

PRESENTED AT

23rd Annual Labor and Employment Law Conference

May 3-4, 2016
Austin, Texas

**SUBSTANTIVE AND PROCEDURAL DUE PROCESS
IN PUBLIC SECTOR EMPLOYMENT LAW**

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I. SCOPE OF THE PRESENTATION

- A. This presentation addresses the juridical concepts of substantive and procedural due process in public sector employment law.
- B. The intention is to provide an overview of the due process clauses contained in the in the United States Constitution, specifically the Bill of Rights, and to trace their development by the U.S. Supreme Court.
- C. This exercise will begin with some speculation about the pre-constitutional origins of the juridical concept of due process.
- D. The presentation will then trace the development of the due process clauses over time, and explain the application of due process in the context of employment law.

II. WHAT IS DUE PROCESS?

- A. The short answer to this is that due process is a requirement of notice and an opportunity to be heard before a final judgment or decision is rendered against one's interests. This is typically known as procedural due process.
- B. But due process has also come to include a notion known as substantive due process. Substantive due process is more akin to an absolute privilege, or immunity, or natural right that cannot be overridden or overturned by anyone.
- C. The most common reference to substantive and procedural due process in our jurisprudence is the reference to the Magna Carta.
- D. The popular understanding of the Magna Carta is that it is one of the first written documents in which the rights of individuals are established as against a sovereign entity.
- E. The Magna Carta is in fact an early 13th century (1215 C.E.) between King John of England and a group of barons who demanded certain protections from and limitations on the royal sovereign.
- F. A closer review of the history of this document reveals that it was drafted by the then Archbishop of Canterbury, Stephen Langton, who was an English Cardinal of the Roman Catholic Church.
- G. The Magna Carta was an effort to secure peace by the use of a negotiated pact between a sovereign and a local ruling class. The agreement made express that which was implied by the fact of King John's need to negotiate -- that the ruling sovereign was limited in its authority. Or, put another way, that the subject class had certain privileges and immunities from the authority of the sovereign in specified subject matter areas.

- H. The deeper context that is usually left out of this story, is that this effort occurred at a time of the Roman's Church's rise in political power, particularly with the development of canon law principles.
- I. Consequently, to the extent that canonists of the medieval period were developing canon law principles, many of them derived from Holy Scripture, there is another source of authority for the juridical concept of due process of law.
- J. Johannes Monachus (d.1313) a medieval French canonist, argued that the concept of due process was reflected in Genesis, in the story of Adam and Eve. Monachus noted that in the biblical story of God's judgment on Adam and Eve for violation of the proscriptive commandment, even God abided by the principles of due process. *See "A Short History of Canon Law" at pp. 68-69 by Kenneth Pennington (Catholic University of America, Washington, D.C.).*
- K. First, God looked for, and summoned, Adam, after Adam was attempting to hide from God. In other words, Adam was provided procedural due process. Secondly, even after pronouncing judgment on the first couple, God allowed them to live. He did not destroy humankind. This is substantive due process. *Id.*
- L. Regardless of whether you agree with or abide by the biblical origins of juridical due process, it is an undeniable fact that the concept of due process has been honored and developed in the West.
- M. By the time of the founding of the American colonies, and later the United States, it was a concept well embedded in the culture, both legally and culturally as a basic component of fairness and ethics.

III. THE BILL OF RIGHTS AND DUE PROCESS

- A. It is a noteworthy feature of the U.S. Constitution that it was conditionally ratified by many states. The conditional ratification called for the inclusion of a Bill of Rights, intended to provide limits on the sovereign.
- B. Only ten of the original twelve amendments were in fact ratified as amendments to the Constitution.
- C. Of the first ten amendments, nine of those reference some guarantee, proscription, limitation, privilege, or immunity that can easily be rooted in a juridical concept of either procedural, or substantive, due process.

IV. THE STATE ACTION REQUIREMENT

- A. Implicit in this topic is the requirement of state action. Because the ideas of due process implicate only the actions of a governing sovereign, the discussion is necessarily limited to the actions of government as an employer.

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First appeared as part of the conference materials for the
23rd Annual Labor and Employment Law Conference session
"Public Sector Update"