

# Decision-Maker Must Listen and Have Power to Decide

For adverse actions, the law does not expect the deciding official to come to the case entirely without knowledge or opinions. In fact, in an action taken under chapter 75 of title 5, the proposing and the deciding official may be the same person, although the statute requires that a chapter 43 action have the concurrence of an official at a higher level than the one who proposed it.<sup>30</sup> (For more on the differences between chapters 43 and 75, see [Performance-Based Actions under Chapters 43 and 75 of Title 5 – Similarities and Differences](#).)

A deciding official's awareness of background information concerning the appellant, his concurrence in the desire to take an adverse action, or his predisposition to impose a severe penalty does not disqualify him from serving as a deciding official on due process grounds.<sup>31</sup> Due process requires notifying the employee of what the official will consider, not that the official be a blank slate.<sup>32</sup>

However, due process does require that the official: (1) consider the employee's response; and (2) be able to render a decision based upon that response. For example, due process is not met if the official fails to read the written reply.<sup>33</sup> Similarly, to be constitutional, the reply period cannot be an empty formality in which the employee speaks while no one with the power to affect the outcome listens.<sup>34</sup> The deciding official must be able to invoke his or her discretion as to whether the proposed penalty is warranted.<sup>35</sup> The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner."<sup>36</sup> Processes that do not offer a meaningful opportunity can run afoul of the Constitution.

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<sup>30</sup> *Davis v. Department of Transportation*, 39 M.S.P.R. 470, 478 (1989); see also *Cross v. Veterans Administration*, 16 M.S.P.R. 429, 431 (1983); *Belanger v. Department of Transportation*, 16 M.S.P.R. 304, 309 (1983). 5 U.S.C. § 4303(b)(1)(D)(ii).

<sup>31</sup> *Lange v. Department of Justice*, 119 M.S.P.R. 625, ¶ 9 (2013); see *Diehl v. Department of the Army*, 118 M.S.P.R. 344, ¶¶ 5–14 (2012); *McGriff v. Department of the Navy*, 118 M.S.P.R. 89, ¶¶ 24–33 (2012).

<sup>32</sup> *But see Lopes v. Department of the Navy*, 116 M.S.P.R. 470, ¶ 13 (2011) (holding that it was a due process violation when the deciding official, who knew the appellant's history from his role in a prior disciplinary action involving her, considered the appellant's past misconduct as an aggravating factor as part of his penalty analysis without informing her that it would be considered and giving her an opportunity to discuss it).

<sup>33</sup> *Hodges v. U.S. Postal Service*, 118 M.S.P.R. 591, ¶ 6 (2012); *Alford v. Department of Defense*, 118 M.S.P.R. 556, ¶¶ 5-7 (2012).

<sup>34</sup> See, e.g., *Lange v. Department of Justice*, 119 M.S.P.R. 625, ¶ 23 (2013) (finding unconstitutional an agency decision where the deciding official admitted she lacked the power to cancel or mitigate the action no matter what the employee's response might say).

<sup>35</sup> *Buelna v. Department of Homeland Security*, 121 M.S.P.R. 262, ¶¶ 27-28 (2014).

<sup>36</sup> *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).