found in the due process clause of the fourteenth amendment and not in the sixth amendment.[68]

The *Gagnon* Court provided guidelines to determine whether a parolee or probationer has a constitutional right to counsel in a revocation proceeding. The Court opined that counsel should be provided where the parolee or probationer makes a request based upon a timely and colorable claim 1) that the parolee or probationer has not committed the asserted violations of parole or probation; or 2) "that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present."[69] The Court also held that in doubtful cases the responsible agency, such as a parole board, should consider whether the parolee or probationer appears capable of speaking effectively for himself. When a request for appointed counsel is refused, the record should clearly indicate the grounds for such refusal.[70]

Both *Morrissey* and *Gagnon* remain the primary Supreme Court pronouncements on the procedural due process to which a parolee is entitled under the fourteenth amendment when faced with a possible revocation of parole. The remainder of this article will deal with the framework under Pennsylvania law by which the Commonwealth can revoke the limited freedom of a parolee.

III. The Revocation Process in Pennsylvania

The parole revocation process, insofar as it deals with parolees

66. U.S. CONST. amend. VI.
67. U.S. CONST. amend. XIV.
68. 411 U.S. 778, 790-91 (1973).
69. *Id.*
70. *Id.*

under the supervision of the Parole Board, has its foundation in three distinct sources — statutory law, administrative regulations, and court decisions.

A. The Statutory Framework

The power of the Parole Board to revoke the paroles of prisoners is found in two sections of the Parole Act, Sections 21[71] and 21.1.[72] Section 21 of the Parole Act merely empowers the Parole Board to recommit to prison those parolees who are found to be in violation of the conditions of parole and to reparole them when the interests of the Commonwealth would not be adversely affected. Section 21.1 was added to the Parole Act in 1951 and details the authority of the Parole Board to recommit parolees for violations of parole conditions and convictions for new criminal offenses. Section 21.1 categorizes parole violations into two separate and distinct categories.

1. Convicted Parole Violators.—The first category is made up of "convicted violators." A "convicted violator" is any parolee who commits a crime punishable by imprisonment while serving a parole term for which the parolee is convicted by being found guilty by a judge or jury, or to which the parolee pleads guilty or nolo contendere at any time thereafter in a court of record. The act of the parolee that gives the Parole Board jurisdiction to revoke parole is the *commission* of a crime while on parole. It is not necessary that the parolee plead guilty or be convicted of the new crime while on parole. Parole Board actions in revoking the parole of convicted violators after the expiration of their original sentence's maximum term have been upheld by Pennsylvania appellate courts.[73] In this way,

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71. PA. STAT. ANN. tit. 61, § 331.21 (Purdon 1964). This statute reads, in pertinent part, as follows:

> *§ 331.21. Power to parole; refusal of parole at expiration of minimum term; recommitment and reparole*
>
> . . . Said [parole] board shall have the power during the period for which a person shall have been sentenced to recommit one paroled for violation of the terms and conditions of his parole and from time to time to reparole and recommit in the same manner and with the same procedure as in the case of an original parole or recommitment, if, in the judgment of the said board, there is a reasonable probability that the convict will be benefited by again according him liberty and it does not appear that the interests of the Commonwealth will be injured thereby.

72. PA. STAT. ANN. tit. 61, § 331.21a (Purdon 1964).

73. Young v. Pennsylvania Board of Probation and Parole, 487 Pa. 428, 409 A.2d 843 (1977); Pyatt v. Pennsylvania Board of Probation and Parole, 30 Pa. Commw. 80, 374 A.2d 755 (1977); Kuykendall v. Pennsylvania Board of Probation and Parole, 26 Pa. Commw. 234,

the parolee can not deprive the Parole Board of jurisdiction to revoke parole by delaying the trial on the new criminal charges until the expiration of the maximum term of the parole sentence. This is true even if the parolee is not even arrested for the new charges until after the expiration of the original sentence's maximum term.[74]

Section 21.1(a) of the Parole Act also gives the Parole Board discretion in determining whether a convicted violator should have parole revoked and be recommitted to prison. The fact that a parolee commits a crime for which the parolee is subsequently convicted does not mandate that the Parole Board revoke parole and return the parolee to prison.[75] The primary purpose of a parole revocation hearing, when the parolee has been convicted of a new crime, is to determine whether parole remains a viable means of rehabilitation, despite the new conviction, and whether the parolee remains a good parole risk.[76] The fact of the conviction has already been determined by the criminal trial court and may not be relitigated before the Parole Board.[77]

(a) Time credits upon recommitment.—When a parolee is convicted of a new offense that was committed while on a parole term, and the Parole Board decides to recommit the parolee to prison, Section 21.1(a) requires that the parolee serve the entire remaining balance of the original sentence with no credit against the parolee's original sentence for time served on parole. This portion of Section 21.1(a) authorizes the Parole Board to recalculate the maximum term expiration date of the sentence of a parolee who is recommitted to prison as a convicted violator.[78] This recalculation extends the maximum term expiration date to account for the time that the parolee was not in prison serving that particular sentence. While the recalculated maximum term expiration date is later than the original date, the entire time spent in prison will not exceed the original max-

363 A.2d 866 (1976).

74. Carr v. Pennsylvania Board of Probation and Parole, 90 Pa. Commw. 312, 315 n.4, 494 A.2d 1174, 1176 n.4 (1985).

75. United States *ex rel.* Bogish v. Tees, 211 F.2d 69 (3d Cir. 1954).

76. Commonwealth v. Kates, 452 Pa. 102, 305 A.2d 701 (1973); O'Hara v. Pennsylvania Board of Probation and Parole, 87 Pa. Commw. 356, 487 A.2d 90 (1985); Simmons v. Pennsylvania Board of Probation and Parole, 74 Pa. Commw. 283, 459 A.2d 897 (1983).

77. Morrissey v. Brewer, 408 U.S. 471, 490 (1972); Chapman v. Pennsylvania Board of Probation and Parole, 86 Pa. Commw. 49, 484 A.2d 413 (1984). *See also* Commonwealth v. Brown, 503 Pa. 514, 469 A.2d 1371 (1983) (conviction of new crime constitutes a violation of probation as a matter of law).

78. Simpson v. Pennsylvania Board of Probation and Parole, 49 Pa. Commw. 178, 410 A.2d 957 (1980); Commonwealth *ex rel.* Rector v. Rundle, 84 Dauph. 91 (Pa.C.P. 1965).

imum sentence, no matter how serious the parole violation. The Parole Board does not have the power to alter the parolee's judicially-imposed sentence and can only mandate that the parolee, upon recommitment as a convicted violator, serve the remaining balance of the original sentence's unexpired term.[79]

Pennsylvania appellate courts have interpreted the phrase "at liberty on parole" contained in Section 21.1(a) as meaning all times that the parolee is not incarcerated on that particular sentence.[80] Therefore, when a parolee is subject to consecutive sentences and is granted parole on the initial sentence and commences serving the minimum term of the second sentence, the parolee is on "constructive parole" on the initial sentence. He is not entitled to credit against that initial sentence should the Parole Board later revoke his parole as a convicted violator.[81] Likewise, when the parolee is incarcerated following a new arrest and fails or is unable to post bail, that time in jail is not credited to the initial sentence upon recommitment as a convicted violator since the parolee was not confined solely due to the Parole Board's warrant.[82] That pre-trial confinement time is properly credited to the new sentence that the parolee receives upon conviction of the subsequent crime, although, if the parolee is not convicted, the time spent in jail is credited to his parole sentence.[83]

The one possible exception to this general rule involves the situation in which a parolee attends an in-patient drug or alcohol treatment center as a specific condition of parole imposed by the Parole Board. In *Cox v. Board of Probation and Parole*,[84] the Pennsylvania Supreme Court construed the "at liberty on parole" language of Section 21.1(a) as allowing credit against a parolee's original sentence for time spent in an in-patient drug or alcohol rehabilitation center.

79. Hawkins v. Pennsylvania Board of Probation and Parole, 88 Pa. Commw. 547, 490 A.2d 942 (1985); McClure v. Pennsylvania Board of Probation and Parole, 75 Pa. Commw. 176, 461 A.2d 645 (1983).

80. Hines v. Pennsylvania Board of Probation and Parole, 491 Pa. 142, 420 A.2d 381 (1980); Jones v. Pennsylvania Board of Probation and Parole, 44 Pa. Commw. 610, 404 A.2d 755 (1979); Haun v. Cavell, 190 Pa. Super. 346, 154 A.2d 257 (1959).

81. Hines v. Pennsylvania Board of Probation and Parole, 491 Pa. 142, 420 A.2d 381 (1980); Commonwealth *ex rel.* Jones v. Rundle, 413 Pa. 456, 199 A.2d 135 (1964) (per curiam); Debnam v. Pennsylvania Board of Probation and Parole, 71 Pa. Commw. 572, 455 A.2d 297 (1983).

82. Zazo v. Pennsylvania Board of Probation and Parole, 80 Pa. Commw. 198, 470 A.2d 1135 (1984); Hairston v. Jacobs, 48 Pa. Commw. 117, 408 A.2d 1195 (1979).

83. Gaito v. Pennsylvania Board of Probation and Parole, 488 Pa. 397, 412 A.2d 568 (1980); Sturtz v. Pennsylvania Board of Probation and Parole, 71 Pa. Commw. 71, 453 A.2d 1093 (1983) (per curiam); Campbell v. Pennsylvania Board of Probation and Parole, 48 Pa. Commw. 454, 409 A.2d 980 (1980).

84. 507 Pa. 614, 493 A.2d 680 (1985), *rev'g*, 78 Pa. Commw. 183, 467 A.2d 90 (1983).

The key inquiry to determine if the parolee should be given credit on the original sentence upon recommitment as a convicted violator is whether the constraints and restrictions placed upon the parolee's liberty at the rehabilitation center make the parolee's time at the center more akin to incarceration than the greater freedom of parole subject to the general conditions of release, commonly referred to as "street time."[85]

A seeming anomaly in the area of time credit is the possibility for credit against a parolee's sentence for time spent at a drug or alcohol rehabilitation center while credit for time actually spent in prison on constructive parole is flatly prohibited. The restrictions on the parolee's liberty are less onerous at the rehabilitation center than those a parolee experiences in prison while on constructive parole. The important distinction is that while at the rehabilitation center the parolee is serving time only on the original sentence from which parole was granted. A parolee on constructive parole is serving the minimum term of another sentence while also serving parole on the original sentence, thus the granting of time credit for constructive parole would permit a parolee to convert two consecutive sentences into concurrent sentences for the period of constructive parole.

Parolees who are recommitted by the Parole Board as technical violators differ from those recommitted as convicted violators in that they are entitled to credit against their original sentences for time spent on parole in good standing. However, Section 21.1(b) mandates that a technical violator shall receive no credit against the original sentence for time on parole during which the parolee was delinquent or in absconder status.[86]

(b) Order of service of sentences.—Section 21.1(a) also mandates that where the Parole Board imposes backtime upon a convicted violator who has also been sentenced to a term of imprisonment for a new conviction, the backtime and the new sentence must be served consecutively.[87] In *Commonwealth v. Dorian*,[88] the Pennsylvania Supreme Court rejected a contention that Section 9761 of

85. *Id.* at 619-20, 492 A.2d at 683. *See also*, Casenote, *Inpatient Drug Treatment Programs: Custody or Freedom for Purposes of Pennsylvania's Parole Act?*,59 TEMPLE L.Q. 659 (1986).

86. Brunner v. Pennsylvania Board of Probation and Parole, 32 Pa. Commw. 483, 373 A.2d 467 (1977); Commonwealth *ex rel.* Hall v. Board of Probation and Parole, 3 Pa. Commw. 435 (1971).

87. Commonwealth v. Zuber, 466 Pa. 453, 353 A.2d 441 (1976); Commonwealth v. Draper, 222 Pa. Super. 26, 293 A.2d 614 (1972).

88. 503 Pa. 116, 468 A.2d 1091 (1983).

the Sentencing Code[89] was inconsistent with Section 21.1(a) of the Parole Act insofar as mandating consecutive sentences was concerned so that Section 9761 of the Sentencing Code impliedly repealed the inconsistent provisions of Section 21.1(a). The Pennsylvania Superior Court had found that Section 9761 of the Sentencing Code affected a partial repeal of Section 21.1(a) due to language in Section 9761 that permits a sentencing court to run a new sentence concurrently with any other sentence to which a defendant may be presently subject.[90] In reversing that decision, the Supreme Court opined that the Superior Court's language to that effect was dictum and specifically disapproved it. The inconsistency that the Superior Court found between Section 9761 of the Sentencing Code and Section 21.1(a) of the Parole Act was implicitly resolved when the Supreme Court noted that the Parole Act is a specific piece of legislation covering the narrow area of parolees who are returned to prison as convicted violators by the Parole Board. The Sentencing Code, by contrast, is a general sentencing code designed to cover a variety of circumstances.[91] The law continues to be well-settled that parole violation backtime and a new sentence must be served consecutively and a sentencing judge has no power to order the two to run concurrently.

Section 21.1(a) also prescribes the order in which parole backtime and new sentences are to be served. The specific provision of Section 21.1(a) which deals with the order of the service of sentences provides:

> If a new sentence is imposed upon such parolee, the service of the balance of said term originally imposed shall precede the commencement of the new term imposed in the following cases:
>
> (1) If a person is paroled from any State penal or correctional institution under the control and supervision of the Department

89. 42 PA. CONS. STAT. ANN. § 9761 (Purdon 1982). The provision of Section 9761 that was at issue in *Dorian* pertained to the order of sentences. That provision, subsection (a), provides:

> *(a) Order of service of sentences.*—If a minimum sentence imposed by a court which is to run concurrently with one which has been previously imposed would expire later than the minimum of such a previously imposed sentence, or if the previously imposed sentence is terminated before the expiration of the minimum sentence of the last imposed sentence, the defendant shall be imprisoned at least until the last imposed minimum sentence has been served.

Id.

90. 314 Pa. Super. 244, 460 A.2d 1121 (1983).

91. *See* Rivera v. Pennsylvania Board of Probation and Parole, 79 Pa. Commw. 558, 470 A.2d 1088 (1984).

> of Justice [now Department of Corrections] and the new sentence imposed upon him is to be served in any such State penal or correctional institution.
>
> (2) If a person is paroled from a county penal or correctional institution and the new sentence imposed upon him is to be served in the same county penal or correctional institution.
>
> In all other cases, the service of the new term for the latter crime shall precede commencement of the balance of the term originally imposed.[92]

Therefore, under this statutory provision, when a parolee was originally paroled from a State Correctional Institution (SCI) and the new sentence is also to be served in a SCI, the parolee serves the parole backtime first and, when reparoled or service of the maximum sentence is completed, commences serving the new sentence.[93] The same is true where the parolee was paroled from a county prison and the new sentence is to be served in the *same* county prison.[94] However, when a parolee is paroled from a SCI and the new sentence is to be served in a county prison, or when the parolee is paroled from a county prison and the new sentence is to be served in a SCI or a *different* county prison, the new sentence will be served first. Upon parole from or completion of that sentence, the parolee will commence serving the backtime imposed by the Parole Board on the original sentence.[95] The order of service of backtime and a new sentence is mandatory and a trial court is without the power or authority to alter the statutory scheme insofar as the order in which the sentences are served.[96]

2. Technical Parole Violators.—Section 21.1(b) of the Parole Act[97] deals with technical violators. The Pennsylvania Supreme Court has defined a technical violator as a parolee who breaches the terms and conditions of parole that were imposed by the Parole Board as a condition of release from prison and which form the

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92. PA. STAT. ANN. tit. 61, § 331.21a(a) (Purdon 1964).

93. Pugh v. Pennsylvania Board of Probation and Parole, 45 Pa. Commw. 41, 404 A.2d 776 (1979); Commonwealth *ex rel.* Wright v. Maroney, 201 Pa. Super. 118, 191 A.2d 866 (1963).

94. *See* PA. STAT. ANN. tit. 61, § 331.21a(a)(2) (Purdon 1964).

95. Carter v. Rapone, 39 Pa. Commw. 160, 394 A.2d 1092 (1978); Davis v. Cuyler, 38 Pa. Commw. 488, 394 A.2d 647 (1978).

96. Commonwealth *ex rel.* Sanders v. Maroney, 202 Pa. Super. 202, 195 A.2d 882 (1964); Commonwealth *ex rel.* Godfrey, 193 Pa. Super. 344, 165 A.2d 97 (1960), *aff'd*, 404 Pa. 401, 171 A.2d 755 (1961).

97. PA. STAT. ANN. tit. 61, § 331.21a(b) (Purdon 1964).

terms of the parole contract.[98] Section 21.1(b) empowers the Parole Board to recommit a parolee who violates those terms and conditions, other than by the commission of a new crime of which the parolee is convicted in a court of record. In *Rivenbark v. Pennsylvania Board of Probation and Parole*,[99] the Pennsylvania Supreme Court construed that statutory language as withholding from the Parole Board the authority to recommit parolees as technical violators for a breach of parole conditions when the parolee's conduct which formed the basis of the breach also formed the basis of a new criminal conviction. Under *Rivenbark*, a "technical parole violation" is restricted to conduct which constitutes a breach of the terms and conditions of parole but does not also give rise to a new criminal conviction.

While the *Rivenbark* decision does prohibit the Parole Board from recommitting a parolee as a technical and convicted violator for the same conduct, *Rivenbark* can not be read to prohibit the Parole Board from recommitting a parolee both as a convicted and a technical violator when there is independent conduct on the part of the parolee which does not constitute a new crime of which the parolee is convicted. For example, a parolee who travels from Philadelphia to Allentown to commit a robbery, of which he is subsequently convicted, may be recommitted as a technical violator for leaving his parole district without permission even though the robbery conviction precludes the Parole Board from basing a technical violation on the assaultive behavior which forms part of the robbery conviction. Thus, while the categories of technical and convicted violator are mutually exclusive for purposes of conduct giving rise to a new criminal conviction, the Parole Board may still lawfully recommit a parolee as a technical and as a convicted violator for a course of conduct in which only a portion of that conduct gives rise to a new criminal conviction.[100] The Pennsylvania Commonwealth Court has since ruled that the holding in *Rivenbark* be given retrospective

98. Hines v. Pennsylvania Board of Probation and Parole, 491 Pa. 142, 146 n.4, 420 A.2d 381, 383 n.4 (1980).

99. 509 Pa. 248, 501 A.2d 1110 (1985).

100. *See* Pitt v. Pennsylvania Board of Probation and Parole, 97 Pa. Commw. 116, 508 A.2d 1314 (1986) (parolee's arrest in Delaware County which resulted in his conviction for rape, robbery, theft by unlawful taking and possession of an instrument of crime did not prevent the Parole Board from recommitting the parolee as a technical parole violator for traveling outside of the Philadelphia parole district, which was the district to which he was paroled, in violation of general parole condition 1, 37 PA. CODE § 63.4(1) (1986). The parolee's leaving his parole district was not an element of any of the crimes of which he was convicted so it was properly considered as a technical parole violation.). *See also* Wile, *1987 Probation and Parole Survey, supra*, at 127-28.

effect.[101]

3. Revocation Hearings.—The Pennsylvania General Assembly has provided a little guidance in the provisions of the Parole Act insofar as the actual parole revocation process is concerned. What little statutory guidance that exists is found in Section 22 of the Parole Act[102] and in the Administrative Agency Law.[103]

(a) Personal appearance before the parole board.—Some of the statutory provisions in the Parole Act are misleading or obsolete. An example is Section 22 with its language to the effect that the Parole Board need not personally see or hear all of the witnesses or evidence. This seems to indicate that the Parole Board can act to revoke paroles on the basis of reports submitted by hearing examiners and parole agents. However, the Pennsylvania Supreme Court rejected this reading of Section 22 in *Commonwealth ex rel. Rambeau v. Rundle.*[104] In *Rambeau*, the Court held that the opinion of the United States Supreme Court in *Morrissey*, mandating that a parolee facing revocation of parole be entitled to have the opportunity to be heard in person and present witnesses and documentary evidence,[105] required that the parolee be given the opportunity to be heard personally by the Parole Board.[106] The *Rambeau* holding, therefore, effectively invalidated that portion of Section 22 which purported to empower the Parole Board to revoke paroles without affording the parolee the opportunity to appear before it in person and present his or her case.

The right to present one's case before the Parole Board does not entitle the parolee to appear before the *entire* Parole Board. Formerly, Section 4 of the Parole Act[107] required that a majority of the entire membership of the Board is necessary to revoke parole which

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101. Brewer v. Pennsylvania Board of Probation and Parole, 96 Pa. Commw. 423, 507 A.2d 934 (1986).

102. PA. STAT. ANN. tit. 61, § 331.22 (Purdon 1964). The pertinent part of this statute reads as follows:

> In granting and revoking paroles, and in discharging from parole, the [parole] board acting thereon shall not be required to personally hear or see all the witnesses and evidence submitted to them for their action, but they may act on a report submitted to them by their agents and employees, together with any pertinent and adequate information furnished to them by fellow members of the board or by others.

103. 2 PA. CONS. STAT. ANN. §§ 501-508 and 701-704 (Purdon Supp. 1986).

104. 455 Pa. 8, 314 A.2d 842 (1973), *rev'g*, Commonwealth *ex rel.* Rambeau v. Board of Probation and Parole, 4 Pa. Commw. 152 (1972).

105. 408 U.S. 471, 489 (1972).

106. Commonwealth *ex rel.* Rambeau v. Rundle, 455 Pa. 8, 19-20, 314 A.2d 842, 848 (1973), *rev'g*, 4 Pa. Commw. 152 (1972).

107. PA. STAT. ANN. tit. 61, § 331.4 (Purdon 1964).

under *Rambeau* entitled a parolee to appear before a quorum of the Parole Board in order to satisfy due process requirements.[108] The 1986 amendments to this section modify the *Rambeau* decision since the Parole Board may now act to revoke paroles in two-person panels. The *Rambeau* holding that parolees are entitled to appear before three members of the Parole Board was based upon former Section 4's requirement that a majority vote of the entire five-member Parole Board was necessary to revoke parole, but now all that is required is an opportunity for the parolee to appear before the two-member panel which will make the revocation decision on his parole.

(b) Admissibility of evidence.—The evidentiary portions of Section 22, however, were recently given new life by the Pennsylvania Commonwealth Court in *Jefferson v. Pennsylvania Board of Probation and Parole*[109] wherein the court cited that section as one of the bases for admitting a laboratory urinalysis report into evidence at a parole revocation hearing over the objection of the parolee. In *Jefferson*, the parolee was charged by the Parole Board with violating general condition 5A[110] of his parole by using narcotics. The sole evidence submitted by the parole agent in support of the asserted parole violation was a laboratory urinalysis report that showed that the parolee's urine sample tested positive for tetrahydrocannabinol ("THC"), the active ingredient in marijuana. While the parole agent could testify as to the circumstances surrounding the taking of the urine sample from the parolee and the shipment to the Regional Clinical Laboratories in Erie, Pennsylvania, the agent had no knowledge of the procedures utilized by the Regional Clinical Laboratories, nor did he have any knowledge as to the preparation of the laboratory report. The laboratory report from the Regional Clinical Laboratories consisted of a slip of paper with the laboratory name and a number of chemical substances preprinted on the report. The parolee's name, parole number, and date of the sample were written upon the slip, and a control number, corresponding to that assigned to the urine sample taken from the parolee, was entered on the slip.

108. Pierce v. Pennsylvania Board of Probation and Parole, 46 Pa. Commw. 507, 406 A.2d 1186 (1979).

109. 95 Pa. Commw. 560, 506 A.2d 495 (1986).

110. 37 PA. CODE. § 63.4(5)(i) (1986). This regulation requires that parolees: "[A]bstain from the unlawful possession or sale of narcotics and dangerous drugs and abstain from the use of controlled substances within the meaning of The Controlled Substance, Drug, Device and Cosmetic Act [PA. STAT. ANN. tit. 35, § 780-101 - 780-144 (Purdon Supp. 1986)] without a valid prescription." *Id.*

After the sample was tested, a check mark was placed beside the preprinted name of each substance for which the sample tested positive. No other data, except a technician's or supervisor's signature rubber-stamped upon the document, appeared on the laboratory return slip. Upon objection by the parolee's counsel, the Parole Board hearing examiner found good cause to accept the laboratory return slip based upon the Parole Board's long standing contract with that particular laboratory and its policy to accept the results from that laboratory at its revocation hearings.[111] Based upon that laboratory report showing the presence of THC in the parolee's urine and the agent's testimony concerning how the sample was taken, the Parole Board recommitted him as a technical parole violator.

On appeal, the Commonwealth Court ruled that the language of Section 22 of the Parole Act evidenced a clear intent by the General Assembly to broaden the admissibility of evidence at parole revocation proceedings. While the court duly noted its prior decision in *Grello v. Pennsylvania Board of Probation and Parole*,[112] which held that due process precludes the Parole Board from revoking parole solely upon hearsay evidence, the court reasoned that by virtue of Section 22 the laboratory slip did not constitute inadmissible hearsay. In reviewing the statutory language of the second paragraph of Section 22, the court ruled that the General Assembly intended to allow the Parole Board to rely upon laboratory reports from an entity whose reports the Parole Board found reliable in the past.[113]

The Commonwealth Court's reliance upon Section 22 to permit the Parole Board to base a parole revocation order upon an uncorroborated laboratory return slip seems to be misplaced in light of prior case law interpreting Section 22 and the use of hearsay evidence in parole revocation proceedings. Section 505 of the Administrative Agency Law,[114] which exempts Commonwealth administrative agencies from adherence to technical rules of evidence, has been consistently interpreted as not exempting administrative agencies

111. Jefferson v. Pennsylvania Board of Probation and Parole, 95 Pa. Commw. 560, 565-66, 506 A.2d 495, 497-98 (1986).

112. 83 Pa. Commw. 252, 477 A.2d 45 (1984).

113. Jefferson v. Pennsylvania Board of Probation and Parole, 95 Pa. Commw. 560, 566, 506 A.2d 495, 498-99 (1986).

114. 2 PA. CONS. STAT. ANN. § 505 (Purdon Supp. 1986). This section reads as follows:

> *§ 505. Evidence and cross-examination*
>
> Commonwealth agencies shall not be bound by technical rules of evidence at agency hearings, and all relevant evidence of reasonably probative value may be received. Reasonable examination and cross-examination shall be permitted.

from the application of the hearsay evidence rule.[115] Rather, the hearsay evidence rule has been termed a fundamental rule of law, as opposed to a technical rule of evidence, and should be applied by administrative agencies at those points in their proceedings where facts crucial to the issues are sought to be placed upon the record.[116]

B. The Regulatory Framework

Section 23 of the Parole Act[117] empowers the Parole Board to promulgate regulations for the conduct of parolees under its supervision. The regulations that impose the specific conditions of parole are found in Chapter 63 of Title 37 of the Pennsylvania Code.[118] The general conditions of parole, applicable to all parolees, are found at Section 63.4.[119]

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115. State Board of Medical Education and Licensure v. Contakos, 21 Pa. Commw. 422, 346 A.2d 850 (1975); Bleilevens v. State Civil Service Commission, 11 Pa. Commw. 1, 312, A.2d 109 (1973). *Contra* Lucas v. Department of Environmental Resources, 53 Pa. Commw. 598, 420 A.2d 1 (1980) (agency hearing examiner is not strictly bound by hearsay rule).

116. State Board of Medical Education and Licensure v. Contakos, 21 Pa. Commw. 422, 424-25, 346 A.2d 852; Bleilevens v. State Civil Service Commission, 11 Pa. Commw. 1, 4, 312 A.2d 109, 111 (1973).

117. PA. STAT. ANN. tit. 61, § 331.23 (Purdon 1964). Additional rulemaking authority for the Parole Board is found in PA. STAT. ANN. tit. 71, § 186 (Purdon 1962).

118. 37 PA. CODE §§ 63.1-63.8 (1986).

119. 37 PA. CODE § 63.4 (1986). This provision reads as follows:

> *§ 63.4. General conditions of parole.*
>
> If parole is granted, the parolee shall be subject to the following conditions:
>
> (1) Report in person or in writing within 48 hours [following release from prison] to the district office or suboffice specified by the [Parole] Board and not leave that district without prior written permission of the parole supervision staff.
>
> (2) Live at the residence approved by the Board at release and not change residence without the written permission of the parole supervision staff.
>
> (3) Maintain regular contact with the parole supervision staff by:
>
> (i) Reporting regularly as instructed and following any written instructions of the Board or the parole supervision staff.
>
> (ii) Notifying the parole supervision staff within 72 hours of any arrest.
>
> (iii) Notifying the parole supervision staff within 72 hours of any change in status including but not limited to employment, on the job training, and education.
>
> (4) Comply with all municipal, county, State, and Federal criminal laws, as well as the Vehicle Code and the Liquor Code (PA. STAT. ANN. tit. 47, §§ 1-101 - 9-902 (Purdon 1969)).
>
> (5) Additionally:
>
> (i) Abstain from the unlawful possession or sale of narcotics and dangerous drugs and abstain from the use of controlled substances within the meaning of The Controlled Substance, Drug, Device and Cosmetic Act, PA. STAT. ANN. tit. 35, §§ 780-101 - 780-144 (Purdon 1977) without a valid prescription.
>
> (ii) Refrain from owning or possessing any firearms or other weapons.

The regulatory framework for the parole revocation process is found in Chapters 71[120] and 75[121] of Title 37 of the Pennsylvania Code. Chapter 71 provides the procedure for the arrest of parole violators and conducting parole revocation hearings. Chapter 75 lists the presumptive ranges for backtime[122] which the Parole Board may impose for various parole violations.

The Parole Board's regulations establish two separate procedures to determine the validity of asserted parole violations. This dichotomy mirrors the statutory distinction found in Section 21.1 of the Parole Act between technical and convicted violators. Sections 71.1 and 71.2 of Title 37 of the Pennsylvania Code apply when the violation of parole asserted is a breach of the conditions of parole other than the parolee's arrest or conviction for a new criminal offense. Sections 71.3 and 71.4 pertain where the only asserted parole violation is arrest or conviction for a new criminal offense. Section 71.5 is a general procedure section that is applicable to procedures involving both technical and convicted violators.

1. Technical Violations.—By their own terms, Sections 71.1 and 71.2 pertain only to those situations where the only violation of parole charged is a breach of the specific conditions of parole other than arrest or conviction for a new criminal offense.

The parole agent is the initiating authority for technical parole violations. When the agent has reason to believe that a parolee has violated the conditions of parole, he may apply to his district supervisor for permission to arrest the parolee.[123] When the agent is unable to contact the district supervisor or when the agent feels that the immediate confinement of the parolee is imperative, the agent is authorized to have the parolee arrested and detained for up to forty-eight hours.[124] If the agent utilizes such a forty-eight hour detention, he is required to apply, as quickly as possible, to his district supervi-

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(iii) Refrain from any assaultive behavior.

120. 37 PA. CODE §§ 71.1-71.5 (1986).

121. 37 PA. CODE §§ 75.1-75.4 (1986).

122. "Backtime" in the context of a parole violation has been judicially-defined as:

> [T]hat part of an *existing* judicially-imposed sentence which the Board directs a parolee to complete following a finding after a *civil* administrative hearing that the parolee violated the terms and conditions of parole, which time must be served before the parolee may again be eligible to be considered for a grant of parole.

Krantz v. Pennsylvania Board of Probation and Parole, 86 Pa. Commw. 38, 43, 483 A.2d 1044, 1047 (1984) (emphasis in original). *See also* Rivenbark v. Pennsylvania Board of Probation and Parole, 509 Pa. 248, 253 n.4, 501 A.2d 1110, 1113 n.4 (1985).

123. 37 PA. CODE § 71.1(a) (1984).

124. 37 PA. CODE § 71.1(d) (1984).

sor for a "Warrant to Commit and Retain," which is a Parole Board document issued to arrest and hold a suspected parole violator.[125]

Within forty-eight hours of his arrest for asserted technical parole violations, the parolee is informed both orally and in writing 1) of the charges against him; 2) that a probable cause hearing will be held within fifteen days; 3) that he has a right to speak at that hearing and have voluntary witnesses appear on his behalf; 4) that he may present evidence by affidavit; 5) that he may retain counsel and he is provided with the address of the appropriate public defender; 6) that he may request the presence of witnesses upon whose testimony the parole violations are to be based; and 7) that the purpose of the hearing will be to determine whether probable cause exists to believe that he committed a parole violation.[126]

Preliminary hearings are conducted by Parole Board hearing examiners, and the parolee has a right to be present throughout the hearing. At the time of the preliminary hearing, the parolee has the option of waiving that hearing with the showing of probable cause for a final violation hearing[127] if the parolee is willing to waive his right to appear before a quorum, now panel, of the Parole Board.[128] Parole Board representatives who are familiar with the facts upon which the asserted parole violations are based are required to be present at the preliminary hearing to testify; other witnesses need be present only if specifically requested, in advance, by the parolee.[129] Upon the completion of the hearing, the hearing examiner submits a written report to the Parole Board summarizing the evidence presented and stating whether any of the asserted parole violations are supported by probable cause.[130]

A violation hearing will be scheduled within 120 days of the preliminary hearing if probable cause is found to support the asserted parole violations.[131] The Parole Board is required to furnish

125. *Id.*

126. 37 PA. CODE § 71.2(1) (1986).

127. In its regulations, the Parole Board terms the second-level hearing dealing with technical parole violations a "violation hearing" while the second-level hearing dealing with new criminal convictions is termed a "revocation hearing." *See* 37 PA. CODE §§ 71.2(9), 71.2(11), 71.2(14), 71.4(1), 71.4(3), 71.4(5), 71.5(d) (1986). The two hearings are mutually exclusive so that where a parolee is charged both with a new conviction and technical parole violations, he is given both a violation hearing and a revocation hearing.

128. 37 PA. CODE § 71.2(4)(iv) (1981).

129. 37 PA. CODE § 71.2(6) (1981).

130. 37 PA. CODE § 71.2(7) (1981).

131. 37 PA. CODE § 71.2(11) (1983). Where the Parole Board fails to schedule a violation hearing within 120 days of the preliminary hearing, and none of the delay is attributable to the parolee or his counsel, the Pennsylvania Commonwealth Court has ruled that such a delay constitutes a per se denial of due process entitling the parolee to a dismissal with

both the parolee and counsel with written notice of the scheduled time and place of the violation hearing. In addition to the information provided in the notice of the preliminary hearing, the violation hearing notice must apprise the parolee of his right to a hearing before a quorum of the Parole Board; to the assistance of counsel and the availability of free counsel if indigent; to cross-examine and confront adverse witnesses unless good cause is specifically found to deny confrontation and cross-examination; and that the parolee has a right to speak and present voluntary witnesses on his own behalf and present evidence by affidavit or otherwise.[132] Technical parole violations must be proven by a preponderance of the evidence.[133]

Where the violation hearing is held before a Parole Board Hearing Examiner, rather than before a quorum of the Parole Board, the examiner is required to file a written report which states: 1) the asserted parole violations that have been proven by a preponderance of the evidence and the asserted parole violations that have not been proven; 2) the evidence relied upon; and 3) the examiner's recommendation as to the disposition of the parole violations and the reasons for the recommendation.[134]

The role of the examiner in Parole Board revocation proceedings differs from that of a referee in workmen's compensation and unemployment compensation matters in that the Parole Board examiner is not a fact-finder and makes only recommendations which the Parole Board is free to adopt or disregard. Unlike his workmen's compensation and unemployment compensation counterparts, the Parole Board examiner is not empowered to make any final decisions. By statute, all decisions relating to parole revocation are reserved to the Parole Board.

The Parole Board is required by its own regulations to act promptly upon the examiner's report unless the parolee, or counsel, requests a delay so that a statement in opposition to parole revocation may be submitted on the parolee's behalf. That statement must be submitted to the Parole Board within seven days of the hearing before the examiner.[135] The Parole Board then has the entire record before it and is empowered to make its own credibility determina-

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prejudice of the technical parole violation charges. Capers v. Pennsylvania Board of Probation and Parole, 42 Pa. Commw. 356, 400 A.2d 922 (1979) (en banc).

132. 37 PA. CODE § 71.2(12) and 71.2(13) (1983).

133. 37 PA. CODE § 71.2(20) (1983); Hossback v. Pennsylvania Board of Probation and Parole, 80 Pa. Commw. 344, 471 A.2d 186 (1984).

134. 37 PA. CODE § 71.2(17) (1983).

135. 37 PA. CODE § 71.2(18) (1983).

tions based upon its own review of that record.

2. Conviction for a New Criminal Offense.—Sections 71.3 and 71.4 of Title 37 of the Pennsylvania Code[136] relate specifically to those cases where the only parole violation is the arrest and conviction of a new criminal offense. Section 71.3 deals with the situation where a parolee is arrested and charged with a new criminal offense. Section 71.4 pertains to the procedure where the parolee is convicted of the new criminal offense, either following trial or by pleading guilty or nolo contendere.

(a) Arrest for a new criminal offense.—The detention of a parolee by the Parole Board for a new crime is independent of the parolee's new criminal proceeding as well as any technical violations that the Parole Board may have asserted against the parolee. When a parolee is arrested and charged with a new crime, he may be detained on the basis of that new charge by a Parole Board warrant only after 1) a *prima facie* case has been made out at a criminal preliminary hearing; 2) the parolee waives that hearing; 3) the parolee is convicted of a crime in Philadelphia Municipal Court or before a District Justice; or 4) a "Detention Hearing" is conducted by the Parole Board.[137] A "Detention Hearing" is simply an independent probable cause hearing, the convicted violator counterpart to a preliminary hearing, conducted by the Parole Board to determine whether probable cause exists to believe that the parolee has violated parole and should be detained pending the disposition of the new criminal charges.[138] In any event, the parolee must be provided with or waive a criminal preliminary hearing or a Parole Board Detention Hearing within thirty days of his initial detention by the Board.[139]

It is entirely possible for the parolee to post bail yet remain in custody due to the Board's warrant and detainer.[140] Where a parolee does post bail on the new charges but remains incarcerated solely due to the parole warrant and detainer, the Parole Board is required to credit the original sentence with the time the parolee spent so incarcerated regardless of the eventual outcome of the new criminal

136. 37 PA. CODE §§ 71.3 and 71.4 (1986).

137. 37 PA. CODE § 71.3(1) (1986).

138. Reale v. Pennsylvania Board of Probation and Parole, 99 Pa. Commw. 16, 18 n.5, 512 A.2d 1307, 1308 n.5 (1986).

139. 37 PA. CODE § 71.3(9) (1986).

140. *See, e.g.*, Mitchell v. Pennsylvania Board of Probation and Parole, 491 Pa. 291, 420 A.2d 1324 (1980); Gaito v. Pennsylvania Board of Probation and Parole, 488 Pa. 397, 412 A.2d 568 (1980).

prosecution.[141]

In evaluating whether a parolee who has been arrested for a new criminal offense should be further detained, the Parole Board takes into consideration a number of factors including the seriousness of the new offense, the risk to the community if the parolee is released, the supervision history while on parole, the possibility of the parolee absconding, and involvement of a firearm or assaultive behavior in the new criminal charge.[142] Once a decision has been made to detain the parolee, no further hearings need be held until the criminal charges are disposed. While the regulations do require the Parole Board to conduct a monthly review of the status of the criminal charges, that monthly review does not entitle the parolee to a new Detention Hearing for each month the parolee is detained.[143]

(b) Revocation hearing following conviction.—Once the parolee has been convicted, either by a finding of guilt by a judge or jury or by a plea of guilty or nolo contendere, the Parole Board is required to hold a due process hearing for the parolee prior to making a decision whether or not to revoke parole and recommit the parolee to prison. The Parole Board's administrative regulations term this type of second-level *Morrissey* hearing a "revocation hearing."[144]

The purpose of the revocation hearing is to allow the Parole Board to determine whether the parolee should be recommitted to prison and have parole revoked because of the new criminal conviction.[145] There are two distinct phases to the revocation hearing. The first phase is when the parole agent provides proof that the parolee has been convicted of a crime committed while on parole. The parole agent easily accomplishes this task by introducing into evidence copies of criminal court docket sheets showing that the parolee has been convicted of a crime and indicating the date of the offense to show that it was committed while the parolee was on parole.[146] The fact

141. Hines v. Pennsylvania Board of Probation and Parole, 491 Pa. 142, 420 A.2d 381 (1980); Campbell v. Pennsylvania Board of Probation and Parole, 48 Pa. Commw. 454, 409 A.2d 980 (1980) (where bail is not posted, confinement time is properly credited against the new sentence and not against the original sentence).

142. *See* 37 PA. CODE § 71.3(10) (1986).

143. 37 PA. CODE § 71.3(11) (1986).

144. 37 PA. CODE §§ 71.4(1)(iii),(2),(3)(i),(5) (1980).

145. 37 PA. CODE § 71.4(1)(i) (1980).

146. 37 PA. CODE § 71.5(d) (1986) authorizes the Parole Board to rely solely upon documentary evidence and reports provided the Parole Board is satisfied as to their authenticity, relevancy, and accuracy. *See also* Anderson v. Pennsylvania Board of Probation and Parole, 91 Pa. Commw. 486, 497 A.2d 947 (1985); Davis v. Pennsylvania Board of Probation and Parole, 85 Pa. Commw. 481 A.2d 714 (1984).

that the parolee may have appealed the new conviction is irrelevant insofar as the Parole Board's proceedings are concerned.[147]

The second, and more important phase of the revocation hearing is when the parolee is given the opportunity to convince the Parole Board that parole remains a viable rehabilitative tool and that the parolee remains a good parole risk.[148] Once the parole agent has established the fact that the parolee has sustained a new conviction for a crime committed while on parole, a presumption is raised that parole is no longer a viable tool for rehabilitation.[149] It is then incumbent upon the parolee to rebut that resumption with positive evidence that may mitigate or justify the new conviction and show that the parolee is able to function as a contributing, law-abiding member of society. The reported decisions emanating from Pennsylvania appellate courts indicate the judiciary considers this the primary purpose of the revocation hearing since the fact of the new conviction is a matter of public record.[150]

The parolee is also entitled to have the revocation hearing held within a reasonably prompt period of time following conviction. By regulation, the Parole Board is required to provide the parolee with a revocation hearing within 120 days of being officially notified that a new conviction has occurred.[151] However, unlike the 120 day time limit for violation hearings, the period within which the Parole Board must provide a parolee with a revocation hearing does not commence until the parolee enters an institution under the jurisdiction of the Pennsylvania Department of Corrections or waives the right to appear personally before a quorum of the Parole Board.[152]

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147. Terrell v. Jacobs, 37 Pa. Commw. 493, 390 A.2d 1379 (1978). *Cf.* Commonwealth v. Shaw, 280 Pa. Super. 575, 421 A.2d 1081 (fact that guilty plea was under collateral attack did not render parole revocation order illegal in that a valid guilty plea existed at the time of the parole revocation hearing).

148. Commonwealth v. Kates, 452 Pa. 102, 305 A.2d 701 (1973); O'Hara v. Pennsylvania Board of Probation and Parole, 87 Pa. Commw. 356, 487 A.2d 90 (1985); Simmons v. Pennsylvania Board of Probation and Parole, 74 Pa. Commw. 283, 459 A.2d 897 (1983).

149. Harper v. Pennsylvania Board of Probation and Parole, ___ Pa. Commw. ___, 520 A.2d 518 (1987); Pickert v. Pennsylvania Board of Probation and Parole, 100 Pa. Commw. 44, 514 A.2d 252 (1986) (Barbieri, J., concurring).

150. O'Hara v. Pennsylvania Board of Probation and Parole, 87 Pa. Commw. 356, 371, 487 A.2d 90, 98 (1985).

151. 37 PA. CODE § 71.4(2) (1980); Woods v. Pennsylvania Board of Probation and Parole, 79 Pa. Commw. 134, 469 A.2d 332 (1983).

152. 37 PA. CODE § 71.4(2)(i) (1980); Blair v. Pennsylvania Board of Probation and Parole, 78 Pa. Commw. 41, 467 A.2d 71 (1983), *cert. denied*, 466 U.S. 977 (1984) (time spent by parolee in county prison excluded in timeliness calculation); Auman v. Pennsylvania Board of Probation and Parole, 38 Pa. Commw. 621, 394 A.2d 686 (1978) (time spent by parolee in out-of-state prison excluded in timeliness calculation); Harris v. Pennsylvania Board of Probation and Parole, 38 Pa. Commw. 391, 393 A.2d 510 (1978) (time spent by parolee in federal penitentiary excluded in timeliness calculation).

This precondition does not apply, however, where the parolee is confined in a county prison, outside of the jurisdiction of the Department of Corrections, solely on account of the Parole Board's warrant and detainer. In those cases, the 120 day period commences when the Parole Board receives official notification of the conviction.[153] With the elimination of the "full board" type of revocation hearings by Act 134,[154] this exclusion may become less important once the Parole Board amends its regulations to reflect the statutory changes.

The triggering event that commences the regulatory time period is the conviction for a new criminal offense based upon a verdict or a plea of guilty. This issue was resolved in the case of *United States ex rel. Burgess v. Lindsey*.[155] In a civil rights action under Section 1983 of the Civil Rights Act of 1866,[156] Walter Burgess was recommitted by the Parole Board as a convicted parole violator following his conviction on May 23, 1973, of robbery and related offenses. The Parole Board, in accordance with its prior practice, delayed Burgess' revocation hearing until after he was sentenced in Montgomery County Common Pleas Court on December 31, 1973. This policy of delaying the scheduling of the revocation hearing until after the imposition of sentence was based upon a Pennsylvania Superior Court decision[157] holding that the term "conviction" included sentencing following the finding of guilt. In Burgess' case, the nine month delay from conviction to revocation hearing on February 7, 1974, was typical of the effect of the Parole Board's policy. In rejecting the "highly technical" definition of "conviction" relied upon by the Parole Board, the court reviewed the statutory language of Section 21.1(a) of the Parole Act[158] and concluded that a verdict or plea of guilty "provides the [Parole] Board with all the information it needs to begin the parole revocation process, for it establishes the fact of a parole violation."[159] Therefore, the Parole Board was required to provide a convicted parole violator with a revocation hearing within a reasonable time after the parolee's guilt was established.[160] A subsequent unpublished order in *Burgess* became the basis for the Parole Board's

153. Dobson v. Pennsylvania Board of Probation and Parole, 41 Pa. Commw. 27, 398 A.2d 252 (1979); Taylor v. Pennsylvania Board of Probation and Parole, 40 Pa. Commw. 454, 397 A.2d 849 (1979).

154. *See* 1986 PA. LEGIS. SERV. No. 7, at 18-19 (Purdon).

155. 395 F. Supp. 404 (E.D. Pa. 1975).

156. 42 U.S.C. § 1983 (Supp. III 1979).

157. Commonwealth v. Greer, 215 Pa. Super. 66, 257 A.2d 317 (1969).

158. PA. STAT. ANN. tit. 61, § 331.21a(a) (Purdon 1964).

159. 395 F. Supp. 404, 411 (E.D. Pa. 1975).

160. *Id.*

regulation establishing the 120 day time period, which is codified at Section 71.4(2) of Title 37 of the Pennsylvania Code.[161]

3. Presumptive Ranges for Backtime.—Once the Parole Board has determined, following a timely violation or revocation hearing, that a parolee has violated parole, Section 21.1 of the Parole Act authorizes the Parole Board to return the parole violator to prison to serve the entire remaining balance of the original sentence. Section 21.1 also empowers the Parole Board to reparole both technical and convicted parole violators when it would be in their best interest and the interests of the Commonwealth would not be injured.

The grant of discretion to the Parole Board whether to reparole a parole violator is complete; however, the Parole Board adopted a series of presumptive ranges in 1979 which structured its discretion in mandating the time to be served in prison before consideration for reparole. As noted earlier in this article, the Parole Board does not have the authority to alter the original judicially-imposed sentence from which parole was granted.[162] Therefore, the Pennsylvania Commonwealth Court distinguished parole violation "backtime" from a "sentence" as follows:

> A "sentence" has been defined as the judgment formally pronounced by the court upon a defendant who has been convicted in a *criminal* prosecution which awards the punishment to the inflicted. [citation omitted]. By comparison, "backtime" is merely that part of an *existing* judicially-imposed sentence which the [Parole] Board directs a parolee to complete following a finding after a *civil* administrative hearing that the parolee violated the terms and conditions of parole, which time must be served before the parolee may again be eligible to be considered for a grant of parole.[163]

Simply put, backtime is that portion of a parolee's unserved sentence that must be served before he or she can again apply for consideration for parole. The Parole Board promulgated its presumptive range regulations, codified in Chapter 75 of Title 37 of the Pennsylvania Code,[164] to structure its previously unrestricted discretion to consider

161. *See* Andrews v. Pennsylvania Board of Probation and Parole, 97 Pa. Commw. 605, 609-10, 510 A.2d 394, 396 (1986).

162. *See supra* note 79.

163. Krantz v. Pennsylvania Board of Probation and Parole, 86 Pa. Commw. 38, 42-3, 483 A.2d 1044, 1047 (1984) (emphasis in original).

164. 37 PA. CODE §§ 75.1-75.4 (1986).

parole violators for possible reparole. The presumptive range regulations can be separated into two categories — those dealing with new convictions and those dealing with technical parole violations.

The regulations dealing with new convictions attempt to list the various offenses a parolee may be convicted of and assign a backtime range, in terms of months, to each of those offenses.[165] The Parole Board acknowledges that its listing is not exhaustive and, should a parolee be convicted of an offense not listed in the regulation, the Parole Board will utilize the presumptive range assigned to an offense that most closely resembles that of which the parolee was convicted.[166] When a parolee is convicted of multiple offenses, the Parole Board has interpreted its regulations as allowing it to impose backtime for each separate offense and aggregate the backtime in order to reach a new parole eligibility date.[167]

As with new convictions, the regulations dealing with technical parole violations assign a presumptive range of backtime, in terms of months, to each general parole condition that may be the subject of a technical parole violation.[168] Unlike the presumptive ranges for convictions, however, the technical parole violation regulations do not allow the Parole Board to aggregate ranges where there are multiple technical parole violations. Instead, where there are multiple technical parole violations, the regulations direct that the presumptive range of the condition violation having the highest backtime will be used.[169]

The regulations do not provide a specific presumptive range for violations of special parole conditions imposed under Section 23 of the Parole Act.[170] The regulations do, however, provide that violations of special conditions shall be treated at *least* as severely as the least serious of the general conditions with backtime allotted to the violation of a special parole condition aggregated with the backtime allotted to the violation of general parole conditions to arrive at a

165. *See* 37 PA. CODE § 75.2 (1986).

166. 37 PA. CODE § 75.1(3) (1986); Harrington v. Pennsylvania Board of Probation and Parole, 96 Pa. Commw. 556, 507 A.2d 1313 (1986) (Parole Board is bound by Pennsylvania General Assembly's determination of the severity of an offense regardless of the less severe treatment afforded by the sister state where the subsequent conviction occurred); Moore v. Pennsylvania Board of Probation and Parole, 93 Pa. Commw. 218, 500 A.2d 1286 (1985) (out-of-state offense analogized to the most similar Pennsylvania offense).

167. Perry v. Pennsylvania Board of Probation and Parole, 86 Pa. Commw. 548, 485 A.2d 1231 (1984); Corley v. Pennsylvania Board of Probation and Parole, 83 Pa. Commw. 529, 478 A.2d 145 (1984).

168. 37 PA. CODE § 75.4 (1986).

169. 37 PA. CODE § 75.3(e) (1986).

170. PA. STAT. ANN. tit. 61, § 331.32 (Purdon 1964).

reparole eligibility date.[171]

4. Administrative Review of Parole Board Revocation Decisions.—Once parole has been revoked for either technical or criminal violations, a parolee may have that decision reviewed by the Parole Board. Act 134, the 1986 amendment to the Parole Act, provides an administrative appeal procedure for parole revocation decisions. Section 4(d) of the Parole Act[172] allows any interested party to appeal a Parole Board decision on a parole revocation matter. This is a departure from the prior administrative appeal procedure provided for under the Parole Board's administrative regulations which allowed only a parolee or his or her counsel the right to appeal.[173] Thus, under present law, it is now conceivable for a parole agent or victim to file an administrative appeal of a Parole Board decision not to recommit an asserted parole violator. The appeal must be filed with the Parole Board within thirty days of the date of the Parole Board order being appealed. The appeal is heard by a panel of three Parole Board members appointed by the chairman. At least two out of the three appointed may not have served already on the panel whose decision is being appealed. Under the statute, the appeal panel may affirm, reverse, remand, or order the matter heard de novo. Prior to Act 134, administrative appeals were handled through the Parole Board's Hearing Review Division. The Division now handles only matters not covered within the scope of a statutory administrative appeal and provides technical assistance and direction to Parole Board Hearing Examiners.[174]

The Pennsylvania Commonwealth Court specifically found that the Parole Board's Hearing Review Division and the administrative relief process it offers constitute an adequate and meaningful administrative remedy which a parolee is required to exhaust prior to seeking judicial review of a Parole Board parole revocation order.[175] The

171. 37 PA. CODE § 75.3(f) (1986); Marsh v. Pennsylvania Board of Probation and Parole, 86 Pa. Commw. 482, 485 A.2d 853 (1984).

In Johnson v. Pennsylvania Board of Probation and Parole, ___ Pa. Commw. ___, 527 A.2d 1107 (1987) (en banc), this regulation was construed as assigning a three to eighteen month presumptive range to violations of special parole conditions.

172. PA. STAT. ANN. tit. 61, § 331.4(d) (Purdon 1986).

173. *See* 37 PA. CODE § 71.5(h) (1986).

174. *See* 1977-1978 PA. BD. OF PROBATION & PAROLE BIANN. REP. 11.

175. St. Clair v. Pennsylvania Board of Probation and Parole, 89 Pa. Commw. 561, 493 A.2d 146 (1985); *see also* Krantz v. Pennsylvania Board of Probation and Parole, 86 Pa. Commw. 38, 41 n.3, 483 A.2d 1044, 1045 n.3 (1984); Lantzy v. Pennsylvania Board of Probation and Parole, 82 Pa. Commw. 626, 627 n.2, 477 A.2d 18, 19 n.2 (1984). *See generally* Wile, *Probation and Parole*, 57 PA. B.A.Q. 152, 162 (1986) [hereinafter Wile, *Probation and Parole*].

present administrative appeal procedure provides a more meaningful remedy to parolees as the Parole Board itself is more involved in reviewing the revocation order being appealed.

C. *Judicial Enforcement of Due Process Requirements*

If a parolee is still dissatisfied after the Parole Board has rendered a decision on his or her administrative appeal of a parole revocation order, he or she may obtain judicial review of that order. Pennsylvania appellate courts have taken an active role in enforcing the minimal due process requirements set forth by the United States Supreme Court in *Morrissey*. The judiciary has also ensured that the Parole Board complies with the requirements of its own administrative regulations pertaining to rights granted parolees in the revocation process. Throughout their oversight of the Parole Board's parole revocation process, Pennsylvania appellate courts have emphasized that the process is an administrative, not a criminal one, and have utilized mostly administrative law principles in weighing the Parole Board's procedures to guarantee they comport with due process standards.[176]

1. Notice of Violations and Hearing.—One of the basic due process rights that the *Morrissey* Court delineated for parolees is the right to advance notice of asserted parole violations and disclosure of the evidence supporting those asserted violations. In administrative law, the right to notice has two elements — the right to notice of procedural rights, such as adequate advance notice of the right to a hearing[177] and adequate notice of the hearing itself and the issues involved.[178] The Parole Board's regulations mandate that the Parole Board apprise the parolee of both elements. The parolee must be notified of the right to a hearing before a quorum of the Parole Board, of the right to counsel, and of the right to present witnesses

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176. *See* Rivenbark v. Pennsylvania Board of Probation and Parole, 509 Pa. 248, 253, 501 A.2d 1110, 1113 (1985); Gundy v. Pennsylvania Board of Probation and Parole, 82 Pa. Commw. 618, 622, 478 A.2d 139, 141 (1984).

177. Pennsylvania appellate courts have held that where an administrative agency or the General Assembly has provided a duly published set of procedures for pleadings, hearings, and appeals, the agency is not required to give additional notice of such rights to parties before it. *See* Johnson v. Pennsylvania Board of Probation and Parole, ___ Pa. Commw. ___, 524 A.2d 528 (1987); Fusaro v. Pennsylvania Public Utility Commission, 34 Pa. Commw. 14, 382 A.2d 794 (1978); Commonwealth v. Derry Township, 10 Pa. Commw. 619, 314 A.2d 868 (1973), *vacated on other grounds*, 466 Pa. 31, 351 A.2d 606 (1976).

178. *See, e.g.*, Clark v. Department of Public Welfare, 58 Pa. Commw. 142, 427 A.2d 712 (1981).

and evidence in his own behalf and confront and cross-examine adverse witnesses. The regulations also require that the parolee be notified of the asserted parole violations, the circumstances of the asserted violation, and the date of the parole violation hearing.[179] The regulations mandate that this notice will be given to the parolee both orally and in writing.[180] The Parole Board has adopted a form, designated the PBPP-340, entitled "Notice of Charges and Hearing," which notifies the parolee of the asserted parole violations, the supporting evidence, and the time of the parole violation hearing, while simultaneously informing the parolee of the procedural rights to which the parolee is entitled.[181]

In policing the notice requirement, the reported decisions of Pennsylvania appellate courts have centered mostly on ensuring that the parolee receives timely and adequate notice of the asserted parole violations. In *Hendrickson v. Pennsylvania State Board of Parole*,[182] decided nearly a decade prior to *Morrissey*, the Pennsylvania Supreme Court found the Parole Board had given a parolee adequate notice when the parolee was immediately informed of the nature of the asserted parole violations, the Parole Board had evidence tending to prove those violations, and the parolee had six weeks between the time he received notice of the asserted violations and the time he appeared before the Parole Board.

(a) Timing of notice.—In *Hendrickson*, the Pennsylvania Supreme Court held that six weeks advance notice of asserted parole violations was adequate notice to the parolee. The Pennsylvania Commonwealth Court ruled in *Simmons v. Pennsylvania Board of Probation and Parole*[183] that thirty-two days advance notice of asserted parole violations was sufficient to satisfy due process. Similarly, in *Colon v. Pennsylvania Board of Probation and Parole*,[184] the Commonwealth Court found eight days advance notice was constitutionally sufficient where the parolee articulated no discernible prejudice stemming from the length of time in which he had to prepare his defense to the parole violation charges.

However, in *Murray v. Jacobs*,[185] the Commonwealth Court

179. 37 PA. CODE §§ 71.2(12) and 71.4(3) (1983).
180. *Id.*
181. *See* Coades v. Pennsylvania Board of Probation and Parole, 84 Pa. Commw. 484, 497-98 n.16, 480 A.2d 1298, 1305 n.16 (1984).
182. 409 Pa. 204, 185 A.2d 581 (1962), *cert. denied*, 374 U.S. 817 (1963).
183. 74 Pa. Commw. 283, 459 A.2d 897 (1983).
184. 74 Pa. Commw. 431, 456 A.2d 1145 (1983).
185. ___ Pa. Commw. ___, 512 A.2d 785 (1986).

held that a weekend's notice is inadequate to satisfy due process. In *Murray*, the parolee, Wendell Murray, was charged with violating parole by stealing a pack of cigarettes and subsequently being convicted of retail theft. He was originally scheduled for a parole Revocation Hearing at SCI-Camp Hill on June 17, 1985. That hearing was postponed at the insistence of a Parole Board Hearing Examiner after the examiner learned Murray was in the prison clinic diagnosed as having pre-Acquired Immune Deficiency Syndrome (AIDS). On Friday, August 23, 1985, the Parole Board notified Murray and his counsel of a parole revocation hearing scheduled for Monday, August 26, 1985. As a result of the short notice, the assistant public defender was unable to rearrange his schedule in order to attend the Monday hearing. At the hearing Murray was cajoled by the hearing examiner to waive counsel in the face of having his hearing again postponed indefinitely. Following the hearing, the Parole Board revoked his parole.

On appeal, the Commonwealth Court held that two days advance notice over a weekend does not constitute adequate notice sufficient to comply with due process. While there was no allegation that Murray's counsel was not prepared to present a defense on such notice, the court noted that counsel was unable to attend the hearing on such short notice. This inadequate notice was not cured by Murray's failure to request a continuance of the hearing since the Parole Board placed him in the untenable position of having to choose between waiving either his right to counsel or his right to a speedy hearing.[186] Since Murray's hearing had been previously postponed by the Parole Board, the notice was constitutionally inadequate.

The court did distinguish the factual situation in *Murray* from that present in *Hill v. Pennsylvania Board of Probation and Parole*.[187] In *Hill*, the Parole Board also provided Charles Hill with only two days' notice of his parole Revocation Hearing. Like Murray, Hill did not have counsel present to represent him at the hearing and further stated that he felt two days was an inadequate time in which he could prepare his defense.[188] The hearing examiner offered Hill a continuance of the revocation hearing to procure the presence of counsel and allow time to prepare an adequate defense. Hill refused the offered continuance, stating only that he wanted the

186. *Id.* at ____, 512 A.2d at 790.

187. 89 Pa. Commw. 140, 492 A.2d 80 (1985), *allowance to appeal denied*, ____ Pa. ____, 524 A.2d 496 (1987).

188. *Id.* at 147, 492 A.2d at 84.

fact of two days' notice on the record to serve as the basis for a possible appeal. On those facts, the Commonwealth Court found that Hill knowingly and intelligently waived his right to advance notice of his revocation hearing, in effect, curing the alleged defective notice.[189]

(b) Required content of notice.—In addition to being timely, the notice must also adequately inform the parolee of the specific conditions of parole the Parole Board asserts were violated and the circumstances surrounding the asserted violations. The test for determining the sufficiency of notice is one of reasonableness in relation to the facts. In other words, does the notice reasonably inform the parolee of the matter to be dealt with at the hearing and provide enough information to enable the parolee to prepare his case?[190]

There can be no question that the Parole Board violates a parolee's due process rights when it hears evidence on an asserted parole violation of which the parolee was not notified. In *Champion v. Pennsylvania Board of Probation and Parole*,[191] the parolee, Donald Champion, was charged on March 8, 1977 by the Parole Board with various technical parole violations and new criminal charges. A parole preliminary and detention hearing on the asserted technical parole violations and the new criminal *charges* was scheduled for March 17, 1977, but continued at Champion's request until March 31, 1977. On March 31, 1977, Champion waived his preliminary and detention hearing so that the hearing could be considered as the second-level violation hearing. At that time, he informed the Parole Board hearing examiner that he had been convicted of the new criminal charges the previous day. The hearing examiner thereupon held a revocation hearing regarding the asserted technical parole violations. The Parole Board conceded that there was no advance notice to Champion informing him that his conviction would be the basis of a parole revocation hearing on March 31, 1977.[192]

On appeal, the Pennsylvania Commonwealth Court reversed the Parole Board's revocation order and remanded the case for a new hearing with proper notice. The court rejected the Parole Board's argument that formal advance notice of the criminal conviction was

189. *Id.* at 147-48, 492 A.2d at 84. *But see* Commonwealth v. Spence, 252 Pa. Super. 341, 381 A.2d 949 (1977) (issue of right to written notice of asserted parole violations not waived by parolee's failure to raise the issue of lack of notice at the revocation hearing).

190. *See generally* B. SCHWARTZ, ADMINISTRATIVE LAW, § 97 (1976).

191. 41 Pa. Commw. 350, 399 A.2d 447 (1979).

192. *Id.* at 352-53, 399 A.2d at 448.

unnecessary since Champion was already aware of that conviction. The pertinent inquiry is whether Champion was aware that a *revocation* hearing on the basis of a new criminal *conviction* would be held on March 31, 1977. The court concluded that the Parole Board had violated its own regulations[193] as well as the minimum due process requirements set forth in *Morrissey* when it proceeded to revoke Champion's parole on the basis of the conviction despite the fact that Champion had no prior notice that the conviction would be considered at that hearing.[194]

While the Parole Board may not use conduct or asserted violations of which the parolee has no prior notice of when it determines whether the parolee violated parole, the Commonwealth Court has permitted the Parole Board to consider such conduct to determine whether parole should be revoked once the asserted parole violations of which the parolee is aware have been proven. In *Washington v. Pennsylvania Board of Probation and Parole*,[195] the Commonwealth Court held that the Parole Board did not violate the parolee's due process rights where it considered the parolee's summary conviction, which was not included in the notice of parole violation charges, in determining whether he should be recommitted to prison as a parole violator. In that case, the Parole Board asserted that the parolee, Mark Washington, violated his parole by possessing a weapon and engaging in assaultive behavior. In support of those asserted parole violations, the Parole Board noted the following on its form PBPP-340, Notice of Charges and Hearing:

> On 2/12/82 you had in your possession a dangerous/offensive weapon (knife). A Violation of Condition #5B.
>
> On 2/12/82 you allegedly stabbed Jonas Hampton inside the Princes' Tavern, 225 High St., Phoenixville, Pa. A Violation of Condition #5C.[196]

During Washington's parole violation hearing, his parole agent testified that he pleaded guilty to the summary offense of harassment. The Parole Board found that he violated his parole by engaging in assaultive behavior and recommitted him to prison. The Court held that the Parole Board could properly consider Washington's summary conviction for harassment to determine whether or not his parole should be revoked as a result of the proven parole violation of

193. 37 PA. CODE §§ 71.2, 71.4 (1983).
194. 41 Pa. Commw. 350, 353, 399 A.2d 447, 448 (1979).
195. 73 Pa. Commw. 432, 458 A.2d 645 (1983).
196. *Id.* at 434, 458 A.2d at 646.

assaultive behavior. The Parole Board could not use the conviction to establish a violation of parole when it failed to provide to the parolee an amended notice stating its intention to use the conviction for that purpose.[197] Since the Parole Board used the conviction only to determine the penalty it should impose upon Washington as a result of the technical parole violation, its consideration of the conviction was proper.

In addition to informing the parolee of the specific parole violations asserted by the Parole Board and the basis for those violations, the parolee is also entitled to be informed of the date, time, and place of the parole revocation hearing. In *McCloud v. Pennsylvania Board of Probation and Parole*,[198] the Parole Board informed the parolee, Artie McCloud, that a parole violation hearing would be held regarding asserted technical parole violations. Although the notice McCloud received specified the asserted violations and their bases, the notice failed to include the date, time, or place of the scheduled violation hearing. As a result, McCloud, who was incarcerated and had no trouble being summoned for a parole hearing, appeared at the Violation Hearing without counsel. He was represented by counsel at his earlier preliminary hearing and argued that his attorney was not present because the notice of the parole violations included no date for the scheduled hearing. On appeal, the Commonwealth Court rejected the Parole Board's argument that McCloud or his attorney had the obligation to inquire of the Parole Board to ascertain when the violation hearing was scheduled. Instead, the obligation is upon the Parole Board to provide the parolee with notice of its proceedings.[199] The court denied McCloud a new hearing on the technical parole violations since the Parole Board had subsequently provided him with a new hearing in conjunction with a new criminal conviction that he sustained. Although the court noted that McCloud's right to a new hearing would otherwise be clear, the Parole Board had already provided him with the relief he sought.[200]

The important test of the requirement of notice is whether it adequately and timely informs the parolee of the charges against which he must defend and when and where he must present that defense. In reviewing the adequacy of the notice provided in parole violation proceedings, the Pennsylvania Commonwealth Court has

197. *Id.* at 437, 458 A.2d at 648.
198. 47 Pa. Commw. 208, 407 A.2d 484 (1979).
199. *Id.* at 210, 407 A.2d at 485.
200. *Id.*

consistently held that minor technical defects in the notice are not fatal. In *Hughes v. Pennsylvania Board of Probation and Parole*,[201] the Commonwealth Court held that the Board's incorrect listing of the county in which the parolee was alleged to have sustained a new conviction did not render the notice invalid. The court noted that the Parole Board documented the parolee's date of arrest and conviction and informed the parolee that a full Board Revocation Hearing would be held. That notice was "sufficiently informative" to satisfy due process since the parolee received enough information to have received actual notice. The fact that the Parole Board had listed the parolee's new conviction as taking place in Chester County rather than Delaware County was not a fatal defect.[202]

Likewise, the Commonwealth Court has held on numerous occasions that an incorrect Department of Corrections institution number[203] listed on the written notice will not invalidate an otherwise adequate notice. In *Snyder v. Pennsylvania Board of Probation and Parole*,[204] the Commonwealth Court held that the Parole Board's use of the parolee's incorrect Department of Corrections institution number on its Notice of Charges and hearing did not invalidate the otherwise adequate notice since the Parole Board had used its own correct parole number, which covered all sentences to which the parolee was subject. In *Winters v. Pennsylvania Board of Probation and Parole*,[205] the Commonwealth Court held that an incorrect institutional number constituted "harmless error."[206]

When enforcing a parolee's right to prior notice of asserted parole violations and the revocation hearing, Pennsylvania appellate courts have been more concerned with the information contained in the notices than with the form of the notice itself. As long as the notice contains sufficient information to inform the parolee of the asserted conduct at issue, the conditions of parole alleged to have been violated, and when and where the revocation hearing is to be

201. 81 Pa. Commw. 87, 473 A.2d 225 (1984).

202. *Id.* at 90-1, 473 A.2d at 227.

203. An institution number is a four-digit number with a letter prefix assigned to a prisoner by the Department of Corrections during the prisoner's classification upon reception into the Department's jurisdiction. The institution number relates to a specific sentence to which the prisoner is subject. When prisoners are constructively paroled from one sentence to commence service of a consecutive sentence, the Department assigns a new institution number to the prisoner for that sentence. The letter prefix identifies which of the Department's regional Diagnostic and Classification Centers assigned the institution number.

204. 78 Pa. Commw. 193, 467 A.2d 112 (1983).

205. 94 Pa. Commw. 236, 503 A.2d 488 (1986).

206. *Id.* at 250, 503 A.2d at 495. *See also* Oliver v. Pennsylvania Board of Probation and Parole, 89 Pa. Commw. 635, 494 A.2d 10 (1985).

held, the notice will be considered constitutionally adequate, minor defects in form notwithstanding.

2. Opportunity to be Heard.—The Pennsylvania judiciary strictly enforced a parolee's right to appear personally before a quorum of the Parole Board prior to having parole revoked. That right was first recognized by the Pennsylvania Supreme Court in *Commonwealth ex rel. Rambeau v. Rundle*,[207] wherein the Supreme Court construed the *Morrissey* minimal due process requirement of providing the parolee the right to be heard in person. The court interpreted the standard as requiring the Parole Board to afford parolees the opportunity to appear in person prior to the decision whether to revoke parole. Since Section 4 of the Parole Act[208] requires only a majority vote of the Parole Board in order to revoke parole, the *Rambeau* Court held that it is not necessary for a parolee to appear before all five members of the Parole Board and that a quorum of the Parole Board is all that is required to satisfy due process.[209] In *Pierce v. Pennsylvania Board of Probation and Parole*,[210] the Pennsylvania Commonwealth Court concluded that the provision of Section 4 of the Parole Act authorizing the Parole Board to revoke paroles on a majority vote is not violative of due process. The Commonwealth Court further concluded that a hearing before three of the five Parole Board members is all that is constitutionally required.[211]

Act 134 amended Section 4 of the Parole Act to allow the Parole Board to act on parole revocation matters in two-member panels. Thus, the right to appear before a quorum of the Parole Board, set forth in *Rambeau*, has been statutorily modified by Act 134.[212] Since the two-member panels are empowered by statute to revoke or continue parole, the parolee's right from *Morrissey* to appear in person to argue his or her case is preserved.

Under prior law, a parolee could waive the right to appear before a quorum of the Parole Board. The Pennsylvania Commonwealth Court consistently held that a parolee could change his or her mind at any time prior to the actual hearing and still be entitled to be heard personally by a quorum of the Parole Board. In *LaBoy v.*

207. 455 Pa. 8, 314 A.2d 842 (1973).
208. PA. STAT. ANN. tit. 61, § 331.4 (Purdon 1964).
209. 455 Pa. 8, 19-20, 314 A.2d 842, 847-48 (1973).
210. 46 Pa. Commw. 507, 406 A.2d 1186 (1979).
211. *Id.* at 510, 406 A.2d at 1188.
212. 74 Pa. Commw. 332, 459 A.2d 916 (1983).

Pennsylvania Board of Probation and Parole,[213] the parolee, Israel LaBoy, signed a waiver of his right to be heard by a quorum of the Parole Board on July 7, 1981. When he appeared before a Parole Board hearing examiner on August 13, 1981, LaBoy claimed to have expressed a desire to be heard by a quorum of the Parole Board and objected to having his hearing before the examiner. The court found that the Parole Board's regulations[214] expressly permit parolees to change their minds with respect to the waiving of a hearing before a quorum of the Parole Board. The regulations provide that when a parolee who has previously waived such a hearing appears before a hearing examiner and desires a hearing before a quorum of the Parole Board, the examiner is required to terminate the proceedings and initiate the scheduling of a hearing before a quorum of the Parole Board, denoted in the regulations as a "full Board hearing."[215] In *LaBoy*, the record was deficient as to whether the parolee had actually requested a full Board hearing, and the court remanded the case to the Parole Board with directions to provide a complete record.[216] In *Hartman v. Petsock*,[217] the Commonwealth Court obtained a complete record and held that the Parole Board hearing examiner committed reversible error when he proceeded to take evidence at a parole violation/revocation hearing after the parolee expressed a desire to have a full Board hearing. In *Hartman*, the court remanded the case back to the Parole Board for a new hearing, to be heard before a quorum of the Parole Board if the parolee so desired.

The right of a parolee to insist upon a full Board Violation or Revocation Hearing is based upon the plain language of the Parole Board's own regulations.[218] The Commonwealth Court has required the Parole Board on numerous occasions to comply with its own regulations insofar as the parole revocation procedure is concerned.[219] Once the Parole Board amends its regulations to comport with the new parole revocation procedure embodied in Act 134, the question of whether a parolee may insist upon appearing before a quorum of the Parole Board will become moot.

Just as a parolee can waive the right to a full Board hearing,

213. *See* 37 PA. CODE §§ 71.2(14)(ii)(B), 71.4(5)(iii) (1983).
214. *See, e.g.*, 37 PA. CODE § 71.4(2)(i) (1980).
215. 74 Pa. Commw. 332, 334, 459 A.2d 916, 917 (1983).
216. *Id.*
217. 97 Pa. Commw. 311, 509 A.2d 935 (1986).
218. 37 PA. CODE §§ 71.2(14)(ii)(B) and 71.4(5)(iii) (1983).
219. *See, e.g.*, Kunkelman v. Pennsylvania Board of Probation and Parole, 40 Pa. Commw. 149, 396 A.2d 898 (1979); Tate v. Pennsylvania Board of Probation and Parole, 40 Pa. Commw. 4, 396 A.2d 482 (1979).

the parolee can waive the right to be heard at all. In *O'Hara v. Pennsylvania Board of Probation and Parole*,[220] the Commonwealth Court upheld the Parole Board's action in proceeding with a parole Revocation Hearing in absentia where the parolee refused to participate. The parolee, Thomas O'Hara, was accused of violating parole by sustaining several new criminal convictions while on parole. He had court-appointed counsel to represent him in his Erie County criminal cases who also initially undertook to represent him in his parole matter when he had his preliminary hearing in Erie County Prison. After O'Hara's transfer to the State Correctional Institution at Pittsburgh (SCI-Pittsburgh), in Allegheny County, his court-appointed Erie County counsel would no longer represent him.[221] O'Hara insisted upon being represented by his Erie County attorney and refused to apply for the services of the local public defender. When his parole hearings were scheduled at SCI-Pittsburgh, he refused to attend or otherwise participate without his Erie County attorney. After rescheduling the parole Revocation Hearing five times, the Parole Board held the hearing in absentia and recommitted O'Hara as a parole violator. On appeal, the Commonwealth Court found that O'Hara had waived his right to appear by refusing to participate in the hearing, despite receiving adequate advance notice. The Parole Board did not violate O'Hara's due process rights by proceeding with the sixth scheduled parole hearing after he refused to attend.[222]

3. Right of Confrontation and Cross-Examination.—A parolee's right to confront and cross-examine adverse witnesses has been given sporadic protection by Pennsylvania appellate courts. As noted by the United States Supreme Court in *Morrissey*, the right to confront and cross-examine adverse witnesses is not absolute and may be denied upon a specific finding of good cause by the Parole Board or hearing examiner.[223] Additionally, Section 505 of the Administrative Agency Law[224] mandates that reasonable examination and cross-examination shall be permitted in proceedings before

220. 87 Pa. Commw. 356, 487 A.2d 90 (1985).

221. *Id.* at 369 n.15, 487 A.2d at 97 n.15. *See also* Wile, *Right to Counsel, supra* note 175, at n.122.

222. *Cf.* 87 Pa. Commw. at 370, 487 A.2d at 97 (no violation of right to counsel by Parole Board proceeding with sixth scheduled parole revocation hearing in absentia upon parolee's refusal to appeal).

223. 408 U.S. 471, 489 (1972).

224. 2 PA. CONS. STAT. ANN. § 505 (Purdon Supp. 1986).

Commonwealth agencies.

Both the *Morrissey* and the *Gagnon* Courts recognized that parole revocation proceedings are of a more informal nature than adversary criminal trials. In *Morrissey*, the Supreme Court wrote that the process should be informal enough to permit consideration of letters, affidavits, and other documents not normally admissible in an adversary trial.[225] In *Gagnon*, the Court recognized that certain conventional substitutes for live testimony, such as affidavits and depositions, are permissible in parole revocation proceedings without violating principles of due process.[226]

(a) Hearsay evidence.—Pennsylvania appellate courts have acknowledged that hearsay evidence may be utilized in proceedings before Commonwealth administrative agencies. In *Walker v. Unemployment Compensation Board of Review*,[227] the Pennsylvania Commonwealth Court attempted to set forth guidelines for the use of hearsay evidence in such proceedings. The court set forth the following guidelines regarding the use of hearsay evidence:

> (1) Hearsay evidence, *properly objected to*, is not competent evidence to support a finding of the [Unemployment Compensation] Board [of Review] [citations omitted]; (2) Hearsay evidence, *admitted without objection*, will be given its natural probative effect and may support a finding of the Board, *if it is corroborated by any competent evidence in the record*, but a finding of fact based *solely* on hearsay will not stand.[228]

While originally dealing with unemployment compensation law, the *Walker* guidelines have been extended to other Commonwealth agencies.[229]

In *Grello v. Pennsylvania Board of Probation and Parole*,[230] the Pennsylvania Commonwealth Court held that a Parole Board revocation order based entirely upon hearsay evidence violates due process and cannot stand. In *Grello*, the parolee, John Grello, was charged with violating three conditions of parole — possessing a fire-

225. 408 U.S. 471, 489 (1972).

226. 411 U.S. 778, 782 n.5 (1973). Additionally, the fourth amendment's exclusionary rule is not applicable to parole revocation proceedings. Nickens v. Pennsylvania Board of Probation and Parole, 93 Pa. Commw. 313, 502 A.2d 277 (1985).

227. 27 Pa. Commw. 522, 367 A.2d 366 (1976).

228. *Id.* at 527, 367 A.2d at 370 (citations omitted) (emphasis in original).

229. *See, e.g.*, Anderson v. Department of Public Welfare, 79 Pa. Commw. 182, 468 A.2d 1167 (1983).

230. 83 Pa. Commw. 252, 477 A.2d 45 (1984).

arm, engaging in assaultive behavior, and consuming alcohol. The evidence Grello's parole agent presented at the parole violation hearing consisted of the affidavit of an Allentown police officer and the agent's recollection of the testimony of two witnesses who testified at a criminal preliminary hearing before a District Justice on the alleged assaults. Grello's defense counsel timely objected to the introduction of the hearsay but was overruled by the Parole Board hearing examiner. In vacating the Parole Board's revocation order, the Commonwealth Court specifically adopted the principle that due process does not permit the revocation of parole based entirely upon hearsay evidence.[231] In so doing, the court brought the treatment of hearsay evidence in parole cases within the jurisdiction of the Parole Board in line with that accorded hearsay evidence by the Pennsylvania Superior Court in probation cases under the jurisdiction of the common pleas courts.[232]

Although hearsay generally cannot be the sole basis for administrative action, when an exception to the hearsay rule is applicable because there are other indicia of its reliability, hearsay may justify Parole Board action. For example, in *Anderson v. Pennsylvania Board of Probation and Parole*,[233] and *Davis v. Pennsylvania Board of Probation and Parole*,[234] the Commonwealth Court permitted the use of uncertified copies of criminal court docket sheets as proof of conviction in parole revocation hearings. In *Anderson*, the court held that such documents did not constitute inadmissible hearsay[235] because they were "public records" admissible under the Uniform Photographic Copies of Business and Public Records Act.[236] Likewise, in *Whitmore v. Pennsylvania Board of Probation and Parole*,[237] the Commonwealth Court opined that laboratory urinalysis reports could qualify under the business records exception[238] to the hearsay rule if the Parole Board provided a proper evidentiary foundation. In *Whitmore*, however, the Parole Board failed to lay a proper foundation, and the report constituted inadmissible hearsay.[239]

The Pennsylvania Commonwealth Court has also recognized

231. *Id.* at 254, 477 A.2d at 46.

232. *See* Commonwealth v. Greenlee, 263 Pa. Super. 477, 398 A.2d 676 (1979); Commonwealth v. Riley, 253 Pa. Super. 260, 384 A.2d 1333 (1978). *See also* Wile, *Probation and Parole, supra*, at 160.

233. 91 Pa. Commw. 486, 497 A.2d 947 (1985).

234. 85 Pa. Commw. 278, 481 A.2d 714 (1984).

235. 91 Pa. Commw. 486, 491, 497 A.2d 947, 950 (1985).

236. 42 PA. CONS. STAT. ANN. § 6109 (Purdon 1982).

237. 94 Pa. Commw. 569, 504 A.2d 401 (1986).

238. 42 PA. CONS. STAT. ANN. § 6108 (Purdon 1982).

239. 94 Pa. Commw. 569, 571, 504 A.2d 401, 402 (1986).

that evidence otherwise constituting hearsay may be properly admitted under certain circumstances. In *Falasco v. Pennsylvania Board of Probation and Parole*,[240] the court upheld a Parole Board hearing examiner's decision to admit into evidence a certified letter sent to the parolee at his approved address but returned by the United States Postal Service undelivered and marked "addressee moved, left no forwarding address." Since the parole agent offered the letter to show why he undertook an investigation of the parolee's whereabouts, rather than as substantive evidence that the parolee had indeed moved from his approved residence in violation of his parole, the letter did not constitute hearsay and was properly admitted.

(b) "Good cause" findings.—A further exception to the admissibility of hearsay evidence in parole revocation proceedings is the "good cause" exception. This exception was specifically carved out by the *Morrissey* Court as a reason for denying a parolee the right to confront and cross-examine adverse witnesses. The applicability of the good cause exception to the Parole Board's revocation proceedings gives it considerably more leeway in admitting hearsay evidence than the *Walker* decision permits other Commonwealth agencies.

Although the Court in *Morrissey* stated that a parole board could deny confrontation and cross-examination upon a specific finding of "good cause," the Court did not further define what was meant by "good cause." There is no reference to "good cause" in the Parole Act, which predates the *Morrissey* decision. Additionally, the regulations promulgated by the Parole Board make no attempt to define what constitutes "good cause" so as to deny a parolee the right to confront and cross-examine an adverse witness.

In the absence of any clear or specific guidance, the Pennsylvania Commonwealth Court has held that good cause must be determined on a case-by-case basis.[241] The Commonwealth Court has shown a marked aversion to accepting Parole Board policies or per se rules as "good cause" to accept hearsay evidence. In *Grello*[242] and *Razderk v. Pennsylvania Board of Probation and Parole*,[243] the Commonwealth Court invalidated a Parole Board policy of finding per se good cause to deny confrontation and cross-examination whenever a witness was located outside of a fifty mile radius of the

240. ___ Pa. Commw. ___, 521 A.2d 991 (1987).

241. Grello v. Pennsylvania Board of Probation and Parole, 83 Pa. Commw. 252, 255, 477 A.2d 45, 47 (1983).

242. *Id.*

243. 76 Pa. Commw. 176, 179 n.4, 463 A.2d 111, 113 n.4 (1983).

situs of the parole revocation hearing. In *Hracho v. Pennsylvania Board of Probation and Parole*,[244] the Court invalidated a finding of good cause based upon a Parole Board policy not to subpoena out-of-state witnesses.[245]

In addition to invalidating set policies of the Parole Board that find per se good cause, the Commonwealth Court has also been willing to review specific findings of good cause made by the Parole Board or its hearing examiners. In *Tyson v. Pennsylvania Board of Probation and Parole*,[246] the Commonwealth Court invalidated a hearing examiner's finding of good cause based upon a witness' unsworn declaration that she was afraid of the parolee. Similarly, in *Wagner v. Pennsylvania Board of Probation and Parole*,[247] the court held that a witness' statement that he was "too busy" to attend the parole violation hearing did not constitute good cause to admit the witness' statement over the parolee's objection. In *Powell v. Pennsylvania Board of Probation and Parole*,[248] the Court invalidated a finding of good cause based upon a hearing examiner's "official notice" of a certain laboratory's state certification and the number of technicians involved in the testing process because the examiner's notice was based upon his personal experience in his former position that is not a subject of proper judicial notice.[249] However, in *Myers v. Pennsylvania Board of Probation and Parole*,[250] the Court upheld a hearing examiner's finding of good cause based upon the fact that the author of the New York parole violation report in question was not within the jurisdiction of the Commonwealth and was therefore unavailable to the Parole Board.

Thus far, Pennsylvania appellate courts have refrained from establishing a test for determining the adequacy of good cause findings in parole revocation proceedings coming before the Parole Board. The only appellate court to have addressed the issue, the Pennsylva-

244. 94 Pa. Commw. 222, 503 A.2d 112 (1986). *Contra* Myers v. Pennsylvania Board of Probation and Parole, 97 Pa. Commw. 574, 510 A.2d 387 (1986) (good cause based upon unavailability of out-of-state official upheld). The distinction between *Hracho* and *Myers* can be explained in terms of the documents sought to be admitted. In *Hracho*, the parole agent sought to admit a handwritten statement allegedly made by a North Carolina police officer. The statement was neither on any official letterhead nor notarized. In contrast, the report in *Myers* was an official parole violation report submitted by New York parole authorities to the Parole Board.

245. 94 Pa. Commw. 222, 225, 503 A.2d 112 ,113 (1986).

246. 84 Pa. Commw. 326, 479 A.2d 52 (1984).

247. 92 Pa. Commw. 132, 498 A.2d 1007 (1985).

248. 100 Pa. Commw. 7, 513 A.2d 1139 (1986), *allowance to appeal denied*, ___ Pa. ___, 523 A.2d 346 (1987).

249. *Id.* at ___, 513 A.2d at 1142.

250. 97 Pa. Commw. 574, 510 A.2d 387 (1986).

nia Commonwealth Court, continues to review good cause issues on a case-by-case basis and is careful not to usurp the fact-finding function of the Parole Board.[251] The only departure the Commonwealth Court has made thus far from this case-by-case approach is the court's blanket disapproval of what it terms "arbitrary evidentiary 'policies'" as constituting good cause to deny confrontation and cross-examination.[252] This disapproval of arbitrary policies indicates a conviction on the part of the Commonwealth Court that the Parole Board, when making its good cause findings, must balance the competing interests involved — the interest of the parolee in confronting and cross-examining a witness upon whose testimony his liberty may be taken away, the interest of the witness in not personally appearing at the parole hearing, and, finally, the interest of the Parole Board itself in arriving at a reliable and informed decision on the parole violation matter before it.

(c) Official Notice.—In addition to the "good cause" exception to the hearsay rule, the Parole Board also has available the doctrine of official notice. Under the doctrine of official notice, it is permitted to consider facts and information on a particular parolee that are contained in its own files without entering the file or its contents into evidence at a revocation hearing. In *Falsaco v. Pennsylvania Board of Probation and Parole*,[253] the Pennsylvania Commonwealth Court expressly held that the doctrine of official notice is applicable to parole revocation proceedings held by the Parole Board. In *Falsaco*, the court permitted the Parole Board to consider a summary of adjustment contained in a parole violation report prepared by the parolee's parole agent in determining an appropriate penalty for the parolee's parole violation. The summary of adjustment is an account of the parolee's parole history and was objected to as hearsay by defense counsel. The court held that since the challenged material was merely a summary of information that was already in the possession of the Parole Board, it could be properly used in determining the penalty once the Parole Board had established the parole violation.[254]

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251. Powell v. Pennsylvania Board of Probation and Parole, 100 Pa. Commw. 7, ___, 513 A.2d 1139, 1144 (1986), *allowance to appeal denied*, ___ Pa. ___, 523 A.2d 346 (1987).

252. *See Powell*, 100 Pa. Commw. 7, ___, 513 A.2d 1139, 1144 (1986); *Grello*, 83 Pa. Commw. 252, 255, 477 A.2d 45, 47 (1983); *Razderk*, 76 Pa. Commw. 176, 179 n.4, 463 A.2d 111, 113 n.4 (1983).

253. ___ Pa. Commw. ___, 521 A.2d 991 (1987).

254. *Id.* at ___, 521 A.2d at 994-95.

The official notice doctrine, as adopted by the Commonwealth Court in *Falsaco*, allows an administrative agency, such as the Parole Board, to take notice of facts and information contained in the agency's files as well as those facts that are obvious and notorious to an expert in the agency's field of expertise.[255] As noted by the court, the doctrine of official notice is a much broader concept than the doctrine of judicial notice, and it allows the Parole Board to take notice of facts and information that would not be possible for a trial court to notice at a parole or probation revocation proceeding under the court's jurisdiction.[256]

Up to this time, however, the Commonwealth Court has only approved the Parole Board's use of official notice in the penalty phase of the parole revocation process.[257] The attempts by the Parole Board to use official notice in the fact-finding phase have not met with success. In *Abbruzzese v. Pennsylvania Board of Probation and Parole*,[258] the Commonwealth Court reversed a parole revocation order based upon a hearing examiner's taking official notice of a fact based upon a parole agent's testimony. Likewise, in *Powell v. Pennsylvania Board of Probation and Parole*,[259] the Commonwealth Court reversed a parole revocation order based upon a good cause finding by a hearing examiner who took notice of the drug laboratory's state certification based upon his personal knowledge rather than of any information contained in the Parole Board's files. While the Parole Board's attempts to use official notice in the fact-finding phase of the parole revocation procedure has not yet met with success, there is no reason why the doctrine is not applicable in that phase if the Parole Board chose to use it in the correct manner.

4. "Neutral and Detached" Hearing Body.—The one minimal due process requirement set forth in *Morrissey* that has not received much judicial attention is the requirement that the parole revocation hearing be held before a "neutral and detached" hearing body. The Court commented that such a hearing body need not be comprised of judicial officers or lawyers and that a "traditional" parole board

255. *Id.* at ____, n.6, 521 A.2d at 994 n.6.

256. *See generally* 42 PA. CONS. STAT. ANN. § 9771 (Purdon 1982) (revocation of probation); PA. STAT. ANN. tit. 61, § 314 (Purdon Supp. 1987) (revocation of parole where maximum sentence is less than two years); Pa. R. Crim. P. 1409, 42 PA. CONS. STAT. ANN. (Purdon Supp. 1987).

257. Bandy v. Pennsylvania Board of Probation and Parole, ____ Pa. Commw. ____, ____ A.2d ____ (No. 2757 C.D. 1986, filed August 12, 1987).

258. ____ Pa. Commw. ____, 524 A.2d 1049 (1987).

259. 100 Pa. Commw. 7, 513 A.2d 1143 (1986), *allowance to appeal denied*, ____ Pa. ____, 523 A.2d 346 (1987).

would satisfy the requirement.[260] The Pennsylvania procedure, whereby a majority vote of the Parole Board is required to revoke a parole and a parolee has a right to personally appear before a quorum of the Parole Board seems to satisfy this requirement of a "neutral and detached" hearing body set forth in *Morrissey*.

There are several additional factors, however, that cast some doubt whether the Parole Board, as structured by the Parole Act, satisfies the *Morrissey* due process requirement of a "neutral and detached" hearing body. In addition to making the decision whether to grant or revoke parole, the Parole Board is also empowered to supervise parolees while on parole.[261] The individual parole agents are employees of, and are ultimately responsible to, the Parole Board for their performance and actions. Therefore, when a parole agent presents evidence of an asserted parole violation at a parole revocation hearing, the agent is presenting that evidence to his or her employer. Conversely, the Parole Board, when it hears parole revocation matters, is passing on the sufficiency of evidence gathered by its employees and agents on its behalf.[262] However, while the parole agents engage in both supervisory and prosecutorial roles, in the parole revocation process their roles are strictly prosecutorial. The revocation decision is entirely up to the Parole Board. Other than presenting the case for parole revocation, the parole agents have no input into the actual revocation decision. Thus viewed, the Parole Board does keep the prosecutorial and adjudicative functions separate and would not seem to impermissibly commingle those functions.

There is virtually no reported case law dealing with what constitutes a "neutral an detached" hearing body for parole revocation purposes. However, the 1976 decision of the United States Supreme Court in *Hortonville Joint School District No. 1 v. Hortonville Education Association*[263] seems to approve of such a structuring of the Parole Board. In *Hortonville*, teachers were dismissed by the local school board after they had admittedly participated in a strike which was illegal under Wisconsin law. Before the school board, the teachers argued that the school board, which also conducted the unsuccessful collective bargaining efforts, was not sufficiently impartial to resolve the issue of their dismissal. The Wisconsin Supreme Court agreed with the teachers that, since the school board was active in

260. 408 U.S. 471, 489 (1972).

261. *See generally* PA. STAT. ANN. tit. 61, §§ 331.16b, 331.17, 331.17a, 331.23 (Purdon Supp. 1986).

262. *See, e.g.*, PA. STAT. ANN. tit. 61, § 331.22 (Purdon 1964).

263. 426 U.S. 482 (1976).

the collective bargaining process, it could not also act as an impartial hearing body consistent with due process requirements.[264] On appeal, the United States Supreme Court reversed. The Court held that the mere familiarity with the facts of a case gained by an administrative agency in the performance of its statutory role does not disqualify it as a decisionmaker.[265] The Court specifically likened the role of the school district to the parole board mentioned in *Morrissey*, since both have their ultimate plenary authority to make decisions derived from the state legislature.[266] The Court held that the school board satisfied the due process requirement of an impartial decisionmaker and specified that due process does not require an independent impartial decisionmaker.

The *Hortonville* decision seems to validate the Parole Board's role in the parole revocation process despite its statutory role of supervising parolees in addition to making decisions on granting and revoking paroles. The key validating factor gleaned from the *Hortonville* decision is that the Parole Board members do not have a personal or official stake in the outcome of the parole revocation decision. It is the parole agent who is personally involved in the supervision of the parolee and the decision whether to bring parole violation charges against a particular parolee. Only after parole violation charges have been initiated by the parole agent or supervisor does the Parole Board become involved in the revocation process. Consequently, the Parole Board probably retains sufficient detachment to satisfy the due process requirement of a "neutral and detached" hearing body set forth in *Morrissey*.

A problem arises when parole agents are appointed as Parole Board members. In *Blackwell v. Pennsylvania Board of Probation and Parole*,[267] the Pennsylvania Commonwealth Court found that the Parole Board violated a parolee's right to a neutral and detached hearing body when a Parole Board member refused to recuse himself from hearing a parole revocation matter in which the same member, while a parole agent, had written the parole violation report recommending the parolee's recommitment. The Court held that the member erred in not recusing himself since a clear conflict of interest existed because the member participated both in the presentation of the revocation case as a parole agent and as an adjudicator while a

264. *See* Hortonville Education Association v. Hortonville Joint School District No. 1, 66 Wis. 2d 469, 225 N.W.2d 658 (1975).

265. 426 U.S. 482, 491 (1976).

266. *Id.*

267. ___ Pa. Commw. ___, 516 A.2d 856 (1986).

Parole Board member. Such conflicts could be avoided, however, by paying closer attention to scheduling of revocation cases and assigning Parole Board members to revocation panels. The advent of two-member revocation panels brought about by Act 134 also lessens the probability of such conflicts arising in future cases.

5. Contents of the Revocation Decision.—The *Morrissey* Court specified that the Parole Board's parole revocation decision must contain a written statement about the evidence it relied upon and its reasons for revoking parole.[268] The Pennsylvania Commonwealth Court has often criticized the Parole Board for its "cryptic" revocation decisions. In *Lewis v. Pennsylvania Board of Probation and Parole*,[269] the Commonwealth Court chastised the Parole Board for its cryptic revocation orders and recommended that it follow a logical format which specifies the following for each parole violation:

> (1) the parole condition number violated, (2) the definition of that condition, (3) the nature of the parolee's offense, (4) any applicable presumptive range, (5) any mitigating or aggravating circumstances considered by the [Parole Board] for increasing or decreasing recommitment time, and (6) the recommitment time actually imposed for violation of that condition.[270]

A part of the problem with the content and structure of the Parole Board's parole revocation orders is the exemption the Parole Board enjoys from Section 507 of the Administrative Agency Law,[271] which mandates that adjudications of Commonwealth agencies contain specific findings of fact and conclusions of law. Even though there is no dispute that the Parole Board is a Commonwealth agency, the Commonwealth Court has relied upon the definition of "adjudication" contained in Section 101 of the Administrative Agency Law[272] to hold that Parole Board parole revocation orders are not "adjudications" subject to the requirements of Section

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268. 408 U.S. 471, 489 (1972).

269. 74 Pa. Commw. 335, 459 A.2d 1339 (1983).

270. *Id.* at 337 n.2, 459 A.2d at 1340 n.2.

271. 2 PA. CONS. STAT. ANN. § 507 (Purdon Supp. 1986).

272. 2 PA. CONS. STAT. ANN. § 101 (Purdon Supp. 1986). The Administrative Agency Law's definition of "adjudication" is as follows:

> *"Adjudication."* Any final order, decree, decision or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any or all of the parties to the proceeding in which the adjudication is made. The term does not include any order based upon a proceeding before a court or which involves the seizure or forfeiture of property, *paroles*, pardons or releases from mental institutions.

Id. (emphasis added).

507.[273] Despite the finding, the Commonwealth Court has emphasized to the Parole Board that it must comport with due process requirements concerning the contents of its parole revocation orders.[274] Unfortunately, those due process requirements noted in *Lewis* are quite general and provide the Parole Board with considerable leeway in the amount of information which it includes in its parole revocation orders. Past practice of the Parole Board indicates that it intends to keep that information to a minimum.

There is also some question as to the viability of the Commonwealth Court's conclusion that Parole Board parole revocation orders are not "adjudications" within the meaning of Section 101 of the Administrative Agency Law. There is considerable language in the Pennsylvania Supreme Court's opinion in *Bronson v. Pennsylvania Board of Probation and Parole*[275] which seems to indicate that the Pennsylvania Supreme Court considers those orders to be "adjudications." In *Bronson*, the court wrote that Sections 701 and 702 of the Administrative Agency Law[276] were applicable to the Parole Board's parole revocation orders and channeled direct appeals from those orders to the Pennsylvania Commonwealth Court.[277] Both Section 701 and 702 deal with direct appeals from "adjudications" of Commonwealth agencies. The court may have indirectly drawn a distinction between Parole Board orders dealing with parole applications, to which no due process rights attach, and those orders dealing with parole revocations which are subject to certain minimal due process requirements. With the apparent conflict between *Bronson* and *Davis*, the precise status of parole revocation orders under the Administrative Agency Law is far from clear and some additional guidance from the Pennsylvania Supreme Court is sorely needed.

6. Right to Counsel.—The 1969 Pennsylvania Supreme Court decision in *Commonwealth v. Tinson*,[278] entitles parolees to the assistance of counsel to defend against the revocation of their paroles by the Parole Board and to appointed counsel if indigent. In *Coades v.*

273. Davis v. Pennsylvania Board of Probation and Parole, 85 Pa. Commw. 278, 481 A.2d 714 (1985). *See also* LaCamera v. Pennsylvania Board of Probation and Parole, 13 Pa. Commw. 85, 317 A.2d 925 (1974) (en banc) (Parole Board order denying a parole application not an "adjudication" from which an appeal lies).

274. Davis v. Pennsylvania Board of Probation and Parole, 85 Pa. Commw. 278, 283, 481 A.2d 714, 717 (1984).

275. 491 Pa. 549, 421 A.2d 1021 (1980), *cert. denied*, 450 U.S. 1050 (1981).

276. 2 PA. CONS. STAT. ANN. §§ 701 and 702 (Purdon Supp. 1986).

277. 491 Pa. 549, 558, 421 A.2d 1021, 1025 (1980).

278. 433 Pa. 328, 249 A.2d 549 (1969).

Pennsylvania Board of Probation and Parole,[279] the Pennsylvania Commonwealth Court determined that while a parolee's right to counsel is absolute, it is based upon statutory rather than constitutional law. The court held that the right to counsel in parole revocation proceedings is based upon Section 6(a)(10) of the Public Defender Act of 1968[280] and upon Section 502 of the Administrative Agency Law.[281] The court then rejected a parolee's claim that the right to counsel is based upon the due process clause of the fourteenth amendment[282] or upon article I, section 9 of the Pennsylvania Constitution.[283]

In *LaCourt v. Pennsylvania Board of Probation and Parole*,[284] the Pennsylvania Commonwealth Court held that the parolee's right to counsel includes the requirement that the assistance provided by counsel be effective. Parole board proceedings are thus distinguished from proceedings before other Commonwealth agencies where the Commonwealth Court specifically declined to extend the right to effective assistance of counsel.[285] This right to effective assistance of counsel does not entitle a parolee to counsel of his or her choice, nor does it entitle the parolee to the best or most experienced defense counsel available.[286] The right only requires that a parolee be provided with counsel who is competent and who represents the parolee's best interest in an effective manner.[287]

While a parolee enjoys a right to the assistance of counsel in resisting the revocation of parole, that assistance is limited to that of a licensed attorney-at-law. In *McCain v. Curione*,[288] the Commonwealth Court held that a parolee has no right, constitutional or otherwise, to be represented in parole revocation proceedings by a nonlawyer. The court held that a parolee may represent himself or be represented by a lawyer. The right of self representation, the court

279. 84 Pa. Commw. 484, 480 A.2d 1298 (1984).

280. PA. STAT. ANN. tit. 16, § 9960.6(a)(10) (Purdon Supp. 1986).

281. 2 PA. CONS. STAT. ANN. § 502 (Purdon Supp. 1986).

282. U.S. CONST. amend. XIV.

283. PA. CONST. art. I, § 9.

284. 87 Pa. Commw. 384, 488 A.2d 70 (1985).

285. *See, e.g.*, Rosenthal v. State Board of Pharmacy, 73 Pa. Commw. 132, 457 A.2d 243 (1983) (disciplinary proceedings before State Board of Pharmacy); Johnson v. Workmen's Compensation Appeal Board (Bernard S. Pinkus Co.), 14 Pa. Commw. 220, 321 A.2d 728 (1974) (proceeding to set aside final receipt in workmen's compensation case).

286. LaCourt v. Pennsylvania Board of Probation and Parole, 87 Pa. Commw. 384, 390, 488 A.2d 70, 74-5 (1985).

287. *Id. See also* Vereen v. Pennsylvania Board of Probation and Parole, 101 Pa. Commw. 63, 515 A.2d 637 (1986).

288. ___ Pa. Commw. ___, 527 A.2d 591 527 A.2d 591 (1987).

held, may not be delegated to a lay person.[289]

(a) Obtaining counsel.—Other than privately retaining counsel, a parolee is entitled to the services of the public defender if he or she lacks available financial resources to hire private counsel. Section 6(a)(10) of the Public Defender Act[290] specifically places upon the various county public defender's offices an obligation to defend indigent parolees faced with the revocation of their paroles.

The mere fact that the Public Defender Act required public defenders to represent indigent parolees did not ensure that parolees were in fact receiving counsel for their hearings before the Parole Board. The fact that parolees were normally held in state correctional institutions outside of the county in which they were sentenced often led to the jurisdictional problem of deciding which public defender's office was obligated to provide counsel to indigent parolees. Quite often a parolee was incarcerated in a state correctional institution located in a county a considerable distance from the county which imposed the sentence from which the parolee was paroled. This jurisdictional question was settled in 1981 in the case of *Passaro v. Pennsylvania Board of Probation and Parole.*[291] The Pennsylvania Commonwealth Court designated the public defender of the county of the parolee's incarceration, as opposed to the public defender of the parolee's sentencing county, as the office to supply legal representation to indigent parolees requesting legal representation in their proceedings before the Parole Board. In choosing the incarceration situs public defendant to shoulder the burden of representing indigent parolees, the court reasoned that

> [I]t is patently absurd, for whatever reason, to require defense counsel to travel the length and breadth of this Commonwealth, to necessitate the transportation of parolees and the attendant security problems, and to incur wholly unnecessary expenses in time and money when those same interests can be served by the incarceration site's public defender.[292]

In order to alleviate the financial burden *Passaro* placed on the twelve counties that host state correctional facilities,[293] the Pennsyl-

289. *Id.* at ____, 527 A.2d at 593-94. In *McCain*, the Commonwealth Court held that proceedings commenced by nonlawyers on behalf of others are nullities and that pleadings signed by nonlawyers on behalf of others are subject to being stricken.

290. PA. STAT. ANN. tit. 16, § 9960.6(a)(10) (Purdon Supp. 1986).

291. 56 Pa. Commw. 32, 424 A.2d 561 (1981) (en banc).

292. *Id.* at 42, 424 A.2d at 565.

293. The Pennsylvania Department of Corrections currently operates fourteen state correctional institutions (SCIs) and state correctional facilities (SRCFs) located in the following

vania General Assembly amended the Public Defender Act in 1981 to impose upon the sentencing counties the costs of providing counsel to indigent parolees.[294]

While *Passaro* solved the question of which public defender's office would provide counsel to indigent parolees at Parole Board parole revocation hearings, there still remained a problem for parolees wanting counsel to represent them in appealing parole revocation orders. Frequently, a parolee would commence an administrative or judicial appeal of an adverse parole revocation order while still housed in one of the Department of Corrections' Diagnostic and Classification Centers.[295] Subsequent to the filing of such an appeal, the parolee would be classified by the Department and transferred to another state correctional institution.

That is the factual scenario present in *Brewer v. Pennsylvania Board of Probation and Parole*,[296] in which the parolee, Kent Brewer, was incarcerated at the Eastern Diagnostic and Classification Center at SCI-Graterford, in Montgomery County, when he filed his pro se appeal of a Parole Board revocation order. Pursuant to *Passaro*, the Commonwealth Court appointed the Montgomery County Public Defender to represent him. Subsequently, Brewer was classified and transferred to SCI-Rockview, in Centre County. Following his transfer, the Montgomery County Public Defender's office petitioned the court to vacate its order appointing it to represent Brewer and to appoint the Centre County Public Defender in its stead. While Brewer joined in the Montgomery County Public Defender's request, the Centre County Public Defender's office opposed

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counties: Allegheny (SCI-Pittsburgh); Cambria (SCI-Cresson); Centre (SCI-Rockview); Cumberland (SCI-Camp Hill); Green (SCI-Waynesburg); Huntingdon (SCI-Huntingdon and SCI-Smithfield); Luzerne (SCI-Dallas and SCI-Retreat); Lycoming (SCI-Muncy); Mercer (SRCF-Mercer); Montgomery (SCI-Graterford); Schuylkill (SCI-Frackville); and Westmoreland (SCI-Greensburg). A fifteenth correctional institution, the former Eastern State Penitentiary (later renamed SCI-Philadelphia), located in Philadelphia County, was closed by the Commonwealth in 1970 and sold to the City of Philadelphia for one dollar in 1971. *See* 1986 PA. DEPT. OF CORRECTIONS ANN. REP. 54-57.

294. PA. STAT. ANN. tit. 16, § 9960.10a (Purdon Supp. 1986).

295. Diagnostic and Classification Centers are the Department of Corrections' initial reception centers for prisoners committed to its jurisdiction. PA. STAT. ANN. tit. 61, § 331.21a (Purdon 1964) mandates that parole violators who were paroled from state correctional institutions be incarcerated at the nearest diagnostic and classification center. The Department maintains three such centers for male prisoners: the Eastern center at SCI-Graterford in Montgomery County; the Central center at SCI-Camp Hill in Cumberland County; and the Western center at SCI-Pittsburgh in Allegheny County. The Diagnostic and Classification Center for female prisoners is located at SCI-Muncy in Lycoming County. *See* 37 PA. CODE § 91.4 (1986). *See also* Hillanbrand v. Pennsylvania Board of Probation and Parole, 96 Pa. Commw. 484, 491 n.5, 508 A.2d 375, 379 n.5 (1986).

296. 90 Pa. Commw. 75, 494 A.2d 36 (1985).

it.

The Commonwealth Court ruled that under *Passaro*, the situs public defender's office was responsible for representing an indigent parolee in an appeal of a Parole Board revocation order. According to the Commonwealth Court, the situs is where the parolee is presently physically incarcerated, not where he was incarcerated at the time the appeal was initially filed. In holding that the obligation to represent Brewer transferred from Montgomery County to Centre County upon Brewer's transfer from SCI-Graterford to SCI-Rockview, the court wrote:

> While our primary objective is to appoint effective counsel for the prisoner, we also must weigh the logistical and economic considerations in the choice of public defender offices. Even though Centre [County] argues that there should be minimal contacts necessary between counsel and Brewer now that the appeal has been perfected, we believe the prisoner must have reasonable access to this counsel even during the appeal period.[297]

The issue of where an indigent parolee can obtain counsel at the various stages of the parole revocation process now seems settled. The public defender's office of the county in which the parolee is physically incarcerated is responsible for providing the parolee with representation at the applicable stage of the parole revocation process. It remains up to the parolee, however, to seek the services of the public defender. The Pennsylvania Commonwealth Court has held on numerous occasions that the Parole Board is not responsible for providing indigent parolees with counsel; it is only required to provide parolees with the opportunity to obtain counsel.[298] The Parole Board is required to provide the parolee with the name and address of the local public defender and also has a duty to notify the public defender of pending parole hearings.[299] It is then up to the parolee to apply for the services of the public defender and provide such information as is required under Section 6(b) of the Public Defender Act to satisfy the public defender that the parolee is indeed indigent and qualifies for its services. The Pennsylvania Commonwealth Court has noted a parolee is not automatically "indigent"

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297. *Id.* at 79, 494 A.2d at 38.

298. *See, e.g.*, O'Hara v. Pennsylvania Board of Probation and Parole, 87 Pa. Commw. 356, 487 A.2d 90 (1985); Passaro v. Pennsylvania Board of Probation and Parole, 56 Pa. Commw. 32, 424 A.2d 561 (1981) (en banc). *See also* Patterson v. Pennsylvania Board of Probation and Parole, 215 Pa. Super. 532, 258 A.2d 693 (1969).

299. *See* 37 PA. CODE §§ 71.2(1)(iv), (5), (12)(v), (12)(vi), (15), 71.4(3)(ii), (3)(iii), (4), (5)(iv) (1983).

and qualified to receive the services of a public defender by the mere fact the parolee is incarcerated,[300] but, once a parolee has applied to the responsible public defender for legal representation and has qualified as "indigent," the public defender is obliged to undertake representation of the parolee and is not permitted to await a formal court appointment.[301]

(b) Waiving counsel.—As with any right, constitutional or statutory, the right to counsel may be waived by the parolee. The only requirement imposed by the courts is that the parolee's waiver of counsel must be knowing and voluntary. In *Coades v. Pennsylvania Board of Probation and Parole*,[302] the Pennsylvania Commonwealth Court held that a parolee may validly waive the right to counsel without having an extensive on-the-record colloquy as required under Pennsylvania Rule of Criminal Procedure 318 in probation violation cases.[303] The Commonwealth Court noted the distinction between state parole cases coming under the exclusive jurisdiction of the Parole Board and probation violation cases held in common pleas courts. The court reviewed the Parole Board's regulatory procedures which ensure the parolee is informed of 1) the right to counsel; 2) the availability of free counsel if indigent; 3) the name and address of the local public defender; 4) the fact that he will in no way be penalized for requesting counsel; and 5) documentation of the waiver on a written waiver of counsel form, PBPP-72.[304] The Commonwealth Court found that this regulatory procedure adequately safeguarded the parolee's right to counsel, and when the regulatory scheme is followed, the waiver will be deemed effective.[305] The Commonwealth Court subsequently reaffirmed its holding in *Coades* in *Hill v. Pennsylvania Board of Probation and Parole*.[306]

A parolee may also waive counsel without expressly doing so and executing the PBPP-72. In *O'Hara v. Pennsylvania Board of Probation and Parole*,[307] the parolee was deemed to have waived

300. *See* Santiago v. Pennsylvania Board of Probation and Parole, 96 Pa. Commw. 51, 52 n.1, 506 A.2d 517, 518 n.1 (1986).

301. Blair v. Pennsylvania Board of Probation and Parole, ___ Pa. Commw. ___, 518 A.2d 899 (1986).

302. 84 Pa. Commw. 484, 480 A.2d 1298 (1984).

303. *See* Commonwealth v. Fowler, 271 Pa. Super. 138, 412 A.2d 614 (1979), *appeal after remand*, 275 Pa. Super. 544, 419 A.2d 34 (1980).

304. 84 Pa. Commw. 484, 497-99, 480 A.2d 1298, 1305-06 (1984).

305. *Id.*

306. 89 Pa. Commw. 140, 492 A.2d 80 (1985), *allowance to appeal denied*, ___ Pa. ___, 524 A.2d 496 (1987).

307. 87 Pa. Commw. 356, 487 A.2d 90 (1985).

counsel representation by his actions. There, the parolee, Thomas O'Hara, was originally represented by a private attorney appointed by the Erie County Common Pleas Court pursuant to Section 7 of the Public Defender Act.[308] Following his conviction for murder and weapons offenses, O'Hara was transferred from the Erie County Prison to the Western Diagnostic and Classification Center at SCI-Pittsburgh, in Allegheny County. The Parole Board scheduled a parole revocation hearing at SCI-Pittsburgh and O'Hara's Erie County defense counsel failed to appear. O'Hara refused to apply for the services of the Allegheny County public defender, the proper office under *Passaro*, and insisted upon being represented by this Erie County attorney. After rescheduling his parole revocation hearing five times, the Parole Board refused O'Hara a further continuance in February 1982. O'Hara refused to further participate in the hearing and the Parole Board proceeded to hold the hearing in absentia and subsequently revoked his parole as a convicted parole violator. O'Hara appealed that action, claiming his right to counsel had been violated.

The Commonwealth Court disagreed and held that there comes a time when the Parole Board is justified in refusing a parolee any further continuances of a parole revocation hearing for the purpose of procuring counsel. In so holding, the court limited the extent of its 1982 ruling in *Brown v. Pennsylvania Board of Probation and Parole*,[309] in which it held that the Parole Board proceeds at its peril when it refuses an unrepresented parolee a continuance of a parole hearing in order to procure counsel. After failing to procure the presence of his desired attorney and refusing to avail himself of the services of the local public defender after five continuances spanning nearly eighteen months, the Commonwealth Court held that the Parole Board properly respected O'Hara's right to counsel. His failure to participate and procure counsel at the sixth scheduled hearing was deemed a de facto waiver of counsel.[310]

(c) Ensuring Counsel's Effectiveness.—In recent years, the Pennsylvania Commonwealth Court has scrutinized more closely the performance of defense counsel in parole revocation cases to ensure that the assistance they provide parolees is effective. In 1985, the Commonwealth Court in *LaCourt v. Pennsylvania Board of Proba-*

308. PA. STAT. ANN. tit. 16, § 9960.7 (Purdon Supp. 1986).
309. 70 Pa. Commw. 597, 453 A.2d 1068 (1982).
310. 87 Pa. Commw. 356, 370, 487 A.2d 90, 97 (1985).

tion and Parole[311] adopted a two-tiered test for determining counsel's effectiveness. The test, adopted from that set forth by the United States Supreme Court in *Strickland v. Washington*,[312] requires that the parolee show 1) that counsel made errors so serious that he or she was not functioning as "counsel" guaranteed by law; and 2) that counsel's deficient performance prejudiced the parolee's defense.[313] In *LaCourt*, the court held that in order for a parolee to show prejudice sufficient to make out a successful ineffectiveness claim, the parolee must show that there is a reasonable probability that, but for counsel's deficient performance, the result of the parole revocation proceeding would have been different.[314]

Like defendants in criminal appeals challenging the effectiveness of their trial counsel,[315] parolees bear the burden of proving counsel's ineffectiveness.[316] Also, the parolee is obliged to raise the issue of counsel's alleged ineffective performance at the first stage of the proceeding in which counsel whose ineffective performance is alleged is no longer representing the parolee or the claim is waived.[317]

Parolees have not been overly successful in pressing ineffective assistance of counsel claims in the Commonwealth Court. The court has rejected ineffectiveness claims of parolees based upon counsel's failure to present alleged mitigating evidence at the revocation hearing,[318] counsel's failure to provide the parolee with an advance copy of the brief filed in an appellate court,[319] counsel's alleged misstatement of the parolee's position in an appellate brief,[320] and counsel's alleged inadequate time to prepare for the parolee's revocation hearing.[321] In *Vereen v. Pennsylvania Board of Probation and Parole*,[322]

311. 87 Pa. Commmw. 384, 488 A.2d 70 (1985). *See also* Wile, *Right to Counsel, supra* notes 173-76.

312. 466 U.S. 668 (1984).

313. 87 Pa. Commw. at 392, 488 A.2d at 75. A similar test is used by the Pennsylvania Superior Court in the contest of probation revocation proceedings. *See* Commonwealth v. Marchesano, 348 Pa. Super. 387, 502 A.2d 597 (1985).

314. 87 Pa. Commw. at 392, 488 A.2d at 75.

315. *See, e.g.*, Commonwealth v. Shore, 487 Pa. 534, 410 A.2d 740 (1980).

316. Vereen v. Pennsylvania Board of Probation and Parole, 101 Pa. Commw. 63, 515 A.2d 637 (1986).

317. *Id.* at ____, 515 A.2d at 639-40. *Cf.* Commonwealth v. Hubbard, 472 Pa. 259, 372 A.2d 687 (1977) (criminal prosecution).

318. Pierce v. Pennsylvania Board of Probation and Parole, ____ Pa. Commw. ____, 525 A.2d 1281 (1987).

319. Winters v. Pennsylvania Board of Probation and Parole, 94 Pa. Commw. 236, 503 A.2d 488 (1986).

320. Toth v. Pennsylvania Board of Probation and Parole, 78 Pa. Commw. 19, 466 A.2d 782 (1983).

321. LaCourt v. Pennsylvania Board of Probation and Parole, 87 Pa. Commw. 384, 488 A.2d 70 (1985).

322. 101 Pa. Commw. 63, 515 A.2d 637 (1987).

the Commonwealth Court agreed with LeVance Vereen's contention that his revocation hearing counsel was ineffective. There, defense counsel failed to lodge a hearsay objection to a computer printout from a drug laboratory that served as the basis of Vereen's subsequent recommitment as a parole violator. The court found that counsel had no reasonable basis for omitting such a basic hearsay objection and that had the objection been made the outcome of the revocation hearing would probably have been different since the document was the sole basis for Vereen's recommitment. On the basis of counsel's ineffective performance, the court held that Vereen was entitled to a new revocation hearing.

In reviewing ineffectiveness claims, the Commonwealth Court seems to be following the rationale used by the Pennsylvania Supreme and Superior Courts in evaluating such claims in criminal cases. Pennsylvania appellate courts give defense counsel the benefit of the doubt when examining counsel's performance. If counsel had some reasonable basis for the challenged action or strategy that was designed to effectuate the client's interests, counsel will be found effective.[323] While *Vereen* shows that it is possible for a parolee to successfully challenge his or her counsel's effectiveness, it is clear that a parolee attempting to do so shoulders a very heavy burden.

7. Right to a Prompt Hearing.—Traditionally, judicial oversight of the Parole Board's scheduling of parole revocation hearings has focused primarily upon requiring the Parole Board to comply with its own regulations regarding providing parolees with first and second level violation and revocation hearings. The courts have recognized, however, that a prompt disposition of asserted parole violations is a due process right and an untimely parole violation hearing constitutes a per se due process violation entitling the parolee to a dismissal with prejudice of the asserted parole violations.[324]

In reviewing timeliness claims of parolees, the courts have shown far more concern for conduct or events at the second level violation or revocation hearings. The Pennsylvania Commonwealth Court has consistently held that if objections to the timeliness of the first level preliminary or detention hearing are not made prior to the

323. *See, e.g.*, Commonwealth v. Wells, ___ Pa. ___, 521 A.2d 1388 (1987); Commonwealth v. Buehl, 510 Pa. 363, 508 A.2d 1167 (1986); Commonwealth v. Thomas, ___ Pa. Super. ___, 526 A.2d 380 (1987); Commonwealth v. McCabe, 359 Pa. Super. 566, 519 A.2d 497 (1986).

324. Capers v. Pennsylvania Board of Probation and Parole, 42 Pa. Commw. 356, 400 A.2d 922 (1979) (en banc).

second level or final violation or revocation hearing, the timeliness objection is considered waived and the parolee has suffered a wrong for which there is no remedy.[325] In *Donnelly v. Pennsylvania Board of Probation and Parole*,[326] the Commonwealth Court held a parolee may not object to the untimeliness of his preliminary hearing under 37 Pa. Code § 71.2(3) once parole has been revoked at a violation hearing. Similarly, in *Whittington v. Pennsylvania Board of Probation and Parole*,[327] the Commonwealth Court held that a parolee who failed to object to the timeliness of his detention hearing prior to his revocation hearing waived the timeliness claim and suffered a wrong for which there is no remedy. The rationale of the Commonwealth Court, as can be gleaned from its opinions, is that an illegal detention will not invalidate an otherwise proper parole revocation.[328]

Most of the appellate decisions dealing with timeliness issues have involved the second level violation or revocation hearings. As noted earlier, Parole Board regulations require the scheduling of a second level hearing within 120 days of a triggering event.[329] For a violation hearing, the triggering event is the finding of probable cause at the parole preliminary hearing.[330] When a new criminal conviction is the subject of a revocation hearing, the triggering event is the official verification to the Parole Board of the guilty plea or verdict.[331]

The 120 day period has been interpreted to be an absolute time limit, the violation of which is a per se due process violation entitling the parolee to a dismissal of the asserted parole violations with prejudice.[332] Thus, the 120 day rule for Parole Board cases differs from that utilized by the common pleas court in probation and parole revocation cases coming under their jurisdiction.[333] Under the Rules of Criminal Procedure, a probation or parole violation hearing must be held "as speedily as possible." The test for determining the timeliness of a parole or probation violation hearing under the Rules

325. *See, e.g.*, Nicastro v. Pennsylvania Board of Probation and Parole, 71 Pa. Commw. 532, 455 A.2d 295 (1983).

326. 72 Pa. Commw. 290, 457 A.2d 145 (1983).

327. 45 Pa. Commw. 658, 404 A.2d 782 (1979).

328. *See, e.g.*, Anderson v. Pennsylvania Board of Probation and Parole, 80 Pa. Commw. 295, 471 A.2d 593 (1984), *citing* Gerstein v. Pugh, 420 U.S. 103 (1975) (an illegal arrest or detention does not void a subsequent conviction).

329. *See supra* notes 128 and 152 and accompanying text.

330. *See* 37 PA. CODE § 71.2(11) (1986).

331. *See* 37 PA. CODE § 71.4(2) (1986).

332. *See, e.g.*, Capers v. Pennsylvania Board of Probation and Parole, 42 Pa. Commw. 356, 400 A.2d 922 (1979) (en banc).

333. *See* Pa. R. Crim. P., Rule 1409, 42 PA. CONS. STAT. ANN. (Purdon 1987).

of Criminal Procedure for due process purposes is to look at the facts and circumstances of the delay, the reasons for the delay, and the prejudice to the probationer or parolee.[334] The Pennsylvania Superior Court has defined "delay," within the context of a probation or parole violation hearing, to mean the time from conviction to the actual revocation hearing.[335] According to the Superior Court's definition, if there is never a conviction, there can never be a delay, and the revocation hearing is presumed timely.[336]

The method of determining the timeliness of Parole Board violation and revocation hearings is more akin to the method used to calculate compliance with the speedy trial rule of Pennsylvania Rule of Criminal Procedure 1100.[337] Thus, unless a period of delay can be directly attributed to the parolee, it is included in the calculation to determine whether the revocation hearing was held within the 120 day period. The Pennsylvania Commonwealth Court has held that a parolee's unavailability due to federal or out-of-state confinement is not counted against the Parole Board for purposes of determining compliance with the 120 day rule.[338]

Pennsylvania appellate courts have consistently held that periods of delay attributed to continuance requests made by the parolee or on his or her behalf are not counted in determining the timeliness of subsequent violation or revocation hearings. The parolee does not even have to know or agree to such a continuance request so long as it is made on his or her behalf. For example, in *Chancey v. Pennsylvania Board of Probation and Parole*,[339] the parolee, Nicholas Chancey, was charged by the Parole Board with various technical parole violations while he was imprisoned in Philadelphia County on new criminal charges. A parole preliminary hearing was scheduled for April 28, 1981, at the Philadelphia House of Correction, but Chancey was hospitalized at the time with a serious illness. An attorney from the Defender Association of Philadelphia, unbeknownst to Chancey, requested a continuance of the preliminary hearing due to his hospitalization. On four subsequent occasions the Parole Board rescheduled Chancey's preliminary hearing and on each of those oc-

334. *See* Commonwealth v. Gochenaur, 331 Pa. Super. 187, 480 A.2d 307 (1984); Commonwealth v. Dorsey, 328 Pa. Super. 241, 476 A.2d 1308 (1984).

335. Commonwealth v. Donato, 353 Pa. Super. 37, 508 A.2d 1256 (1986).

336. *Id.* at 48, 508 A.2d at 1261; *see also* Commonwealth v. Reed, 277 Pa. Super. 94, 419 A.2d 677 (1980).

337. Pa. R. Crim. P., Rule 1100, 42 PA. CONS. STAT. ANN. (Purdon 1987).

338. *See, e.g.*, Brown v. Pennsylvania Board of Probation and Parole, 70 Pa. Commw. 597, 453 A.2d 1068 (1982).

339. 83 Pa. Commw. 42, 477 A.2d 22 (1984).

casions a public defender requested continuances due to his continued hospitalization. When the preliminary hearing was finally held on November 6, 1981, Chancey voiced objections to the timeliness of the preliminary hearing but did not object or otherwise complain about the representation he received from the Philadelphia Defender Association. The Parole Board overruled his timeliness objection and, following the subsequent revocation of his parole, Chancey appealed the revocation order to the Pennsylvania Commonwealth Court, again claiming his preliminary hearing was untimely.

The Commonwealth Court rejected Chancey's argument that a continuance request made by counsel is invalid unless it is made with the parolee's full knowledge and consent. In upholding the timeliness of the preliminary hearing and the validity of the continuance requests made by the public defender, the court reasoned that:

> [C]ontinuances are a matter of sound trial strategy within the reasonable purview of counsel. To hold that counsel cannot unilaterally request continuances that would delay a hearing beyond the time imposed by the [Parole] Board's regulations would severely hamper counsel's ability to effectuate trial strategy.[340]

In response to Chancey's contention that the continuance request was invalid because he had not yet engaged the services of the Defender's Association at the time the requests were made, the court held that the Parole Board, like a court, is entitled to proceed on the basis that a lawyer as an officer of the court represents the person the lawyer purports to represent.[341] The fact that Chancey was represented throughout his initial parole revocation proceedings by the Philadelphia Defender Association undoubtedly diluted his argument that the public defender did not act on his behalf when the continuances were requested. By accepting the services of the Philadelphia Defender's Association, Chancey could be seen to have ratified the actions taken by the public defender on his behalf.[342]

Thus, while delays attributable to the parolee or the parolee's counsel are clearly excluded from determining whether the Parole Board complied with the 120 day rule, the significance of delays attributable to the Parole Board is not as clear cut. The Parole Board's

340. *Id.* at 47, 477 A.2d at 24-25 (citations omitted).

341. *Id.* at 47, 477 A.2d at 24.

342. *Cf.* SEI Corporation v. Norton & Company, 631 F. Supp. 497 (E.D. Pa. 1986) (affirmance of an attorney's unauthorized act may be inferred by the client's failure to repudiate it). *See also* Pueblo of Santo Domingo v. United States, 647 F.2d 1087 (Ct. Cl. 1981); RESTATEMENT (SECOND) AGENCY § 94 (1958).

regulation dealing with computing the period in which it must provide parolees with hearings now excludes from that computation "[r]easonable or necessary continuances granted to, or occurrences related to, the [Parole] Board or its employees."[343] The appellate courts have exercised a greater scrutiny in determining timeliness issues where the delays have been due to actions of the Parole Board.

In *Capers v. Pennsylvania Board of Probation and Parole*,[344] the Parole Board delayed James Capers' parole violation hearing on two occasions. The first delay was made to accommodate the parole agent's vacation plans. The second delay was occasioned by the parole agent's unavailability due to injuries from an assault the day prior to the scheduled parole violation hearing. In *Capers*, the Commonwealth Court held that the delay occasioned by both the agent's vacation and the assault counted against the Parole Board for timeliness purposes. Since the parolee's violation hearing was held outside of the 120 day limit, the court reversed the parole revocation order and mandated that Capers' parole be reinstated. While the Parole Board's regulation (as it existed at the time of *Capers*) did not include an exclusion for reasonable or necessary continuances or occurrences related to the Parole Board or its employees,[345] such an exclusion would have only served to eliminate the second delay, caused by the assault upon the parole agent. The first delay, made to accommodate the parole agent's vacation plans, would probably not be considered either "reasonable" or "necessary" and would still be considered as included in the time computation to determine timeliness.

The decisions indicate a judicial willingness to hold parolees accountable for delays initiated or caused by them in holding parole revocation hearings. The Commonwealth Court is also willing to charge against the Parole Board delays over which a parolee has no control or for which there are no reasonable grounds. While the courts have shown considerable deference to the Parole Board's explanations of delays attributable to its agents and employees, the courts have also served notice that the Parole Board's discretion in this area is not unbridled and that the sanction of vacating a parole revocation order will be imposed if the Parole Board violates a pa-

343. 37 PA. CODE § 71.5(i)(3) (1986).

344. 42 Pa. Commw. 50, 400 A.2d 922 (1979) (en banc).

345. Following the Commonwealth Court's decision in *Capers*, the Parole Board amended 37 PA. CODE § 71.5(i) to include subsection (3), allowing for the exclusion of delays in holding parole hearings due to reasonable and necessary continuances occasioned by the Parole Board or its employees. *See* 12 Pa. Bull. 3290 (1982).

rolee's right to a timely revocation hearing.

IV. Review of Parole Revocation Decisions

Parole revocation orders are subject to appellate review, both at the agency and the judicial level. By comparison, the Pennsylvania Commonwealth Court in its *Reider*[346] decision held that Parole Board orders denying prisoners' applications for parole are not subject to review. Since the 1980 Pennsylvania Supreme Court decision in *Bronson v. Pennsylvania Board of Probation and Parole*,[347] appeals from Parole Board revocation orders are heard by the Pennsylvania Commonwealth Court in the same manner as appeals from final orders of any other Commonwealth administrative agency. Previously, the Commonwealth Court had heard such appeals as mandamus actions under its original jurisdiction.

A. Administrative Remedies

Prior to seeking judicial review of a Parole Board revocation order, a parolee must first seek redress from the Parole Board itself through an administrative appeal process. In its 1985 decision in *St. Clair v. Pennsylvania Board of Probation and Parole*,[348] the Pennsylvania Commonwealth Court held that the exhaustion doctrine is fully applicable to appeals of parole revocation orders. Thus, before a parolee may file a petition for review with the Pennsylvania Commonwealth Court of a parole revocation order, the parolee is first required to exhaust his or her administrative remedies.

Prior to Act 134, the sole administrative remedy with the Parole Board is a process it terms "administrative relief."[349] Parolees were required to file petitions for administrative relief with the Parole Board within thirty days from the mailing date of the parole revocation order from which relief is sought. The petition must be actually received by the Parole Board within the thirty day appeal period and late appeals were routinely denied by the Parole Board as untimely.[350] There is no "mailbox rule" in connection with the administrative relief process where the Parole Board would consider the date

346. Reider v. Pennsylvania Board of Probation and Parole, ___ Pa. Commw. ___, 514 A.2d 967 (1986) (en banc).

347. 491 Pa. 549, 421 A.2d 1021 (1980), *cert. denied*, 450 U.S. 1050 (1981).

348. 89 Pa. Commw. 561, 493 A.2d 146 (1985).

349. *See* 37 PA. CODE § 71.5(h) (1986). *See also supra* note 164 and accompanying text.

350. *See, e.g.*, Maldonado v. Pennsylvania Board of Probation and Parole, 89 Pa. Commw. 576, 492 A.2d 1202 (1985).

of mailing as the date of receipt of an appeal.[351] The petition for administrative relief was processed by the Parole Board's Hearing Review Division, which made a recommendation to the Parole Board for final disposition. The thirty day appeal period for filing a petition for review with the Pennsylvania Commonwealth Court commenced when the answer to the administrative relief petition was mailed by the Parole Board.[352]

This procedure was changed in 1986 by the passage of Act 134. Act 134 created a statutory administrative appeal procedure whereby administrative appeals would be heard by three members of the Parole Board. The Parole Board is presently promulgating regulations designed to implement the changes wrought by Act 134.[353] In its proposed regulations, the Parole Board establishes a bifurcated administrative appeal and relief process. Direct appeals, i.e., those pertaining to issues involving actual parole revocation orders, are handled by the three member panels specified by Act 134. Matters not appealable under Act 134 may still be the subject of an administrative relief petition. Items that may conceivably come under administrative "relief" would be time credit claims that normally do not arise until after a parole revocation order has been issued. While the regulations do not so state, it can be presumed that administrative relief petitions will continue to be processed by the Hearing Review Division. The proposed regulations empower the Parole Board to designate an entity other than itself to dispose of administrative relief matters.

Under both the present and proposed regulations, in order to obtain administrative review a parolee is directed to submit a clear statement of the factual and legal grounds for the appeal. Under the proposed regulations, failure to state clearly and accurately the factual and legal grounds for the appeal is a possible basis for denying the appeal.[354] In addition, under the Administrative Agency Law[355] and the Rules of Appellate Procedure,[356] the failure to raise an issue during the administrative process constitutes a waiver of that issue for purposes of judicial review.[357]

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351. *Id.* at 577-78, 492 A.2d at 1202-03. *See also* 1 PA. CODE § 31.11 (1986).

352. 37 PA. CODE § 71.5(h) (1986). *See also* Pa. R. App. P. 1512(a), 42 PA. CONS. STAT. ANN. (Purdon 1987).

353. *See supra* notes 162 and 163 and accompanying text.

354. ___ Pa. Bull. ___ (1987), proposed 37 PA. CODE §§ 73.1(a)(3) and 73.1(b)(2) (Parole Board draft regulation dated December 8, 1986).

355. 2 PA. CONS. STAT. ANN. § 703(a) (Purdon Supp. 1986).

356. Pa. R. App. P., Rule 1551(a), 42 PA. CONS. STAT. ANN. (Purdon 1987).

357. *See, e.g.*, Lantzy v. Pennsylvania Board of Probation and Parole, 82 Pa. Commw.

In adopting the exhaustion doctrine to parole revocation appeals, the Pennsylvania Commonwealth Court found that the administrative relief process currently embodied in the Parole Board's regulations[358] provided parolees with an adequate and meaningful administrative remedy.[359] The proposed regulations set forth a more specific procedure for seeking redress from parole revocation orders in the administrative setting. Thus, while the proposed regulations tighten up the administrative appeal procedure, they also offer a more meaningful administrative remedy than that currently found adequate by the Commonwealth Court.

The policy rationale for adopting the exhaustion doctrine to parole revocation appeals is two-fold. First, by requiring parolees to first seek redress from the Parole Board, the court gives the Parole Board the opportunity to correct its own errors, thus possibly relieving some of the pressure on the court's own appeal docket.[360] Secondly, the courts are availing themselves of the specialized expertise of the Parole Board in this area of the law.[361] Therefore, the exhaustion of the administrative appeal process with the Parole Board is an essential prerequisite to obtaining judicial review of a parole revocation order.

B. Judicial Review

Exclusive jurisdiction over actions involving Parole Board revocation orders lies with the Pennsylvania Commonwealth Court.[362] In *Bronson*, the Pennsylvania Supreme Court held that such appeals are properly treated as appeals from final orders of Commonwealth agencies under the appellate jurisdiction of the Commonwealth Court.[363] This is the exclusive method by which a parolee may obtain judicial review of a Parole Board revocation order. In *Commonwealth v. Fells*,[364] the Pennsylvania Supreme Court held that the Post Hearing Conviction Act (PCHA)[365] was not applicable to Parole Board revocation orders. Likewise, in *Commonwealth ex rel. Bi-*

626, 477 A.2d 18 (1984).

358. 37 PA. CODE § 71.5(h) (1986).

359. St. Clair v. Pennsylvania Board of Probation and Parole, 89 Pa. Commw. 561, 569, 493 A.2d 146, 152 (1985).

360. *See, e.g.*, Parisi v. Davidson, 405 U.S. 34 (1972).

361. *See, e.g.*, A & B Wiper Supply, Inc. v. Consumer Product Safety Commission, 514 F. Supp. 1145 (E.D. Pa. 1981).

362. *See* 42 PA. CONS. STAT. ANN. § 763(a)(1) (Purdon 1982).

363. 491 Pa. 549, 421 A.2d 1021 (1980), *cert. denied*, 450 U.S. 1050 (1981).

364. ___ Pa. ___, 518 A.2d 544 (1986).

365. 42 PA. CONS. STAT. ANN. §§ 9541-9551 (Purdon 1982).

glow v. Ashe,[366] the Pennsylvania Supreme Court indicated that Parole Board revocation orders are not reviewable by way of a petition for a writ of habeas corpus. There is no case whereby a parolee's attempt to circumvent the exclusive jurisdiction of the Commonwealth Court over Parole Board orders has met with any success in the Pennsylvania Supreme Court.

1. Prerequisites to Judicial Appeal.—As noted in the preceding section, a parolee desiring judicial review of the propriety of a Parole Board revocation order must first exhaust the administrative appeal process available with that agency. Only after the Parole Board has acted on the administrative appeal will an appellate court grant judicial review of the matter.

Once the Parole Board has issued its decision on a parolee's administrative appeal, the parolee has thirty days from the date of mailing of the Parole Board's decision in which to file a petition for review with the Pennsylvania Commonwealth Court.[367] The thirty-day appeal period is mandated by the Rules of Appellate Procedure and is jurisdictional in nature.[368] If the petition for review is filed even one day late, the appeal is untimely and the appellate court is deprived of jurisdiction to entertain the merits of the appeal.[369] The date of mailing of the petition for review can serve as the date of filing if the parolee attaches a certificate of mailing (United States Postal Service Form 3817), showing the date of mailing and the parole number of the Parole Board's order, or mails such a certificate separately to the prothonotary.[370]

The Rules of Appellate Procedure also specify the form and content of the petition for review.[371] Pa.R.A.P. 1513(b) requires that the government unit whose determination is sought to be reviewed,

366. 348 Pa. 409, 35 A.2d 341 (1944). *See also* Gillespie v. Department of Corrections, ___ Pa. Commw. ___, 527 A.2d 1061 (1987).

367. Pa. R. App. P., Rule 1512(a), 42 PA. CONS. STAT. ANN. (Purdon 1987). However, when the Parole Board fails to place a mailing date on its response to an administrative appeal, the thirty day appeal period of Rule 1512(a) does not apply. Wagner v. Pennsylvania Board of Probation and Parole, ___ Pa. Commw. ___, 522 A.2d 155 (1987).

368. *See, e.g.*, Miller v. Unemployment Compensation Board of Review, 505 Pa. 8, 476 A.2d 364 (1984).

369. Hillanbrand v. Pennsylvania Board of Probation and Parole, 96 Pa. Commw. 484, 508 A.2d 375 (1986); St. Clair v. Pennsylvania Board of Probation and Parole, 89 Pa. Commw. 561, 493 A.2d 146 (1985); Manuel v. Pennsylvania Board of Probation and Parole, 76 Pa. Commw. 270, 463 A.2d 1236 (1983).

370. Rule 1514(a), 42 PA. CONS. STAT. ANN. (Purdon 1987). In Sheets v. Department of Public Welfare, 84 Pa. Commw. 388, 479 A.2d 80 (1984), the Pennsylvania Commonwealth Court held that a certified mail form (United States Postal Service Form 3800) bearing a mailing date stamp or postmark by postal authorities will satisfy this rule.

371. *See* Pa.R.A.P., Rule 1513(a), (b), 42 PA. CONS. STAT. ANN. (Purdon 1987).

shall be named as a respondent. In cases involving the Parole Board, the respondent is always the Parole Board and should never be the individual members of the agency. The petition for review itself must contain the following:

> 1. A statement of the basis for the court's jurisdiction. In state parole cases the basis is Section 763(a)(1) of the Judicial Code;
>
> 2. The name of the party seeking review, i.e., the parolee;
>
> 3. The name of the government unit that made the determination sought to be reviewed. In state parole cases it will always be the Parole Board;
>
> 4. A reference to the order or other determination sought to be reviewed, which in state parole cases is the denial of administrative relief and should be identified by the parole number assigned by the Parole Board and the recording or mailing date of the order;
>
> 5. A general statement of the issues sought to be presented to the appellate court; and
>
> 6. A short statement of the relief sought by the parolee.[372]

The petition for review must be filed with proof of service.[373] When a parolee is applying to proceed in forma pauperis, an indigency affidavit must accompany the petition for review; otherwise, the appropriate filing fee must be paid.[374]

2. Scope of Judicial Review.—An appellate court's power of review over a Parole Board revocation order is expressly limited by the Administrative Agency Law. Under Section 703(a) of the Administrative Agency Law,[375] an appellate court may not consider an issue on judicial review that was not raised before the Parole Board. Additionally, the Rules of Appellate Procedure preclude consideration of issues not first addressed to the applicable agency.[376] Thus, in *Seifrit v. Pennsylvania Board of Probation and Parole*,[377] the Pennsylvania Commonwealth Court held that a parolee waived the issue of the sufficiency of the tests utilized by the Parole Board's labora-

372. *Id.*

373. Pa. R.A.P., Rule 1514(a), 42 PA. CONS. STAT. ANN. (Purdon 1987). *See also* Pa.R.A.P., Rule 121, 122, 42 PA. CONS. STAT. ANN. (Purdon 1987).

374. *See generally* Pa.R.A.P., Rule 551-561, 2701, 42 PA. CONS. STAT. ANN. (Purdon 1987).

375. 2 PA. CONS. STAT. ANN. § 703(a) (Purdon Supp. 1986).

376. *See* Pa.R.A.P., Rule 1551(a), 42 PA. CONS. STAT. ANN. (Purdon 1987).

377. ___ Pa. Commw. ___, 514 A.2d 654 (1986).

tory by failing to raise the issue on administrative appeal. Likewise, in *Lantzy v. Pennsylvania Board of Probation and Parole*,[378] the same court held that a parolee waived the issue of the sufficiency of a good cause finding to allow a parole agent's affidavit in evidence and denying the parolee the right to confront and cross-examine the agent by failing to raise that issue on administrative appeal. The Commonwealth Court found that the parolee in *Harper v. Pennsylvania Board of Probation and Parole*[379] waived alleged technical defects in his arrest and detention by the Parole Board by failing to raise them at his parole violation hearing or on administrative appeal. Thus, an appellate court is limited on judicial review to consideration of only those issues that were raised before the Parole Board and that the agency had an opportunity to consider.

Of those issues which are properly preserved for judicial review, the appellate court's scope of review is further restricted by Section 704 of the Administrative Agency Law.[380] Under Section 704, an appellate court is required to affirm a Parole Board revocation order unless that court determines, 1) that a necessary finding is unsupported by substantial evidence; 2) that the Parole Board made an error of law; or 3) that a constitutional right of the parolee was violated.[381]

The "substantial evidence" test is thus the standard used by the appellate court to ascertain whether the Parole Board's findings have proper evidentiary support consistent with notions of due process. "Substantial evidence" has been judicially defined as "such evidence as a reasonable mind might accept as adequate to support a conclusion . . . something more than a scintilla creating a mere suspicion of the existence of the fact to be established."[382] The test is a fairly easy one for the Parole Board to meet. In applying the test, the court reviews all of the evidence in the record that tends to support the Parole Board's findings to determine if, as a whole, it is adequate to support the findings. The court does not consider conflicting evidence, nor does it review the Parole Board's credibility determina-

378. 82 Pa. Commw. 626, 477 A.2d 18 (1984).

379. ___ Pa. Commw. ___, 520 A.2d 518 (1987).

380. 2 PA. CONS. STAT. ANN. § 704 (Purdon Supp. 1986).

381. *See, e.g.*, O'Hara v. Pennsylvania Board of Probation and Parole, 87 Pa. Commw. 356, 487 A.2d 90 (1985); Zazo v. Pennsylvania Board of Probation and Parole, 80 Pa. Commw. 198, 470 A.2d 1135 (1984). *See generally* Estate of McGovern v. State Employees' Retirement Board, 512 Pa. 377, 517 A.2d 523 (1986) (appellate court's scope of review is strictly limited by 2 PA. CONS. STAT. ANN. § 704 (Purdon Supp. 1986) to determining whether that finding is supported by substantial evidence in the record).

382. Chapman v. Pennsylvania Board of Probation and Parole, 86 Pa. Commw. 49, 54, 484 A.2d 413, 416 (1984).

tions or weighing of the evidence.

Conflicting evidence is not considered by the appellate court for a number of reasons. The focus in the substantial evidence test is on that evidence which tends to support the agency's findings. The vitality of the alternative "capricious disregard of competent evidence" test, used by the Pennsylvania Commonwealth Court when the party with the burden of proof has not prevailed before the agency, was called into question by the Pennsylvania Supreme Court in favor of the exclusivity of the substantial evidence test.[383] Since the Parole Board bears the burden of proving asserted parole violations by a preponderance of the evidence, the capricious disregard test was not usually applicable to appeals of parole revocation orders. Another reason conflicting evidence in the record is not reviewed by the appellate court is the position of the Parole Board as the ultimate fact-finder. On numerous occasions, the Commonwealth Court has stated that it will not review the Parole Board's credibility determinations or its weighing of evidence since such functions are solely within its discretion as the fact-finding agency and are not proper functions of a reviewing court.[384] For that reason, the Pennsylvania Commonwealth Court has held in the area of administrative law that the presence of conflicting evidence in the record does not deprive an agency's findings of support by substantial evidence.[385]

While the substantial evidence test is not difficult for the Parole Board to meet, it does require satisfaction of some minimal standards in order to comport with notions of administrative due process. In order to constitute "substantial evidence," the evidence in the record must be both relevant and competent. Although hearsay evidence is admissible in parole revocation proceedings upon a showing of good cause,[386] Pennsylvania appellate courts have held since 1976

383. *See* Estate of McGovern v. State Employees' Retirement Board, 512 Pa. 377, 517 A.2d 523 (1986). A "capricious disregard of competent evidence" was defined as the disbelief of testimony or evidence that someone of ordinary intelligence could not possibly challenge or entertain the slightest doubt as to its truth. *See* Brennan v. Unemployment Compensation Board of Review, 87 Pa. Commw. 265, 270, 487 A.2d 73, 77 (1985). There is a question whether the Pennsylvania Supreme Court really meant to abolish the "capricious disregard" standard in *Estate of McGovern*. Since deciding *Estate of McGovern*, the Pennsylvania Supreme Court itself has used the "capricious disregard" test. *See, e.g.*, Farquhar v. Workmen's Compensation Appeal Board (Corning Glass Works), ___ Pa. ___, ___ A.2d ___ (No. 53 W.D. Appeal Docket 1986, filed July 9, 1987).

384. *See, e.g.*, Harper v. Pennsylvania Board of Probation and Parole, ___ Pa. Commw. ___, ___, 520 A.2d 518, 520 (1987); Chapman v. Pennsylvania Board of Probation and Parole, 86 Pa. Commw. 49, 54, 484 A.2d 413, 416 (1984).

385. *See, e.g.*, *Chapman*, *Id.* at 54, 484 A.2d at 416; Kells v. Unemployment Compensation Board of Review, 32 Pa. Commw. 142, 378 A.2d 495 (1977).

386. Sinwell v. Pennsylvania Board of Probation and Parole, 46 Pa. Commw. 429, 432,

that hearsay evidence, standing alone, is not competent to support an agency finding.[387] Additionally, both of Pennsylvania's intermediate appellate courts have specifically held that a finding of a violation of parole or probation based entirely upon hearsay evidence violates due process.[388] However, since the technical rules of evidence do not apply to parole revocation proceedings,[389] other than the use of hearsay, the Parole Board generally has wide latitude in the types of evidence it may utilize in satisfying its burden of proof.

In reviewing the record for evidentiary support for Parole Board findings, the Commonwealth Court has indicated that certain types of evidence may constitute substantial evidence as a matter of law. Case law indicates that the court accepts the following types of evidence as substantial evidence in parole revocation cases: 1) a parolee's admission on the record;[390] 2) a parole agent's testimony of a parolee's admission made off the record;[391] 3) certified copies of court records;[392] and 4) photographic copies of public records.[393] The Commonwealth Court has indicated that business records would also constitute substantial evidence to support a Parole Board finding that a parolee violated parole.[394]

The court's review of the Parole Board's findings is made more difficult by the lack of a requirement for it to make specific findings of fact and conclusions of law as part of its parole revocation orders.

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406 A.2d 597, 599 (1979).

387. Vann v. Unemployment Compensation Board of Review, 508 Pa. 139, 494 A.2d 1081 (1985); Burks v. Department of Public Welfare, 48 Pa. Commw. 6, 408 A.2d 974 (1979); Walker v. Unemployment Compensation Board of Review, 27 Pa. Commw. 522, 367 A.2d 366 (1976).

388. Grello v. Pennsylvania Board of Probation and Parole, 83 Pa. Commw. 252, 477 A.2d 45 (1984); Commonwealth v. Greenlee, 263 Pa. Super. 477, 398 A.2d 676 (1979).

389. *See* 2 PA. CONS. STAT. ANN. § 505 (Purdon Supp. 1986). This statute provides:

> *§505. Evidence and cross-examination.*
>
> Commonwealth agencies shall not be bound by technical rules of evidence at agency hearings, and all relevant evidence of reasonably probative value may be received. Reasonable examination and cross-examination shall be permitted.

Id. This provision of the Administrative Agency Law is not limited to "adjudications" and is therefore applicable to Parole Board proceedings.

390. Pitch v. Pennsylvania Board of Probation and Parole, 100 Pa. Commw. 114, 514 A.2d 638 (1986); Heckrote v. Pennsylvania Board of Probation and Parole, 77 Pa. Commw. 131, 465 A.2d 118 (1983).

391. Falsaco v. Pennsylvania Board of Probation and Parole, ___ Pa. Commw. ___, 521 A.2d 991 (1987).

392. LaCourt v. Pennsylvania Board of Probation and Parole, 87 Pa. Commw. 384, 488 A.2d 70 (1985); Chapman v. Pennsylvania Board of Probation and Parole, 86 Pa. Commw. 49, 484 A.2d 413 (1984).

393. Anderson v. Pennsylvania Board of Probation and Parole, 91 Pa. Commw. 486, 497 A.2d 947 (1985); Davis v. Pennsylvania Board of Probation and Parole, 85 Pa. Commw. 278, 481 A.2d 714 (1984).

394. Whitmore v. Pennsylvania Board of Probation and Parole, 94 Pa. Commw. 569, 504 A.2d 401 (1986).

Section 507 of the Administrative Agency Law[395] requires other commonwealth agencies to make such findings and conclusions as a precondition to the validity of their adjudications. By its very definition of "adjudication," the Administrative Agency Law excludes parole revocation proceedings from most, but not all, of the procedural requirements of the Administrative Agency Law.[396] On numerous occasions, the Pennsylvania Commonwealth Court has sharply criticized the Parole Board for the language and style used in its parole revocation orders and has recommended a certain format in lieu of the specific findings and conclusions mandated by Section 507.[397]

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395. *See* 2 PA. CONS. STAT. ANN. § 507 (Purdon Supp. 1986). This statute provides:

> *§ 507. Contents and service of adjudications.*
>
> All adjudications of a Commonwealth agency shall be in writing, shall contain findings and the reasons for the adjudication, and shall be served upon all parties or their counsel personally, or by mail.

Id.

396. A discussion of the definition of "adjudication" and its ramifications on the applicability of the Administrative Agency Law on Parole Board revocation proceedings is found at note 264 and accompanying text. Of the procedural sections of the Administrative Agency Law, 2 PA. CONS. STAT. ANN. §§ 501-508 (Purdon Supp. 1986), that pertain to agency hearings, Sections 504 and 506 through and including 508 are limited by their terms to "adjudications" and have been held not applicable to Parole Board revocation proceedings. *See* Davis v. Pennsylvania Board of Probation and Parole, 85 Pa. Commw. 278, 481 A.2d 714 (1984). Sections 502 (pertaining to representation by counsel) and 505 (pertaining to evidence and cross-examination) deal only with Commonwealth agencies and their hearings and have been held to be applicable to Parole Board proceedings. *See* Pitch v. Pennsylvania Board of Probation and Parole, 100 Pa. Commw. 114, 514 A.2d 638 (1986) (Parole Board could properly consider parolee's solicited admission to technical parole violations under Section 505); Coades v. Pennsylvania Board of Probation and Parole, 84 Pa. Commw. 484, 480 A.2d 1298 (1984) (parolee's right to counsel at Parole Board revocation proceedings partially founded in Section 502). In Bronson v. Pennsylvania Board of Probation and Parole, 491 Pa. 549, 421 A.2d 1021 (1980), *cert. denied*, 450 U.S. 1050 (1981), the Pennsylvania Supreme Court held the appeal provisions of the Administrative Agency Law, 2 PA. CONS. STAT. ANN. §§ 701-704 (Purdon Supp. 1986), were applicable to the Parole Board's revocation proceedings despite statutory language addressing appeals from "adjudications" of Commonwealth agencies. The Pennsylvania Supreme Court has never clarified the status of Parole Board revocation orders vis-a-vis the Administrative Agency Law. One possible rationale that reconciles *Bronson* with the definition of "adjudication" in 2 PA. CONS. STAT. ANN. § 101 (Purdon Supp. 1986) is to apply the exclusion from definition of parole orders dealing with parole *applications* while including as adjudications parole orders dealing with parole revocations. Although the Pennsylvania Supreme Court has had several opportunities in which to do so, it has not rationalized *Bronson* with the Administrative Agency Law's definition of "adjudication" so as to justify its holding applying Sections 701 through 704 of the Administrative Agency Law to the Parole Board's revocation proceedings. *See* Rivenbark v. Pennsylvania Board of Probation and Parole, 509 Pa. 248, 501 A.2d 1110 (1985); Cox v. Board of Probation and Parole, 507 Pa. 614, 493 A.2d 680 (1985).

397. *See, e.g.*, Macik v. Pennsylvania Board of Probation and Parole, ___ Pa. Commw. ___, 526 A.2d 460 (1987) (case remanded where Parole Board failed to make a specific finding on parolee's legitimate or unlawful use of utility knife found on his person); Wagner v. Pennsylvania Board of Probation and Parole, ___ Pa. Commw. ___, 522 A.2d 155 (1987) (case remanded where Parole Board's use of term "unexpired term" in revocation order was unclear in light of multiple classes of parole violations); Kramer v. Pennsylvania Board of Probation and Parole, ___ Pa. Commw. ___, 521 A.2d 975 (1987) (Commonwealth Court will not affirm a Parole Board revocation order that is vague and ambiguous with respect to

Other than reviewing the evidentiary support for the Parole Board's findings, an appellate court is limited to determining whether the Parole Board committed an error of law or violated a constitutional right of a parolee in its revocation order. Issues concerning the Parole Board's alleged errors of law usually center upon its interpretation of the Parole Act or of its own regulations. With respect to the Parole Board's interpretation of its own regulations, Pennsylvania courts have consistently held that an agency's interpretation of its own regulations is entitled to controlling weight as long as the interpretation is consistent with the regulation and the enabling legislation.[398] In view of such a doctrine, challenging the Parole Board's interpretation of either its own regulations or of the Parole Act does not offer a parolee much promise of success, although there have been some notable exceptions.[399]

Issues concerning the Parole Board's compliance with its own regulations hold more promise for success for parolees. The courts have held that the Parole Board, like other agencies, is required to comply with its own regulations.[400] When it has failed to do so, the decisions from the appellate courts are mixed on the appropriate sanctions used to punish such noncompliance.[401]

3. Judicial Deference to Parole Board Discretion.—One of the

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the amount and service of backtime ordered); Pitt v. Pennsylvania Board of Probation and Parole, 97 Pa. Commw. 116, 508 A.2d 1314 (1986) (vague parole revocation orders will be construed against the Parole Board); Counts v. Pennsylvania Board of Probation and Parole, 87 Pa. Commw. 277, 487 A.2d 450 (1985) (Parole Board practice of coining its own terms of art and using them without providing definitions is strongly disapproved of when parolees and others outside of the agency must guess at their meaning); Lewis v. Pennsylvania Board of Probation and Parole, 74 Pa. Commw. 335, 459 A.2d 1339 (1983) (Commonwealth Court should not be required to decipher a Parole Board revocation order).

398. Wagner v. Pennsylvania Board of Probation and Parole, 92 Pa. Commw. 132, 498 A.2d 1007 (1985); Gundy v. Pennsylvania Board of Probation and Parole, 82 Pa. Commw. 618, 478 A.2d 139 (1984).

399. *See, e.g.*, Rivenbark v. Pennsylvania Board of Probation and Parole, 509 Pa. 248, 501 A.2d 1110 (1985) (Parole Board's interpretation of Section 21.1 of the Parole Act erroneous); Cox v. Board of Probation and Parole, 507 Pa. 614, 493 A.2d 680 (1985) (Parole Board's interpretation of "at liberty on parole" language contained in Section 21.1(a) of the Parole Act erroneous).

400. Kunkelman v. Pennsylvania Board of Probation and Parole, 40 Pa. Commw. 149, 396 A.2d 898 (1979). *Cf.* Smith Klein Beckman Corp. v. Commonwealth, 85 Pa. Commw. 437, 482 A.2d 1344 (1983) (en banc), *aff'd*, 508 Pa. 359, 498 A.2d 374 (1985) (administrative agencies must follow their own published regulations).

401. *Compare* Capers v. Pennsylvania Board of Probation and Parole, 42 Pa. Commw. 356, 400 A.2d 922 (1979) (en banc) (the court dismissed asserted technical parole violations with prejudice as a result of the Parole Board's failure to provide a parolee with a Violation Hearing within 120 days) *with* Hartman v. Petsock, 97 Pa. Commw. 311, 509 A.2d 935 (1986) and LaBoy v. Pennsylvania Board of Probation and Parole, 74 Pa. Commw. 332, 459 A.2d 916 (1983) (court ordered new hearing as a result of the Parole Board's failure to allow a parolee to revoke a prior waiver of a full Board hearing).

hallmarks of the reported decisions reviewing Parole Board orders is the great deference that the courts have traditionally given to the Parole Board's exercise of discretion. The acts of the Parole Board that the judiciary considers discretionary range from the decision whether to revoke parole to weighing evidence and determining the appropriate backtime to be imposed for parole violations. The only time a court will reverse or modify a discretionary act of the Parole Board is when it has abused its discretion.[402]

The abuse of discretion standard is a difficult one for a parolee to meet. When the Parole Board has acted within its recognized range of discretion, there are numerous appellate court decisions which hold that the judiciary will not review or otherwise second-guess the Parole Board's actions. For example, when the Parole Board has imposed backtime for proven parole violations and the backtime imposed is within the published presumptive range for the violations, the Pennsylvania Commonwealth Court has held on several occasions that it will not review the Parole Board's exercise of discretion.[403] As noted earlier, the weighing of evidence and evaluation of witness credibility are also discretionary functions of the Parole Board which will not be reviewed upon appeal.[404]

There are areas where the courts will examine the Parole Board's exercise of discretion. One of those is finding good cause to deny parolees the right to confront and cross-examine adverse witnesses.[405] Another is the justification for imposing backtime for parole violations in excess of the published presumptive ranges.[406] The test set forth for determining whether the Parole Board has abused its discretion is whether the discretionary act is supported by substantial evidence in the record.[407] Thus, in those cases where sub-

402. *See, e.g.*, Cox v. Board of Probation and Parole, 507 Pa. 614, 493 A.2d 680 (1985); Bradshaw v. Pennsylvania Board of Probation and Parole, 75 Pa. Commw. 90, 461 A.2d 342 (1983).

403. *See, e.g.*, Hawkins v. Pennsylvania Board of Probation and Parole, 88 Pa. Commw. 547, 490 A.2d 942 (1985); Chapman v. Pennsylvania Board of Probation and Parole, 86 Pa. Commw. 49, 484 A.2d 413 (1984).

404. Coleman v. Pennsylvania Board of Probation and Parole, ___ Pa. Commw. ___, 515 A.2d 1004 (1986); Sigafoos v. Pennsylvania Board of Probation and Parole, 94 Pa. Commw. 454, 502 A.2d 1076 (1986).

405. *See, e.g.*, Wagner v. Pennsylvania Board of Probation and Parole, 92 Pa. Commw. 132, 498 A.2d 1007 (1985); Tyson v. Pennsylvania Board of Probation and Parole, 84 Pa. Commw. 326, 479 A.2d 52 (1984).

406. *See, e.g.*, Harper v. Pennsylvania Board of Probation and Parole, ___ Pa. Commw. ___ 520 A.2d 518 (1987).

407. Chapman v. Pennsylvania Board of Probation and Parole, 86 Pa. Commw. 49, 57-8, 484 A.2d 413, 418 (1984). *See generally* Appeal of Mutual Supply Co., 366 Pa. 424, 77 A.2d 612 (1951).

stantial evidence was found to support the discretionary actions of the Parole Board, the court held that there was no abuse of discretion.[408] Conversely, where the challenged actions lacked such evidentiary support, the court found an abuse of discretion and the Parole Board's action was reversed.[409]

4. Further Judicial Review.—If a parolee remains dissatisfied with the Commonwealth Court's decision, the only avenue open for further review is an appeal by allowance to the Pennsylvania Supreme Court. Over the past several years, the Pennsylvania Supreme Court has systematically classified challenges to actions of the Parole Board as within the Commonwealth Court's appellate jurisdiction and not the court's original jurisdiction.[410] As a result, the availability of direct appeal to the Supreme Court of parole matters is now practically nonexistent.

As noted earlier,[411] a direct appeal is a parolee's exclusive avenue to challenge a Parole Board revocation order since the Pennsylvania Supreme Court held that neither the Post Conviction Hearing Act (PCHA) nor habeas corpus proceedings are available as methods to challenge a Parole Board revocation order. Therefore, preserving that direct appeal is of critical importance to the parolee.

V. Conclusion

This article illustrates that the parole revocation process in Pennsylvania can not be categorized as either strictly criminal law or administrative law. Rather, it is a hybrid of the two. While the Parole Board's revocation process is based upon administrative law, parolees are provided with protections and guarantees not afforded litigants in other administrative proceedings. Examples of such protections are the right to effective assistance of counsel and the right to free counsel if indigent. The different treatment afforded parolees can be traced to the nature of the interest involved in the parole revocation process, a liberty interest, as opposed to the property

408. *See, e.g.*, Wolfe v. Pennsylvania Board of Probation and Parole, 94 Pa. Commw. 200, 503 A.2d 483 (1986).

409. *See, e.g.*, Carthon v. Pennsylvania Board of Probation and Parole, ___ Pa. Commw. ___, 512 A.2d 799 (1986).

410. *See* McMahon v. Pennsylvania Board of Probation and Parole, 504 Pa. 240, 470 A.2d 1337 (1983) (parolee's application for time credit addressed to appellate, not original, jurisdiction of Commonwealth Court); Bronson v. Pennsylvania Board of Probation and Parole, 491 Pa. 549, 421 A.2d 1021 (1980), *cert. denied*, 450 U.S. 1050 (1981) (challenge to Parole Board revocation order addressed to appellate, not original jurisdiction of Commonwealth Court).

411. *See supra* notes 364 and 366 and accompanying text.

interests that are the subject of all other administrative proceedings. In contrast, while parole revocation proceedings are a part of the criminal justice system, they are not criminal prosecutions; thus, parolees are not provided with the same protections and safeguards as are criminal defendants. For example, the exclusionary rule, so much a part of a criminal prosecution, is not applicable to parole revocation proceedings.[412] Also, the constitutional prohibition against double jeopardy does not apply to parole revocation proceedings since parole revocations are civil administrative, not criminal, proceedings. Additionally, a parolee does not have the protection of requiring the Commonwealth to prove its case beyond a reasonable doubt. Rather, a parole violation must be proven by only a preponderance of the evidence, a much easier burden for the Commonwealth to meet.

The trend is towards increased importance in the criminal justice system for probation and parole. In 1986, the Parole Board was supervising more parolees and probationers than the entire inmate population in the fifteen state correctional institutions and facilities operated by the Department of Corrections.[413] Facing a shortage of cell space, it is only a matter of time until incarceration is a punishment to be reserved only for the most hardened and violent offenders, with a greater number being placed in some kind of probation or parole status. Unfortunately, if past history is any prediction of future behavior, the number of parole and probation violators will increase proportionately with the number of parolees and probationers. As a result, there should be an increase, rather than a decrease, of parole revocation litigation in the future, thus ensuring a continuing evolution of this area of the law.

412. Commonwealth v. Kates, 452 Pa. 102, 305 A.2d 701 (1973). Nickens v. Pennsylvania Board of Probation and Parole, 93 Pa. Commw. 313, 502 A.2d 277 (1985). *Cf.* Griffin v. Wisconsin, 483 U.S. ____, 97 L.Ed.2d 709 (1987) (fourth amendment's warrant and probable cause requirements do not apply to probationers).

413. *See* 1986 PA. DEPT. OF CORRECTIONS ANN. REP. 21; 1985 PA. BD. OF PROBATION & PAROLE ANN. REP. 26-27.