Due Process Issues in MSPB Cases for Federal Employees

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Federal employees have the right to due process in the processing of personnel actions, such as proposed removals based on misconduct. In our representation of federal employees before the Merit Systems Protection Board (MSPB), one of the major issues that we see involves whether a federal employee has been provided due process in the processing of a disciplinary or adverse action. This can be critical because when due process has not been provided to a federal employee, a federal agency’s final decision can be potentially reversed by the MSPB on appeal.

A Federal Employee’s Right to Due Process

The Fifth Amendment of the U.S. Constitution prohibits the federal government from depriving a person of life, liberty, and property without providing adequate due process. As a result, federal employees can have a property right in their continued federal employment, which means that due process must be provided before an agency interferes with or terminates their employment.

Before a federal employee can be disciplined for alleged misconduct or performance deficiencies, he or she is entitled to due process of law. Due process consists of: (1) notice of the misconduct or performance allegations; and (2) the opportunity to respond to these allegations. Ward v. U.S. Postal Service, 634 F.3d 1274, 1280 (Fed. Cir. 2011). In addition, a federal employee must be given a meaningful opportunity to invoke the discretion of the decision maker before a personnel action is finalized. Cleveland Bd. of Education v. Loudermill, 470 U.S. 532, 546 (1985).

Due Process Involves the Right to Information Relied Upon

A federal agency, if requested by a federal employee, must provide copies of all information relied upon in the processing of a disciplinary action in order to prepare for his or her response to the proposed action. Many federal agencies provide this type of information as a matter of course when they issue a proposed disciplinary action; however, many do not. Thus, it is usually very important for a federal employee to formally request all of the materials relied upon by the agency in proposing the action prior to his or her oral and/or written response to the proposed action. If a federal employee does not do so, then it can be difficult to determine exactly what information the deciding official considered in issuing a final decision.

If a federal agency considers important information in a case that is not provided to a federal employee this fact can be the basis for possible reversal of the action at the MSPB. New information not provided to a federal employee is often called “ex parte communications.” The U.S. Court of Appeals for the Federal Circuit has held that ex parte communications that introduce new and material information about a federal employee’s
case to a deciding official constitute a due process violation. Stone v. Federal Deposit Insurance Corporation, 179 F.3d 1368, 1376-77 (Fed. Cir. 1999).

Due Process Necessary for Penalty Considerations

The U.S. Court of Appeals for the Federal Circuit, in Ward v. USPS, 634 F.3d 1274 (Fed. Cir. 2011) also held that information not provided to an employee regarding penalty determinations (under the Douglas factors in Douglas v. VA, 5 MSPR 280, 5 MSPB 313 (1981)) were also subject to due process concerns. The Ward court stated the following:

Ex parte communications that introduce new and material information whether material to the merits of the underlying charge or material to the penalty to be imposed, violate due process. There is no constitutionally relevant distinction between ex parte communications relating to the underlying charge and those relating to the penalty.

This type of issue may arise when a federal agency issues a decision on a proposed disciplinary action that cites an increased disciplinary penalty based on information that was not provided to a federal employee prior to the oral and written response stages. For example, we have seen cases where agency policies have been cited as aggravating penalty factors in final decisions but were not provided to the federal employee as a basis for the proposed action. This type of error by the agency can be reversed by the MSPB on appeal.

Contact Us

Our firm represents federal employees in due process appeals before the Merit Systems Protection Board (MSPB) throughout the United States. Please contact us at (703) 668-0070 or www.berrylegal.com to schedule a consultation with one of our attorneys to discuss your due process matter.

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Practice Areas

Merit Systems Protection Board (MSPB)