

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2012 MSPB 46

Docket No. CH-0752-11-0075-I-2

**Carolyn Williams,
Appellant,**

v.

**Department of Defense,
Agency.**

March 30, 2012

J. Ward Morrow, Esquire, Washington, D.C., for the appellant.

Thomas S. Tyler, Esquire, Indianapolis, Indiana, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman

OPINION AND ORDER.

¶1 The appellant has filed a petition for review of the initial decision that sustained her indefinite suspension and the agency has filed a cross-petition for review. For the reasons discussed below, we REVERSE the initial decision that sustained the agency's indefinite suspension action. The suspension action is NOT SUSTAINED.

BACKGROUND

¶2 The appellant held the position of Accounting Technician, GS-0525-05, with the Defense Finance and Accounting Service (DFAS) in Cleveland, Ohio. Initial Appeal File (IAF), Tab 1. By memorandum dated May 27, 2008, Linda L.

Patten, the Branch Chief for the agency's Central Adjudication Facility (CAF), Washington Headquarters Service (WHS), advised the appellant that CAF had made a "tentative determination" to deny her eligibility to occupy a "sensitive position." Refiled Appeal File (RAF), Tab 12 at 36-37.¹ In support of this determination, the agency attached a "Statement of Reasons" and advised that "[a]vailable information tends to show [the appellant] ha[d] a history of not meeting [her] financial obligations" demonstrating she was "unable or unwilling to satisfy [her] debts." *Id.* at 38.

¶3 The agency notified the appellant that she could respond to CAF's "tentative determination" and, on September 5, 2008, she submitted a written response. RAF, Tab 12 at 90-91. In her response, the appellant stated that her financial difficulties were the product of circumstances beyond her control, to include "sickness and illnesses within the family," and other pressing financial familial obligations. *Id.* at 90. She also stated that she had "sought professional guidance" and started "making the necessary arrangement with the creditors to have this matter taken care of," noting that she had "contacted the creditors via telephone and regular mail" in order to "settle [her] outstanding debt[s] with them." *Id.* at 90-91.

¶4 On July 9, 2010, CAF informed the appellant that her financial considerations remained a concern and that she had not provided sufficient information to mitigate that concern. RAF, Tab 12 at 102-105. The CAF Letter of Decision informed the appellant of her right to appeal that decision in writing to the WHS Clearance Appeal Board (CAB), or to request a personal appearance

¹ The agency alleged that CAF had tentatively denied the appellant "eligibility for access to classified information and/or occupancy of a sensitive position." RAF, Tab 12 at 36-37. However, the unrefuted record demonstrates the appellant was not in a position that required her to maintain eligibility for access to classified information and CAF's decision was based solely on its determination to deny eligibility to occupy a sensitive position.

before a Defense Office of Hearings and Appeals (DOHA) administrative judge. *Id.* at 106. On July 16, 2010, the appellant made a written election to request a personal appearance before DOHA.

¶5 In a memorandum dated July 30, 2010, the agency proposed to indefinitely suspend the appellant from her position after concluding she was no longer qualified for her non-critical sensitive position based on CAF's decision "to deny [her] access to sensitive [] information," which is a requirement for her position. RAF, Tab 13 at 14-16. The agency also notified the appellant that she could respond to the proposed action orally and/or in writing. *Id.* Finally, it advised that the indefinite suspension would remain in effect "until WHS CAB [sic] issues its decision and we take any necessary follow-on administrative actions related to their [sic] decision." *Id.* The appellant did not respond to the proposed action. IAF, Tab 4 at 31.

¶6 On August 31, 2010, the agency issued a "Notice of Decision" in which it sustained the proposed action and indefinitely suspended the appellant from her position effective September 1, 2010. IAF, Tab 4 at 29-30. In its decision letter, the agency notified the appellant that the suspension would remain in effect "until a final decision on [her] appeal is issued and we take any necessary follow-up administrative actions related to that decision." *Id.*

¶7 The appellant filed a timely Board appeal from the suspension action. IAF, Tab 1. The administrative judge dismissed the appeal without prejudice on the appellant's motion. IAF, Tab 11. The appellant refiled her appeal and argued, inter alia, that there was no nexus between her alleged financial difficulties and the efficiency of the service. RAF, Tabs 1, 13, 22, 24 and 25. She also argued that the agency committed harmful procedural error when it failed to consider the requisite mitigating and aggravating circumstances as required by *Douglas v.*

Veterans Administration, [5 M.S.P.R. 280](#) (1981).² *Id.* Finally, she argued that the penalty imposed was overly harsh. *Id.*

¶8 After a hearing, the administrative judge issued an initial decision sustaining the indefinite suspension action. RAF, Tab 25. He found that “preponderant evidence supports the agency’s basis for terminating the appellant’s eligibility to occupy a sensitive position.” *Id.* at 5. The administrative judge also found that “there is a relationship between the appellant’s conduct and her position and that a nexus exists between the agency’s cause of action and the efficiency of the service.” *Id.* at 6. He also rejected the appellant’s procedural due process claim. *Id.*

¶9 The appellant has filed a petition for review of the initial decision in which she argues that the administrative judge misapplied the governing legal authority in this case. Petition for Review File (PFR File), Tab 1. Specifically, she contends the judge treated the agency’s action as if it were based on a decision to deny, revoke or suspend access or eligibility for access to classified information under *Department of the Navy v. Egan*, [484 U.S. 518](#) (1988), rather than a denial of eligibility to occupy a sensitive position as discussed in the Board’s decisions in *Conyers v. Department of Defense*, [115 M.S.P.R. 572](#) (2010), and *Northover v. Department of Defense*, [115 M.S.P.R. 451](#) (2010). PFR File, Tab 1. She also reiterates the arguments she raised at the hearing. *Id.*

¶10 The agency responded to the appellant’s petition and filed a cross-petition for review in which it also argues that the administrative judge improperly applied the standard of review in this case. PFR File, Tab 3. In direct contrast to the appellant’s claim, however, the agency contends the judge applied the Board’s

² In the proposal notice, the agency stated that CAF had made a decision “to deny [her] access to sensitive or classified information,” which is a requirement for her position. RAF, Tab 13 at 14-16. As noted above, however, the record demonstrates the appellant’s position did not require her to access or maintain eligibility to access classified information. *Id.*

decisions in *Conyers* and *Northover*, which the agency contends the Board decided in error. *Id.* As such, it argues that the judge impermissibly reviewed the merits of the agency’s “security” determination in the context of the appeal. *Id.* Moreover, the agency contends the judge should have applied the standard of review articulated in *Egan* and should have “only consider[ed] whether the Appellant was given appropriate due process.” *Id.* at 8. Alternatively, the agency contends the “Board should consider this case under a paradigm similar to ‘suitability determinations.’” *Id.* at 7.

¶11 The appellant has filed an opposition to the agency’s cross-petition, arguing that the agency’s contention that the administrative judge erred when he relied on the Board’s holding in *Conyers* and *Northover* is without merit. PFR File, Tab 5.

ANALYSIS

The administrative judge properly determined that the appeal was governed by the *Conyers/Northover* standard.

¶12 Generally, in an adverse action appeal, the agency must prove its charge by a preponderance of the evidence, establish a nexus between the action and the efficiency of the service, and establish that the penalty it imposed is within the tolerable bounds of reasonableness. [5 U.S.C. §§ 7513\(a\); 7701\(c\)\(1\)\(B\)](#); *Douglas*, 5 M.S.P.R. at 306-07. More specifically, in appeals such as this, when the charge involves the agency’s withdrawal of its certification or approval of an employee’s fitness or other qualification for the position, the Board has consistently recognized that its adjudicatory authority generally extends to a review of the merits of that withdrawal. *See Adams v. Department of the Army*, [105 M.S.P.R. 50](#), ¶ 10 (2007), *aff’d*, 273 F. App’x 947 (Fed. Cir. 2008).

¶13 In *Egan*, 484 U.S. at 530-31, the Supreme Court limited the scope of Board review in an appeal of an adverse action based on the revocation or denial of a security clearance. There, the Court held that the Board does not have authority to review the substance of the security clearance determination, as it would be

required to do in other adverse action appeals. *Id.* Rather, the Court found that the Board has the authority to review only whether the employee's position required a security clearance, whether the clearance was denied or revoked, whether the employee was provided with the procedural protections specified in [5 U.S.C. § 7513](#), and whether transfer to a nonsensitive position was feasible. *Id.*; see *Hesse v. Department of State*, [217 F.3d 1372](#), 1376 (Fed. Cir. 2000).

¶14 The Board narrowly construed the *Egan* rule in two subsequent interlocutory appeals: *Conyers* and *Northover*. In *Conyers*, the Board held that the rule limiting the scope of Board review when an adverse action appeal is based on loss of a "security clearance" was not applicable to an indefinite suspension based on the denial of an employee's eligibility to occupy a non-critical sensitive (NCS) position which did not require that she have a security clearance or access to classified information. See *Conyers*, [115 M.S.P.R. 572](#), ¶¶ 12-13. In *Northover*, the Board held that the rule limiting the scope of Board review when an adverse action appeal involves loss of a "security clearance" applies only when the agency has made a decision to deny, revoke, or suspend access or eligibility for access to classified information and was not applicable to a reduction in grade which was based on the denial of an employee's eligibility to occupy an NCS position. See *Northover*, [115 M.S.P.R. 451](#), ¶¶ 3, 13.

¶15 Here, the appellant's circumstances are very similar to those of the appellant in *Conyers*. See *Conyers*, [115 M.S.P.R. 572](#), ¶¶ 2, 3, 13. The appellant holds a position with DFAS that requires that she maintain eligibility to hold a sensitive position, but that does not require access to classified information. See RAF, Tab 22 at 7. We therefore find that the administrative judge correctly

determined that the Board has the authority to review the merits of the adverse action.³

The agency may not indefinitely suspend the appellant under the circumstances in this case.

¶16 To sustain an indefinite suspension, the agency must show: (1) It imposed the suspension for an authorized reason, *see Gonzalez v. Department of Homeland Security*, [114 M.S.P.R. 318](#), ¶ 13 (2010); (2) the suspension has an ascertainable end, i.e., a determinable condition subsequent that will bring the suspension to a conclusion, *e.g.*, *Drain v. Department of Justice*, [108 M.S.P.R. 562](#), ¶ 8 (2008); (3) the suspension bears a nexus to the efficiency of the service, *Harding v. Department of Veterans Affairs*, [115 M.S.P.R. 284](#), ¶ 21 (2010), *aff'd*, 451 F. App'x 947 (Fed. Cir. 2011); and (4) the penalty is reasonable, *id.*, ¶ 22.

¶17 With respect to what constitutes an authorized reason for indefinitely suspending an employee, the Board and its reviewing court have approved indefinite suspensions under three limited circumstances:

(1) when an agency has reasonable cause to believe an employee has committed a crime for which a sentence of imprisonment could be imposed, pending the outcome of the criminal proceeding or any subsequent agency action following the conclusion of the criminal process;

(2) when the agency has legitimate concerns that an employee's medical condition makes his continued presence in the workplace dangerous or inappropriate, pending a determination that the employee is fit for duty; and

(3) when an employee's access to classified information has been suspended and the employee must have such access to perform his job, pending a final determination on the employee's access to classified information.

³ Because *Conyers* was before the Board on interlocutory appeal, the Board did not reach the merits of the indefinite suspension. *See Conyers*, [115 M.S.P.R. 572](#).

Gonzalez, [114 M.S.P.R. 318](#), ¶ 13. Although it is not a finite list, the Board has yet to identify any further circumstances under which it would approve indefinitely suspending an employee. *See id.*

¶18 None of the three limited circumstances that allow for an indefinite suspension exists in this case. Moreover, we do not find that the facts of the case at bar present a basis for expanding the list. The agency did not suspend the appellant under the crime provision, because of a medical condition, or because her access to classified information had been suspended and she needed such access to perform her job.⁴ As the Board explained in *Conyers*, eligibility for access to classified information is not synonymous with eligibility to occupy a sensitive position. *See Conyers*, [115 M.S.P.R. 572](#), ¶ 17. Accordingly, the agency has failed to prove by preponderant evidence that it properly placed the appellant on an indefinite suspension. Therefore, we find that the indefinite suspension cannot be sustained.

¶19 In resolving this appeal, we hold only that an agency may not indefinitely suspend an employee based on the circumstances and facts as described herein. We give no opinion on whether the agency could remove the appellant or impose some other adverse action based on the facts of this case. *See Gonzalez*, [114 M.S.P.R. 318](#), ¶ 28 (the Board is constrained “to review this action solely on the basis charged by the agency”) (citing *O’Keefe v. U.S. Postal Service*, [318 F.3d 1310](#), 1315 (Fed. Cir. 2002); *Gottlieb v. Veterans Administration*, [39 M.S.P.R. 606](#), 609 (1989)).

¶20 Finally, because we have reversed the suspension for the reasons stated above, we do not reach the issues raised in the appellant’s petition for review and/or the agency’s cross petition for review. *See e.g., Gonzalez*, [114 M.S.P.R. 318](#), ¶ 28 n.18.

⁴ As noted above, the appellant was not required to have access to classified information to perform her job. *See RAF*, Tab 22 at 7.

ORDER

¶21 We ORDER the agency to CANCEL the appellant's indefinite suspension effective September 1, 2010. *See Kerr v. National Endowment for the Arts*, [726 F.2d 730](#) (Fed. Cir. 1994). The agency must complete this action no later than 20 days after the date of this decision.

¶22 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶23 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* [5 C.F.R. § 1201.181](#)(b).

¶24 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. [5 C.F.R. § 1201.182](#)(a).

¶25 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or DFAS, two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely

provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

¶26 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

**NOTICE TO THE APPELLANT REGARDING YOUR RIGHT TO REQUEST
ATTORNEY FEES AND COSTS**

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at [5 C.F.R. §§ 1201.201](#), 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees **WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION**. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

**NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS**

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose

to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's [Rules of Practice](#), and [Forms 5, 6, and 11](#).

FOR THE BOARD:

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



DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT
CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
 - a. Outside earnings with copies of W2's or statement from employer.
 - b. Statement that employee was ready, willing and able to work during the period.
 - c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.



NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts.

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.
2. The following information must be included on AD-343 for Restoration:
 - a. Employee name and social security number.
 - b. Detailed explanation of request.
 - c. Valid agency accounting.
 - d. Authorized signature (Table 63)
 - e. If interest is to be included.
 - f. Check mailing address.
 - g. Indicate if case is prior to conversion. Computations must be attached.
 - h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)
2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.
3. Outside earnings documentation statement from agency.
4. If employee received retirement annuity or unemployment, provide amount and address to return monies.
5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)
6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.
7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

- a. Must provide same data as in 2, a-g above.
- b. Prior to conversion computation must be provided.
- c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.