

CHAPTER 5

IS PROCEDURAL DUE PROCESS AN ELEMENT OF JUST CAUSE OR A SEPARATE ISSUE WITH DISTINCT REMEDIES?

I. AN INTRODUCTION TO THE TOPIC

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Our system of industrial jurisprudence presumes that employees in collectively bargained employment relationships are entitled to certain protections against arbitrary action, often referred to as “due process.” In theory, due process embodies constitutional, legal, and ethical concepts of fairness, and we as arbitrators use the term in our decisions. But rarely do we define due process more precisely.

The question before us today is, “What constitutes a ‘due process’ violation,” and “To what extent do—and should—due process considerations inform or control the resolution of a particular case?”

For example, is it—as argued to me recently in a private sector case involving a discharge based on theft—a violation of due process to base a termination on evidence obtained through a search and seizure that a federal court found unconstitutional? If so, is such a due process violation a sufficient basis for the arbitrator to overturn a discharge or direct some other remedy? Or is it—as also argued to me recently in a federal sector case involving a class action grievance—a violation of due process to remove individual employees from some duties over an extended period of time in the absence of charges or discipline? Is this a matter of procedural due process or substantive due process, and, if it is a violation, what remedy or remedies are appropriate?

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Some questions to keep in mind when listening to the panelists include:

- Are there core elements of due process—or fundamental fairness—that apply in most if not all cases, or is due process wholly a function of contract—express or implied—and the parties’ practice and history?
- Is an individual’s view on the role of the arbitrator—adjudicator or problem solver—a controlling or significant factor? And, in discipline and discharge cases, if the misconduct alleged is clearly demonstrated on the record, is there any need, or perhaps a fundamental obligation, to review the employer’s predisciplinary measures as well as the procedures followed in the disciplinary process or grievance procedure?
- Is it appropriate to balance the severity of misconduct against the severity of a procedural defect?
- Are certain employees in nonunion settings effectively receiving greater due process protections than bargaining unit employees, for example, in statutory claims under programs comporting with the Due Process Protocol?¹
- Are concepts of due process influenced by current events and a changing legal, social, and political environment, and if so, to what extent?
- Are we as arbitrators to be guided by current legal and political norms, for example, upholding the right of an employer to search employee property or provide otherwise confidential information on the basis of “national security” as might be appropriate for law enforcement officials under the U.S.A. Patriot Act?²

With this as background, let us now hear from our panelists.

¹Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship, May 9, 1995, *reprinted in* Arbitration 1995: New Challenges and Expanding Responsibilities, Proceedings of the 48th Annual Meeting, National Academy of Arbitrators, ed. Najita (BNA Books 1996), at 298, available on the Academy’s Web site, <<http://www.naarb.org/protocol.html>>.

²U.S.A. Patriot Act of 2001, Pub. L. No. 107-56, 18 U.S.C. §1.