UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 141

Docket No. CH-3443-09-0061-I-1

Amber M. Rothlisberger,

Appellant,

v.

Department of the Army,

Agency.

July 27, 2009

Amber M. Rothlisberger, Sparta, Wisconsin, pro se.

Gary F. Baumann, Fort Campbell, Kentucky, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant has petitioned for review of an initial decision that affirmed her indefinite suspension, pending an investigation to determine whether her security clearance should be revoked. For the reasons set forth below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.118, however, VACATE the initial decision, and REMAND the case to the Central Regional Office for further proceedings consistent with this Opinion and Order.

BACKGROUND

¶2 The agency appointed the appellant to an excepted service GS-06 Administrative Support Assistant position on October 31, 2005, at Fort Campbell, Kentucky. Initial Appeal File (IAF), Tab 5, Subtab 4. On May 18, 2007, Colonel Kevin W. Mangum, Commander of the 160th Special Operations Aviation Regiment, at Fort Campbell, immediately suspended the appellant's access to classified information, and restricted her access to the workplace in a Report of Unfavorable Information for Security Information (DA Form 5248-R). He further made the recommendation to revoke the appellant's access to classified information. *Id.*, Tab 1, Attachments. Colonel Mangum also indicated that he was coordinating with local civilian personnel to pursue other administrative remedies, and he made the recommendation to terminate the appellant's federal employment. *Id.*

¶3 From May 19-31, 2007, the agency placed the appellant in paid administrative leave status, and it subsequently indefinitely suspended her without pay for some period of time, pending a final determination on her access to classified material.[1] IAF, Tab 7. The appellant filed her first appeal with the Board on May 21, 2007, alleging that the agency had indefinitely suspended her and placed her under investigation. *Porter v. Department of the Army*, MSPB Docket No. CH-0432-07-0463-I-1 (Initial Decision, Sept. 24, 2007). In response to this appeal, the agency filed a motion to dismiss, which was received by the Board on June 12, 2007, arguing that the appellant had been restricted from the workplace and had been placed in paid administrative leave status. Thereafter, on September 24, 2007, the administrative judge assigned to that appeal dismissed the case for lack of jurisdiction because the appellant had failed to make a non-

[1] The exact date of the appellant's placement in a non-duty, non-pay status is not clear in the record below because neither party submitted the agency's notice of proposed indefinite suspension, the notice of decision, or another document that confirmed the date of the action.

frivolous allegation of Board jurisdiction. *Id.* The appellant did not file a petition for review of the initial decision in the appeal.

¶4 About a year later, on September 30, 2008, the agency finished its investigation, reinstated the appellant's access to classified information, and offered her the opportunity to return to her position. *Id.*, Tab 9, Enclosure 1 at 2. On October 13, 2008, the appellant filed this appeal alleging that the agency had violated her rights as a civil servant, failed to follow its procedures for conducting a security investigation, improperly denied her request for lateral transfer to another office at Fort Campbell, committed harmful error, and retaliated against her for prior EEO-protected conduct. IAF, Tabs 1, 7. The appellant did not request a hearing. *Id.*

¶5 The administrative judge issued an Acknowledgment Order informing the appellant that the Board might not have jurisdiction over her allegations regarding the agency's decision to suspend her security clearance. *Id.*, Tab 2. Because it appeared that the appellant's appeal was untimely by more than a year, the administrative judge issued an order requiring the appellant to make a showing that her appeal was timely filed or that good cause exists for her delay in filing. IAF, Tab, 3. The record does not contain a response from the appellant to this order, and the administrative judge did not decide this issue below. After the record closed, the administrative judge issued an initial decision finding that the appellant did not establish her affirmative defenses of harmful error and retaliation, and affirmed the agency's action. *Id.*, Tab 11.

¶6 The appellant has filed a petition for review arguing that the administrative judge incorrectly identified the date that the indefinite suspension without pay began, that the agency had improperly allowed her to work for more than a year with the wrong type of security clearance prior to suspending that clearance, that the agency failed to follow the Office of Personnel Management's guidance and rules regarding security clearances, that the agency's security clearance investigation had no basis in fact, and that the agency's failure to follow proper

procedures delayed the completion of the investigation. Because she opted to not return to federal employment, the appellant seeks back pay for the time that the agency delayed in acting on her security clearance. Petition for Review File (PFR File), Tabs 1, 2. The agency has responded in opposition to the appellant's petition. *Id.*, Tab 4.

ANALYSIS

¶7 The Board grants petitions such as the appellant's only when significant new evidence is presented that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115). Although the appellant reiterates and expands on arguments that she raised before the administrative judge concerning the merits of her appeal, her petition for review does not present any new, previously unavailable, evidence,[2] and it does not establish that the administrative judge's initial decision was based on an erroneous interpretation of statute or regulation. 5 C.F.R. § 1201.115(a), (d). Therefore, we deny the appellant's petition for review.

¶8 In addition, the appellant's petition for review also appears to have been filed 1 day late, and she has not shown good cause for her delay. Nevertheless, we decline to decide this issue. Instead, we are reopening this appeal on our motion, pursuant to 5 C.F.R. § 1201.118, because there are unusual equitable and legal circumstances in this appeal, which require remanding this appeal in the interests of justice. *See Timmers v. Office of Personnel Management*,

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[2] The appellant also submitted evidence with her petition for review, some of which was not presented prior to the close of record below. PFR File, Tabs 1, 2. Because she has not established that this evidence is new and material, *see* 5 C.F.R. § 1201.115(d)(1), we have not considered it in reaching this decision. However, because we are remanding this appeal to the regional office, the appellant is free to submit the evidence and any additional argument for consideration by the administrative judge.

101 M.S.P.R. 305, ¶ 13 (2006) (the Board has broad discretion in exercising its authority to reopen an appeal in order to prevent a manifest injustice). In particular, the record is insufficiently developed regarding two issues, which could affect the outcome of this case, and the record does not show that the parties were fully apprised by the administrative judge of their respective burdens in this appeal or informed of the kind of evidence required to meet their burdens. The two issues are: (1) Whether the appellant's petition for appeal was timely filed; and (2) whether the agency failed to provide the appellant with required statutory and regulatory procedural protections when it indefinitely suspended her pending a review of her access to classified information.

The record is insufficiently developed to determine whether the appellant's petition for appeal was timely filed.

¶9 Generally, an appellant must file an appeal no later than 30 days after the effective date, if any, of the action being appealed, or 30 days after the date of her receipt of the agency's decision, whichever is later. 5 C.F.R. § 1201.22(b)(1). For determining the timeliness of the appeal, the effective date of an indefinite suspension without pay is considered the date specified in the notice that the action goes into effect, rather than 14 calendar days later. *Lester v. U.S. Postal Service*, 52 M.S.P.R. 57, 59 (1991). Furthermore, if an appellant does not submit an appeal within the time set by the applicable law or regulation, the appeal will be dismissed as untimely filed unless a good reason for the delay is shown. 5 C.F.R. § 1201.22(c).

¶10 In this case, we are unable to determine, based on the record before us, whether the appellant timely filed this appeal. Although the appellant's indefinite suspension appears to have lasted more than a year before she filed this appeal, the effective date of the action is unclear because the agency's notice of decision for the suspension and other documents related to it have not been submitted into evidence. In addition, the record does not establish when the appellant received

the agency's notice of decision. Thus, the starting date for determining the timeliness of this appeal cannot be determined from the record.

¶11 Further, assuming the appeal is untimely, the record is inadequate to weigh whether the appellant has shown good cause for her delay in filing. Specifically, without the notice of decision, it is impossible to determine if the appellant received adequate notice of her appeal rights. *See Dalton v. U.S. Postal Service*, 62 M.S.P.R. 95, 97-98 (1994) (the appellant established good cause for untimely filing an appeal when the agency failed to provide him with notice of his appeal rights). It also is impossible to determine whether the appellant could establish good cause for her delay in filing based on the agency's actions in her first appeal, which was dismissed for lack of jurisdiction on September 24, 2007. Therefore, because these matters cannot be resolved based on the current record, this appeal is remanded for further consideration.[3]

The record is insufficient to determine whether the agency failed to provide the appellant with statutory and regulatory procedural protections when it indefinitely suspended her.

¶12 In an appeal based on the denial or suspension of a security clearance, the Board does not have authority to review the substance of the underlying security clearance determination. *Department of the Navy v. Egan*, 484 U.S. 518, 530-31 (1988). The grant of a security clearance to a particular employee is a sensitive and inherently discretionary judgment call that is committed by law to the appropriate agency of the Executive Branch. *Id.* at 527. As a result, the scope of the Board's review is limited to whether a security clearance was denied, whether

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[3] Another matter that should be addressed on remand is the issue of whether the appellant was an "employee" with appeal rights at the time of her suspension. The agency submitted a copy of the Standard Form (SF) 50-B, Notification of Personnel Action, which documented the appellant's excepted appointment on October 31, 2005. IAF, Tab 5, Subtab 4. The SF 50-B also indicates that the appellant is a 10-point preference eligible veteran. *Id.* On remand, the administrative judge should determine whether the appellant has appeal rights under 5 U.S.C. § 7511(a)(1)(B)(i) or (C)(ii).

the security clearance was a requirement of the appellant's position, and whether the procedures set forth in 5 U.S.C. § 7513 were followed. *Cheney v. Department of Justice*, 479 F.3d 1343, 1352 (Fed. Cir. 2007).

¶13 Under 5 U.S.C. § 7513(b), an individual is entitled to 30 days' advance written notice of the reasons for the suspension of her access to classified information when that is the reason for placing her on suspension pending a decision on her security clearance. *King v. Alston*, 75 F.3d 657, 661 (Fed. Cir. 1996). The agency's notice must provide the employee with specific reasons for the proposed action and provide her with sufficient information to make an informed reply to the agency. *Romero v. Department of Defense*, 527 F.3d 1324, 1328 (Fed. Cir. 2008). In other words, the employee must be given enough information to enable him or her to make a meaningful response to the agency's proposed suspension of the security clearance. *Cheney*, 479 F.3d at 1352. "Merely providing the employee with information that his access to classified information is being suspended, without more, does not provide the employee with sufficient information to make an informed reply to the agency" before being suspended. *King*, 75 F.3d at 662. Additionally, under section 7513(b), the employee is entitled to a reasonable time, but not less than 7 days, to answer orally or in writing and to furnish affidavits and other documentary evidence in support of the answer, to be represented by an attorney or other representative, and to receive a written decision and the specific reasons therefore at the earliest practicable date.

¶14 Furthermore, section 7513 is not the only source of procedural protections for employees subject to adverse actions related to security clearance matters; agencies also must follow the procedures established by their own regulations. *Romero*, 527 F.3d at 1328 (citing *Drumheller v. Department of the Army*¸ 49 F.3d 1566, 1569-73 (Fed. Cir. 1995)). In the event that an agency does not follow its own regulations, 5 U.S.C. § 7701(c)(2)(A) provides that the Board may not sustain an adverse action if the employee shows harmful error in the agency's

application of its procedures in arriving at its decision. *Romero*, 527 F.3d at 1328. Finally, when reviewing a case involving an indefinite suspension without pay pending the completion of a security clearance investigation, the court in *Cheney* also stated that the Board may determine "whether transfer to a nonsensitive position was feasible." *Cheney*, 479 F.3d at 1350.

¶15 Based upon the record before us, we are unable to determine whether the agency has provided the appellant with the statutory and regulatory protections entitled to an employee before being suspended pending the outcome of a security clearance determination. Below, the parties stipulated to the following facts: (1) The appellant's position required a SECRET clearance; (2) the agency issued the Report of Unfavorable Information on May 18, 2007, pertaining to the appellant; (3) the appellant was on administrative leave from May 19-31, 2007; and (4) the agency asked her to return to work on October 2, 2008. IAF, Tab 7.

¶16 In her petition for appeal, the appellant submitted a copy of a July 23, 2007 memo from Lieutenant Colonel Clayton M. Hutmacher, the subject of which was identified as "Consideration of [the appellant's] Proposed Indefinite Suspension." IAF, Tab 1. In the memo, Lieutenant Colonel Hutmacher stated that he had reviewed the record in the appellant's appeal of her security clearance, and he considered her verbal reply made to him on July 10, 2007, but he saw no reason to recommend to the regimental commander that he reconsider his decision to suspend her security clearance. Lieutenant Colonel Hutmacher also provided a brief explanation for his decision, including his conclusion that there were credible allegations that the appellant had engaged in an improper relationship with her ex-husband's battalion commander. However, despite the subject line on the memo, it does not constitute a decision that the appellant would be indefinitely suspended without pay from her position. *Id*. In particular, the memo does not state that the appellant would be suspended beginning on a certain date, it does not contain an explanation or reason for suspending the appellant without pay, and it does not provide the appellant with notice of her appeal

rights. In fact, the memo's analysis and findings relate only to the agency's proposed revocation of the appellant's access to classified information without any reference to her suspension without pay, and it concludes that her access to classified information should not be immediately restored, but instead resolved by appropriate agency security officials. *Id.*

¶17 Further, the record does not contain a copy of the agency's notice of proposed suspension without pay, any document from the regimental commander, Colonel Mangum, reflecting his decision on the proposed suspension without pay, or the agency's detailed statement of reasons for its suspension of the appellant's security clearance. Although the appellant apparently presented an oral reply to Lieutenant Colonel Hutmacher, the record is insufficient to determine whether the agency provided the appellant with all of the process due under section 7513. In particular, the record does not show that the appellant received 30 days' advance written notice of the specific reasons for the suspension, that she received sufficient information to make a meaningful reply to the allegations against her, or that she received other procedural protections required by section 7513. *See Cheney*, 479 F.3d at 1352-53. The record is also insufficient to determine whether the agency provided the appellant with all of the process due under its regulations because neither the agency nor the appellant has submitted any of the pertinent regulations in this case. Finally, the record does not include any response from the agency to the appellant's claim that the agency improperly denied her request for a transfer to another position.

ORDER

¶18 Accordingly, we deny the appellant's petition for review, vacate the initial decision, and remand this appeal for further proceedings consistent with this Opinion and Order. The administrative judge shall apprise the parties of the applicable burdens and elements of proof on the issues of timeliness and jurisdiction raised by this appeal and the issues related to the agency's indefinite

suspension of the appellant without pay based on the suspension of her security clearance. The administrative judge shall then afford the parties the opportunity to submit additional evidence and argument relating to these issues. In particular, the administrative judge should require the agency to submit documentary evidence as to the formalities followed by it in suspending the appellant without pay, in suspending her security clearance, and in responding to the appellant's request for reassignment to another position, along with its regulations that pertain to these actions. The administrative judge should then issue a new initial decision addressing the issues in this appeal.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.