CHAPTER 1
DUE PROCESS AND THE STATUTORY SCHEME—AN OVERVIEW

"Appellants don't win, agencies lose."

RCF to PBB, 6th Ave Dinner
April, 2010

Agency losses are almost always inexcusable. Agencies hold all the cards, draft all the charging notices. But agencies so infrequently dotted all the "t's," crossed all the "i's," that the Civil Service Reform Act (CSRA) sought to jump in and put an end to reversals based on technical errors, "i's" not dotted, "t's" not crossed. The CSRA's harmful error doctrine, places the burden on the procedurally shortchanged appellant to prove that but for the agency's errors, he would have won.

This is not meant to be critical of agencies; in fairness, Bismark's famous saying could be revised as follows: "Adverse actions and laws are like sausages, it is better not to see them made." The typical adverse action is fathered by a plethora of players, many with little or no expertise in disciplinary matters. Investigators often leave gaps, managers demand the employee's removal yesterday and on the nastiest charge (provable or not), experienced lawyers get frustrated with the highly technical requirements of Board charging law, and HR specialists struggle to piece it all together, find common ground, and avoid making a sow's ear out of a silk purse. Quite simply, too many cooks spoil the broth.

The result is a less than perfect adverse action, in fact, is often a loser. But the law never promised a perfect adverse action; however, the Constitution does promise a fair action. 5 USC 7513 and 5 CFR 752.404 detail adverse action procedures, provide safeguards for appellants, and make clear that procedural errors (as opposed to due process violations, especially as to pre-final decision, pre-deprivation notice and reply rights) are, unless unmistakably harmful and outcome determinative, easily dismissed as just part of the game.

But what is not easily dismissed is a due process violation. The Fifth Amendment states "[n]o person shall be…deprived of life, liberty, or property, without due process of law…." Distilled to its basics, due process is defined as fundamental fairness, and that includes advanced notice, an explanation of the agency's evidence, and right to make a predecisional reply. Errors here are not easily dismissed; errors here are usually fatal.

In 1999, the Federal Circuit, in *Stone v. FDIC*, 179 F.3d 1368, 1376–77 (Fed. Cir. 1999), put an end to analyzing errors as to notice and the right to reply as harmless errors—as snafus that could be cured by the MSPB is a post-deprivation hearing. Instead, such errors must be tested against constitutional requirements of procedural due process:

> The introduction of new and material information by means of *ex parte* communications to the deciding official undermines the public employee's constitutional due process guarantee of notice (both of the charges and of the employer's evidence) and the opportunity to respond. When deciding officials receive such *ex parte* communications, employees are no longer on notice of the reasons for their dismissal and/or the evidence relied upon by the agency. Procedural due process guarantees are not met if the employee has notice only of certain charges or portions of the evidence and the deciding official considers new and material information. It is constitutionally impermissible to allow a deciding official to receive additional material information that may undermine the objectivity required to protect the fairness of the process.…
>
> However, not every *ex parte* communication is a procedural defect so substantial and so likely to cause prejudice that it undermines the due process guarantee and entitles the claimant to an entirely new administrative proceeding. Only *ex parte* communications that introduce new and material information to the deciding official will violate the due process guarantee of notice.…
>
> [I]f the Board finds new and material information has been received by the deciding official by means of *ex parte* communications, then a due process violation has occurred and the former employee is entitled to a new constitutionally correct removal procedure. As we have explained previously, when a procedural due process violation has occurred because of *ex parte* communications, such a violation is not subject to the harmless error test.

Then in *Ward v. USPS*, 634 F.3d 1274 (Fed. Cir. 2011), the court stated that agency errors such as to notice and the reply were to be analyzed as harmful errors if, and only if, those errors failed to rise to the level of a due process violation. In other words, procedural errors not involving a fundamental due process requirement (e.g., notice, reply, impartial decider) could be tested against a harmful error criteria. However, such errors as to notice, reply were to be first analyzed as possible due process violations and then as possible harmful errors, if not rising to the level of a due process violation.

Stone brought an acute awareness of the critical importance of clear notice and the opportunity for a meaningful reply. This acute awareness has underscored the critical role played by the employee's "free and open" right to tell his side of the story, before loss of employment, to an impartial decider. That right is so critical and so fundamental to our constitutional process that it cannot be cured after deprivation of employment and an appellant does not have to prove that the violation was (as in a harmful error analysis) outcome determinative. If notice is not clear, if the reply opportunity is not meaningful, the agency action is *per se* void, the employee is entitled to *status quo ante*: back to work with backpay and attorney fees. Put another way, there is no first aid kit for a due process violation.

As result of this re-emphasis on due process, the court and the Board have, in effect, expanded the reach of *Stone* beyond its initial concern with the clarity of the advance notice. Other procedural shortcomings may not now be so easily dismissed as harmless error.

This is a minefield for agencies. Some have described agency due process losses in terms of an "onslaught, a "flourish." But again, these agency due process losses are, self-inflicted wounds. This book deals with that problem, with due process requirements, and with some other procedural requirements as well, in federal disciplinary and performance matters. But for brief comment, this book focuses on tenured federal employees with an entitlement to continued employment, that is, a property interest, right in continued employment. Keep in mind that there are, of course, non-tenured federal employees, usually probationary employees. And keep in mind that although tenured federal employees subject to a short suspension (14 days or less) have pre-deprivation rights, those employees have, by and large, no post-deprivation rights to appeal outside of the protections, if one exists, of a collective bargaining agreement.

We review in this chapter, the basic statutory and regulatory requirements. 5 USC 7513 and 5 CFR 752.404 set out the basic procedural steps, pre- and post-deprivation, and these steps often reflect, but often go beyond, the fundamental due process requirements of notice and reply, pre-deprivation. A statutory violation is not necessarily a due process violation. The statute and regulation lists employees considered to have (or not have) property rights in job tenure and appeal rights (e.g., nonprobationary employees subject to dismissal only for cause).

In reviewing these statutory and regulatory requirements, it is important to keep in mind two things. One: the right to advance notice and to make a predecision, pre-deprivation reply is found in the Fifth Amendment; 5 USC 7513 and 5 CFR 752.404 reflect that right but do not create that right. Two: the right to due process is triggered in the first place by a property interest in continued (but for cause) employment; that property interest is created, not by the constitution or the Fifth Amendment, but by statute (including 5 USC 7513), applicable regulations (including 5 CFR 752.401-406), and other policies as to federal employment.

Before reviewing that statutory and regulatory process, a look ahead and some additional context, may be helpful. Chapter Two discusses—in a constitutional sense—protected rights, where those rights are found, as well as the fundamentals of due process, the Fifth and Fourteenth Amendments; we look at a few key, landmark due process decisions. Chapter Three turns the focus on due process in government employment and discusses liberty interests, property rights as well as some key due process decisions as to government employment. Chapter Four hones in on the key decisions *du jour*, *Stone, Ward et al*, and the analytical framework for dealing with a due process issue; the *Stone* criteria and the *Stone* factors are discussed, the individual factors are broken out and the analytical model is looked at in some detail. Chapter Five discusses what is, what is not an *ex parte* communication, making clear that the phrase is a term of art, that no third party communication is actually necessary, the critical thing being unnoticed information. Chapter Six reviews court and Board decisions, post-*Stone*, and how each *Stone* factor is actually applied in practice. Chapters Seven and Eight then turn to the agency process (starting with the agency investigation and concluding with the appeal); those chapters also consider basic constitutional concerns, due process rights, and procedural entitlements (including post-deprivation entitlements) that arise in that process. Chapter Nine revisits, with a fresh look, the mechanics of harmful error; again, *Ward* makes clear that procedural

errors, which do not rise to the level of a due process error, should then be run through a harmful error analysis. And Chapter Ten concludes with an analysis of two contemporary issues that frequently raise due process concerns, namely, indefinite suspensions and security suspensions and revocations.

With that, we turn to a brief review of the overall adverse action process, starting with the agency's predecisional, pre-deprivation process, going through the Board's appeal process, and ending with the right to appeal to the Federal Circuit. Note that for the sake of simplicity, we focus on adverse actions; however, due process rights attach also to performance actions, in fact, to any deprivation of property.

I. COVERED EMPLOYEES GENERALLY CONSIDERED TO HAVE A PROPERTY INTEREST IN CONTINUED EMPLOYMENT AND PROCEDURAL DUE PROCESS, PRE- AND POST-DEPRIVATION

To back up for a moment, our current system, established by the Civil Service Reform Act of 1978, was preceded by several statutes that were aimed at moving away from a spoils system and ensuing efficiency and fairness. The Pendleton Act in 1883 established the Civil Service Commission (CSC) but the act covered only about 10% of the government's civilian employees. In 1897, President McKinley issued an Executive Order that required that classified civil service employees be removed only for "just cause." Additional protections for the civil service process and civil servants were added by the Lloyd-La Follette Act of 1912, the Veterans Preference Act of 1944, the Back Pay Acts of 1948 and 1966, and several other Executive Orders (Nos. 10988 of 1962 and 11491 of 1969).

Covered employees (roughly put, those considered to have a property right in continued employment and subject to adverse action only for cause (5 USC 7513(a))) are entitled to procedural due process and the right of appeal to the MSPB. Covered employees are defined by statute and regulation. Title 5, United States Code, section 7511(a)(1) defines the meaning of "employee":

> (a) For the purpose of this subchapter—
>
> (1) "employee" means—
>
> (A) an individual in the competitive service—
>
> (i) who is not serving a probationary or trial period under an initial appointment; or
>
> (ii) who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less;
>
> (B) a preference eligible in the excepted service who has completed 1 year of current continuous service in the same or similar positions—
>
> (i) in an Executive agency; or
>
> (ii) in the United States Postal Service or Postal Regulatory Commission; and

(C) an individual in the excepted service (other than a preference eligible)—

(i) who is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service; or

(ii) who has completed 2 years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to 2 years or less;

OPM's regulations at 5 CFR 752.401(c) and (d) reflect case law interpreting 5 USC 7511 and explain covered and excluded employees:

(c) *Employees covered*. This subpart covers:

(1) A career or career conditional employee in the competitive service who is not serving a probationary or trial period;

(2) An employee in the competitive service who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less;

(3) An employee in the excepted service who is a preference eligible in an Executive agency as defined at section 105 of title 5, United States Code, the U.S. Postal Service, or the Postal Regulatory Commission and who has completed 1 year of current continuous service in the same or similar positions;

(4) A Postal Service employee covered by Public Law 100–90 who has completed 1 year of current continuous service in the same or similar positions and who is either a supervisory or management employee or an employee engaged in personnel work in other than a purely nonconfidential clerical capacity;

(5) An employee in the excepted service who is a nonpreference eligible in an Executive agency as defined at section 105 of title, 5, United States Code, and who has completed 2 years of current continuous service in the same or similar positions under other than a temporary appointment limited to 2 years or less;

(6) An employee with competitive status who occupies a position in Schedule B of part 213 of this chapter;

(7) An employee who was in the competitive service at the time his or her position was first listed under Schedule A, B, or C of the excepted service and who still occupies that position;

(8) An employee of the Department of Veterans Affairs appointed under section 7401(3) of title 38, United States Code; and

(9) An employee of the Government Printing Office.

(d) *Employees excluded*. This subpart does not apply to:

(1) An employee whose appointment is made by and with the advice and consent of the Senate;

(2) An employee whose position has been determined to be of a confidential, policy-determining, policy-making, or policy-advocating character by the President for a position that the President has excepted from the competitive service; the Office of Personnel Management for a position that the Office has excepted from the competitive service (Schedule C); or the President or the head of an agency for a position excepted from the competitive service by statute;

(3) A Presidential appointee;

(4) A reemployed annuitant;

(5) A technician in the National Guard described in section 8337(h)(1) of title 5, United States Code, who is employed under section 709(a) of title 32, United States Code;

(6) A Foreign Service member as described in section 103 of the Foreign Service Act of 1980;

(7) An employee of the Central Intelligence Agency or the Government Accountability Office;

(8) An employee of the Veterans Health Administration (Department of Veterans Affairs) in a position which has been excluded from the competitive service by or under a provision of title 38, United States Code, unless the employee was appointed to the position under section 7401(3) of title 38, United States Code;

(9) A nonpreference eligible employee with the U.S. Postal Service, the Postal Regulatory Commission, the Panama Canal Commission, the Tennessee Valley Authority, the Federal Bureau of Investigation, the National Security Agency, the Defense Intelligence Agency, or any other intelligence component of the Department of Defense (as defined in section 1614 of title 10, United States Code), or an intelligence activity of a military department covered under subchapter I of chapter 83 of title 10, United States Code;

(10) An employee described in section 5102(c)(11) of title 5, United States Code, who is an alien or noncitizen occupying a position outside the United States;

(11) A nonpreference eligible employee serving a probationary or trial period under an initial appointment in the excepted service pending conversion to the competitive service, unless he or she meets the requirements of paragraph (c)(5) of this section;

(12) An employee whose agency or position has been excluded from the appointing provisions of title 5, United States Code, by