



# ALABAMA MUNICIPAL INSURANCE CORPORATION MUNICIPAL WORKERS COMPENSATION FUND, INC.



## Loss Control Division

### 35. DUE PROCESS AND PUBLIC PERSONNEL DISCIPLINE

Note: Readers should also consult the articles "Practical Guidelines for Discipline and Termination of a Municipal Employee" and "Employee Termination Checklist" in this publication.

Over the past 20 years, numerous federal and state lawsuits have centered around public personnel questions. These suits have resulted from public laws relating to equal employment opportunity, employment of the disabled, employment of older persons, and mandated personnel systems. Most of these cases have questioned hiring practices and statutory safeguards for job applicants. Little attention has been paid to the problems of employers.

Admittedly, vexing problems still exist relating to public employer hiring practices. Even more troubling are problems caused by suspension or termination of public employees. A public employee facing termination has both statutory and constitutional safeguards to ensure fair and reasonable treatment. The most prominent safeguards are found in the Fifth and Fourteenth Amendments to the U. S. Constitution which state that no persons shall be deprived of life, liberty or property without due process of law.

There are, essentially, two different types of due process. "Substantive due process" is the fundamental constitutional legal theory that holds that the due process clause not only requires "due process," that is, basic *procedural* rights but that it also protects basic *substantive* rights. "Substantive" rights are those general rights that reserve to the individual the power to possess or to do certain things, such as freedom of speech and religion, "Procedural" rights are special rights that, instead, dictate *how* the government can lawfully go about taking away a person's freedom or property or life, when the law otherwise gives them the power to do so.

This article addresses the due process requirements of public personnel disciplinary procedures to assist public employers in establishing personnel procedures for suspensions and dismissals. Proper respect for due process could very well avoid expensive and harassing litigation for the public employer.

#### Major Decisions

The Fifth Amendment to the U. S. Constitution states that "no person shall be deprived of life, liberty or property without due process of law." Originally this amendment was construed to be applicable only to the federal government. Later, the Fourteenth Amendment was ratified to provide "nor shall any State deprive any person of life, liberty or property without due process of law." The Fourteenth Amendment clearly applies to municipalities as well. *City of Mobile v. Bouldin*, 446 U.S. 55 (1980). Further, Section 1983 of Title 42 of the U.S. Code prohibits any person from depriving another of his or her civil rights under color of state law. Section 1983 covers municipal actions as well.

Here we are concerned about a public employee who is called by the employer to answer for some transgression and employment is terminated. The employee appeals, claiming that the public employer breached a duty owed the employee by depriving him or her of property (in this instance, the job) without extending due process of law, and further, depriving the employee of liberty (in this instance, his or her good name in the community) without providing due process of law. A public employee with a constitutionally protected property interest in that employment must be afforded the process prior to termination. *Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532, 105 S.Ct 148 (1985).

The public employer is certainly justified in asking whether a public employee's job is property within the meaning of the Fifth and Fourteenth Amendments and also how the loss of the job might cause a deprivation of the employee's liberty within the meaning of these amendments.

Three major U.S. Supreme Court decisions shed light on these questions: *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sinderman*, 408 U.S. 593 (1972); and *Bishop v. Wood*, 426 U.S. 341 (1976).

The decisions in *Roth* and *Sinderman* involved tenured teachers who were dismissed and who claimed violation of due process as to property and liberty rights. These decisions were applicable to all public employees, whether tenured or non-tenured. The court held that a public employee has a property interest protected by due process if he or she could show a “legitimate claim of entitlement” to the job – a contract, or tenure, or even oral or implied understandings – creating a reasonable expectation of continued employment. The court observed that property interests are not created by the Constitution but by the rules or understandings that stem from independent sources such as state law.

The court then defined liberty rights entitled to due process protection as existing in cases where (1) the employee is terminated for reasons which deprive the employee of his or her that he or she cannot find other employment in his or her chosen field. The court did observe that mere firing might make it harder to find another job, but that alone did not create a liberty interest infringement. The hearing an employee is entitled to in such cases gives him or her an opportunity to refute charges and clear his or her name. Following the decisions rendered in these two cases, the federal courts were flooded with due process personnel cases.

In 1976, the U.S. Supreme Court took another look at the situation in the *Bishop* case. In this case, a police officer was discharged without a hearing after being told privately that his dismissal was based on specified violations. The city ordinance under which he was employed made no provision for a hearing on dismissal but provided that a permanent employee could be discharged for failure to perform up to the standards of his classification, for negligence, inefficiency or unfitness to perform his duties. The officer claimed he had a right to continued employment which gave him a right to a pre-termination hearing. Also, the officer claimed he was deprived of his liberties because the discharge stigmatized him without his having an opportunity to refute the reasons of discharge,

The court held that he did not have a property interest protected by due process and set out the following:

- Whether a property interest is created by ordinance or by implied contract, the sufficiency of the claim of entitlement must be decided by reference to state law; and
- That the interpretation of the ordinance by a federal district judge that the employee served at the pleasure of the employer and had no property right, which finding was affirmed by the court of appeals, would not be re-examined by the Supreme Court.

In denying the employee’s claimed deprivation of liberty without due process, the court held that, assuming that the dismissal was a mistake and based on incorrect information, he was not deprived of his liberty in the discharge. Termination of an employee is not in itself a deprivation of liberty. In this case, reasons for discharging the employee were not made public. He could not claim damage to reputation or stigma to his name based on reasons not generally known or recorded.

While this decision came as a breath of fresh air, we must hasten to add that the laws of the state and the ordinances of a municipality must be regarded as the determining factors as to whether an employee has a property right which is entitled to due process protection. The ruling of the court regarding the liberty right, which is entitled to protection, depends upon the reasons set forth in the termination notice specifications, the discharge decision and whether such reasons are generally available for public dissemination.

### **Application in Alabama**

Alabama laws relating to employment and dismissal of municipal employees are not uniform statewide. General laws pertain to employees of mayor-council cities and towns. Several cities have special acts establishing their forms of government, and special personnel laws are applicable to Anniston, Jasper, Sylacauga, Tuscaloosa and the cities in Montgomery, Mobile and Jefferson Counties, among others. While these statutes afford different degrees of

protection to employees, the laws do provide a property right for municipal employees that is protected by due process, except in cases of probationary employment, temporary employment, employment contracts that are expressly limited as to term, and dismissals for reasons of economy – that is, abolishing a job for economic reasons.

It is important to keeping mind that Sections 11-43-230 through 11-43-232, Code of Alabama 1975 specifically provide that a pre-disciplinary hearing must be provided to any municipal law enforcement officer. These sections should be reviewed carefully before any disciplinary action or termination action is initiated against a municipal law enforcement officer.

### **What is Due Process?**

The following essential elements of a due process hearing have been identified by various American court decisions.

- Notice of the charges to be heard;
- Notice of the time and place of the hearing
- An opportunity for the to-be-terminated or to-be-disciplined employee to fairly refute the charges; and
- An impartial decision maker.

Other elements or sub-elements of a due process hearing which are generally required and which should be furnished (depending upon the situation and the municipal attorney's advice) are:

- The hearing should be held prior to the termination, the discipline or the stigmatizing charge except where impractical due to an emergency.
- The employee should have an opportunity to suggest any desired hearing procedures;
- The notice of the hearing and notice of the charge against the employee should be in writing;
- The decision maker should be impartial, that is, someone other than the charging authority and someone who is not privy to the facts prior to the hearing;
- If possible, the charging authority should present the employee with a list of witnesses to be called at the hearing;
- All witnesses should be required to testify under oath;
- All parties should be afforded the right to be represented by legal counsel present at the hearing;
- The informal evidence rules of administrative hearings should be followed;
- The employee should be allowed to have the record transcribed at his or her own expense;
- The decision makers should prepare findings based upon the hearing record consisting of a short written summary of the relevant facts and reasons for termination;
- Each party should be afforded an opportunity to present witnesses;
- Each party should be afforded an adequate opportunity to prepare for the hearing prior to the date of the hearing.

By informing the to-be-terminated employee of his or her rights and affording the employee an opportunity to exercise those rights, the disgruntled employee is forced to inform the municipality of any complained of wrongdoing on the part of the city with respect to either the substance of the matter or the procedures used by the city. If the employee fails to do so, the city may later explain that the employee was informed of his or her rights, was afforded an opportunity to exercise those rights, chose not to avail himself or herself of those rights, and should be stopped from later asserting unfair treatment and lack of due process.

Notice requires a fair and reasonable amount of time and specification of the charges, not just generalities. A listing of evidence to be brought by the employer before the hearing is not required. As to whether the notice must be in writing depends on the governing statutes. If a written notice is required, an oral notice is insufficient. The League recommends that a carefully drafted notice be delivered in writing. The notice must be sufficiently explicit to enable the employee to make an explanation and generally, it is signed by the person

empowered to remove the employee. Notice may be waived by the employee. However, for safety's sake, a waiver should be in writing.

As for the opportunity to be heard, the Supreme Court has ruled that the opportunity must be granted at "a meaningful time and in a meaningful manner." In *Bishop*, the court stated that the hearing could be held after the employee had been terminated from employment, which is sufficient if there is no conflict with the provisions of the state law. Alabama laws might allow suspension pending a hearing but no final dismissal.

And, *Stallworth v. City of Evergreen*, 680 So. 2d 229 (AL 1996), the Alabama Supreme Court held that an employee with a right to continued employment is entitled to an impartial hearing officer at a pre-termination hearing, and that a fair post-termination hearing will not cure the due process violations of the pre-termination hearing. Although, in *Gilbert v. Homar*, 65 LW 4442 (1997), the U.S. Supreme Court held that tenured employees in position of public trust and visibility – such as police officers in this case – who are charged with felonies, are not entitled by due process to notice and a hearing prior to suspension without pay.

The hearing must be before an officer or tribunal vested with jurisdiction to act. Generally, the tribunal vested with the authority to conduct removal or suspension hearings cannot delegate that authority. Attorney General's Opinion 88-00252 and 92-00234.

On the subject of opportunity to confront accusers, it has been held sufficient if the real and substantive reasons for termination were presented by direct testimony of the witnesses, though reports of nameless complaints can be received.

In Alabama, hearings are generally deemed quasi-judicial unless the power is vested in an administrative officer from whom an appeal is provided. Generally, strict rules of procedure do not apply. Technical accuracy of an indictment and trial in a criminal court are not expected. The hearings may be conducted informally. However, the informality must not be permitted to become unwarranted laxity. The theme of fairness threads its way through the notice, hearing, and right to appeal.

The right to cross-examination is usually recognized. The right to be represented by counsel is not absolute unless required by state law, ordinance or regulation. Denial of counsel has been ruled not to be a violation of due process. Generally, the right to have counsel is provided.

The board holding the hearing is not bound by strict rules of admission of evidence. The board holding the hearing must act upon what is presented and not upon its own information. Evidence should be limited to the charges. Real evidence, such as inspections, may be allowed.

The burden of proof is on the one alleging the infractions and a fair preponderance of evidence is needed to warrant removal.

A final judgment based on the evidence presented at the hearing is necessary. The record of proceedings should show affirmatively: (1) that charges sufficient in law were preferred; (2) that due notice was given; (3) that a trial was had where the employee was permitted to be heard; and (4) that a judgment order was rendered.

The matter of an impartial tribunal has caused considerable legal wrestling but seems to have been fairly well settled now. In one U.S. Supreme Court case, *Hortonville Joint School District No. 1 v. Hortonville Education Assn.*, 426 U.S. 482 (1975), a school board fired tenured teachers and provided them with a hearing. The same board sat to determine if its decision to fire was proper. There was no evidence of actual bias in the form of adverse interest by the members of the board and the fact that the board had fired the employees was held not in itself to constitute bias.]

### **Some Recommendations**

Suits challenging terminations on the basis of denial of due process name not only the board as an entity but also the members as defendants. The action is for breach of duty owned and therefore *ex delicto* – that is, through an action in tort. Personal liability may be involved if it can be shown that the body acted maliciously or arbitrarily in depriving the plaintiff of his or her rights.

- Use special care in specifying reasons for dismissal. Wherever possible refer to specific regulations, policies or laws the employee has breached. This protects against infringement of liberty rights.

- Look closely at the ordinance or statute under which the employee was hired to determine whether there was a properly right in his or her employment that would entitle the employee to due process protection. An employee may also acquire a property interest in the job through employment handbooks, contracts, legislation or other guarantees of continued employment. These areas should also be carefully examined.
- Confer with officers who are charged with the responsibility of discharging employees to ensure they understand these constitutional issues. Bring in the City attorney to confer about procedures that should be followed in dismissal situations.

### Checklist

- Identify the office or board charged with the responsibility and power to remove employees.
- If not required by law, determine the wisdom of giving written notice of the hearing.
- Identify the causes of removal of an employee in the city by statute, ordinance or regulation.
- Ensure that the hearing power over dismissal proceedings has not been unlawfully delegated.
- Does the procedure require or allow representation by counsel?
- What provisions for records of hearings are required? What records are essential?
- Are subpoena powers available to compel attendance of witnesses?
- Are basic judgment entries for the record?

### Attorney General's Opinions and Court Decisions on Due Process

- If the personnel rules of a municipality require a personnel board, the municipality must create the board and give it the powers set out in the personnel rules. Attorney General's Opinion 92-00111.
- The Legislature has the power to create by local act a county personnel system. Attorney General's Opinion 93-00004.
- Alabama is an at-will employment state but the employment-at-will relationship can be modified by provisions in an employee handbook, through promises in a letter, or by contract. *Campisi v. Scoles Cadillac, Inc.*, 611 So. 2d 296 (AL 1992); *Udcoff v. Freidman*, 614 So. 2d 436 (Ala 1993); *Abney v. Baptist Medical Centers*, 397 So. 2d 682 (AL 1992).
- Evidence which supports one charge against an employee is sufficient to justify dismissal of the employee, even if the evidence fails to support other charges. *Williams v. Mobile County Personnel Board*, 607 So. 2d 268 (AL Civ. App. 1992).
- An employee of a public agency that is meeting in executive session may sit in on the session only if his or her presence is required in order to protect due process or if the entity requires the employee's presence in an official capacity. Attorney General's Opinion 99-00247
- When a city limits its right to terminate an employee by providing specific procedures that must be followed in order to terminate an employee, a violation of those procedures gives rise to a breach-of-contract wrongful termination claim. *Hardric v. City of Stevenson*, 843 So. 2d 206 (AL Civ. App. 2002).
- In *City of Orange Beach v. Duggan*, 788 So.2d 146 (Ala. 2000), the Alabama Supreme Court held that procedural due process does not require an entirely neutral decision-maker at a pre-termination hearing for a public employee, where a full-evidentiary post-termination hearing remedies any defects at the pre-termination hearing.

**INDEX WORDS – DUE PROCESS AND PUBLIC PERSONNEL  
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