UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 55

Docket No. DE-0752-10-0179-I-1

Massoud Rahgozar,

Appellant,

v.

Department of the Air Force,

Agency.

April 16, 2012

Raymond B. Rounds, Esquire, Ogden, Utah, for the appellant.

Kevin C. Probasco, Esquire, Hill Air Force Base, Utah, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant petitions for review of the initial decision that affirmed his removal. For the reasons set forth below, we GRANT the petition for review, VACATE the initial decision, and REMAND the appeal for further proceedings consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant, an Aerospace Engineer for the agency's Aircraft Sustainment Group at Hill Air Force Base, Utah, held a "Secret" level security clearance as required for the position. Initial Appeal File (IAF), Tab 1 at 1; Tab

4, Attachment 1; Tab 13, Aff. at 3-4; Aff. Ex. 25.[1] In April 2002, the agency notified him of its preliminary decision to revoke his access to classified information or assignment to sensitive duties and to suspend his access to classified information. *Id.*, Tab 8, Subtab 4v. The attached statement of reasons explained that the basis for concern was the appellant's "foreign preference" – he held dual United States and Iranian citizenship and continued to visit relatives in Iran using his Iranian passport. *Id.*, Attachment. The appellant filed a response. IAF, Tab 8, Subtab 4q. In September 2002, the agency's Central Adjudication Facility (CAF) issued a final revocation of his access to classified information, concluding that he did not mitigate the agency's concern about a foreign preference because he did not renounce his dual citizenship or relinquish his foreign passport. *Id.*, Subtab 4p. The appellant appealed that determination. *Id.*, Subtabs 4k-4o. The agency's Personnel Security Appeal Board (PSAB) denied the appeal in January 2003. *Id.*, Subtab 4j.

¶3 The agency did not remove the appellant when he lost his security clearance, however; rather, it changed his position's sensitivity code by altering his duties so that he could continue working in the position[2] without a security clearance. IAF, Tab 13, Aff. at 6, 8, 14, Aff. Ex. 25. The appellant continued working in that fashion until 2008. *Id.*, Aff. at 14.

¶4 In March 2008, the agency changed the sensitivity code of the appellant's position to again require a security clearance. IAF, Tab 8, Subtab 4g; Tab 20, Ex. 1. In response, the appellant's commander requested reinstatement of the appellant's security clearance, noting that the appellant now agreed to renounce

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[1] The appellant's submission contains an affidavit accompanied by numbered exhibits and a brief accompanied by numbered exhibits. *See* IAF, Tab 13. We will identify the separate groups of exhibits as "Aff. Exs." and "Br. Exs."

[2] The administrative judge found that the appellant's position did not change in series, title, or grade level. IAF, Tab 21 at 12; *see also* IAF, Tab 8, Subtab 4g.

his foreign citizenship and surrender his foreign passport. *Id.*, Tab 8, Subtab 4g at 2; Tab 13, Aff. Ex. 27. The appellant also submitted a new Standard Form (SF)-86 investigation questionnaire for national security positions in support of the commander's request. *Id.*, Tab 13, Aff. Ex. 28.[3] In October 2009, the CAF denied the commander's request to reinstate the appellant's security clearance.[4] *Id.*, Tab 8, Subtab 4e. The CAF based its decision on an updated investigation that revealed that the appellant still had relatives in Iran, continued to travel on his Iranian passport after the original revocation of his security clearance, and agreed to renounce his dual citizenship only after consulting with his Iranian relatives. *Id*. The decision stated that the commander could seek the appellant's reinstatement again in 12 months. *Id.*

¶5 In November 2009, the agency proposed the appellant's removal based upon his "failure to obtain a Secret clearance." IAF, Tab 8, Subtab 4d. The appellant filed a response, although it is not in the record. *Id.*, Subtab 4c. The agency removed the appellant, effective December 16, 2009, for "failure to obtain a Secret security clearance, as required for [his] permanent position of Aerospace Engineer." *Id.*, Subtab 4c; *see also id.*, Subtab 4b. The appellant filed a timely appeal, IAF, Tab 1, later withdrawing his request for a hearing, *id.*, Tab 18.

¶6 The administrative judge affirmed the appellant's removal. She identified the only issue as whether the appellant proved that the agency committed harmful error, i.e., violated its regulations, by denying him a new security clearance process before removing him. She concluded as follows: The appellant received

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[3] The administrative judge found that the appellant presented conflicting accounts of whether he submitted this document on his own initiative or at the agency's request. IAF, Tab 21 at 10 n.5. But the agency does not appear to dispute the appellant's contention that the agency relied upon the SF-86 in reviewing the reinstatement request. *Id.*, Tab 19 at 16.

[4] The appellant maintains that this decision was only provided to his commander, and that he did not receive a copy until he filed his Board appeal. IAF, Tab 19 at 6.

all of the procedural protections to which he was entitled during the original security clearance revocation process. His commander's subsequent request to reinstate the security clearance was not a request for a new clearance; therefore, it did not trigger the procedural protections required for the denial of a clearance. The agency did not violate the appellant's due process rights, and the agency's regulations provided no procedures to challenge the denial of a request to reinstate a security clearance. The Board lacks jurisdiction to consider the appellant's discrimination claim. IAF, Tab 21.

¶7 The appellant has filed a timely petition for review. Petition for Review (PFR) File, Tab 1. The agency has filed a response opposing the appellant's petition. *Id.*, Tab 3.

ANALYSIS

¶8 When an employee is removed for cause under 5 U.S.C. § 7513 based upon the denial or revocation of a security clearance, the employee is entitled to certain procedural protections under the statute. *Department of the Navy v. Egan*, 484 U.S. 518, 530 (1988). In particular, the employee suffering the adverse action is entitled to enough information to enable him or her to make a meaningful response to the loss of his security clearance. *See, e.g., Cheney v. Department of Justice*, 479 F.3d 1343, 1352 (Fed. Cir. 2007); *Rothlisberger v. Department of the Army*, 111 M.S.P.R. 662, ¶ 13 (2009). The Board may then determine whether cause existed, whether the clearance was actually denied, and whether transfer to a nonsensitive position was feasible. *Egan*, 484 U.S. at 530. In addition, the Board may determine whether the agency afforded the employee minimum due process with respect to his constitutionally protected property interest in his employment. *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985). Moreover, an agency must also follow its own regulations regarding security clearance decisions. *Romero v. Department of Defense*, 527 F.3d 1324, 1328 (Fed. Cir. 2008) (*Romero I*); *Rothlisberger*, 111 M.S.P.R. 662, ¶ 14.

¶9 Here, the parties dispute whether the agency provided the appellant with the proper procedural protections under the relevant regulations in connection with the 2009 denial of his commander's request to reinstate his security clearance. The regulations at issue are those of the Department of Defense (DoD) relating to personnel security, DoD Regulation 5200.2-R (5200.2-R), and the analogous regulations of the agency, AFI31-501 AFMCSUP HILLAFBSUP I (AFI31-501).[5] *See* IAF, Tab 8, Subtabs 4i, 4x; Tab 13, Br. Exs. 1, 2; Tab 17, Att. 1; Tab 20, Ex. 2.

¶10 Pursuant to 5200.2-R, Sections C8.2.1, C8.2.2, no "final unfavorable personnel security clearance" determination will be made nor an "unfavorable administrative action" taken under this regulation without granting the individual the procedural benefits provided for in Section C8.2.2. IAF, Tab 8, Subtab 4x at 4. These procedural benefits include receiving a statement of the reasons for the unfavorable administrative action, the opportunity to respond, a written decision, the opportunity to appeal to the relevant PSAB, and a written decision from the PSAB. *Id*. at 4-6. An "unfavorable administrative action" is defined as an "[a]dverse action taken as the result of personnel security determinations and unfavorable personnel security determinations as defined in this Regulation." 5200.2-R, Section DL1.1.29.[6] An "unfavorable Personnel Security Determination" is defined, in part, as a denial or revocation of a security clearance or access to classified information. *Id*., Section DL1.1.30.

¶11 The appellant's security clearance was revoked in 2002. Thus, under 5200.2-R, the appellant suffered an "unfavorable personnel security

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[5] The parties do not appear to dispute that the DoD regulations control over the agency regulations.

[6] Neither side included the definition sections of 5200.2-R, but we have obtained them from DoD's official website (www.defense.gov). *See* 5 C.F.R. § 1201.64 (the Board may take official notice of matters that can be verified).

determination" in 2002 – the revocation of his security clearance. He continued working, however, so he did not suffer an "unfavorable administrative action" (which requires both an unfavorable personnel security determination and an adverse action based upon it) at that time because the agency did not take an adverse action against him. In 2009, he suffered an adverse action (removal), but the parties dispute whether the removal was an "unfavorable administrative action" because they disagree concerning whether the denial of the request to reinstate his security clearance constituted an "unfavorable personnel security determination," that is, whether it triggered the same procedural protections as a denial of a new security clearance.

¶12 In that regard, the appellant argues that the administrative judge ignored the procedural protections in the regulations relating to reinstatements in finding that the agency's failure to provide procedures in 2009 did not violate its regulations. PFR File, Tab 1 at 1. The appellant further argues that the administrative judge's decision would allow the agency to circumvent an employee's procedural protections by simply labeling the request for a security clearance as a request for reinstatement rather than a request for a new security clearance. *Id*. at 1-2. The appellant also asserts that further review of the agency's reinstatement decision is essential to allow him to challenge incorrect information in the reinstatement decision that post-dated the original revocation of his clearance. *Id* at 3.[7]

¶13 The administrative judge relied largely upon one agency regulation in reaching her conclusion that the appellant was not entitled to further agency procedures in connection with the 2009 action on his security clearance:

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[7] The appellant does not challenge the administrative judge's conclusions that he received all the required procedural protections in connection with the 2002 revocation of his security clearance, that a security clearance was required for his position, and that the agency did not have a policy of transferring employees who lost their clearances to other positions. ID at 5.

> **Security Clearance Reinstatement**. An individual's commander may request reinstatement of their security clearance 12 months after the effective date of revocation or denial or decision of the PSAB, whichever is later. Requests should be sent to the CAF with the commander's recommendation for approval. The commander includes an explanation on how the individual's behavior has improved and the appropriate documentation corresponding to the reasons(s) for the denial or revocation. The documentation required depends on the reason(s) involved, such as, evaluation for mental health issues, evaluation for drug or alcohol abuse; or current financial statement(s).

AFI31-501, Section 8.7. *See* IAF, Tab 8, Subtab 4i at 8. She noted that this section does not specifically refer to any appellate rights for the denial of a request to reinstate a security clearance, unlike the provisions relating to the initial denial or revocation of a security clearance. ID at 6-7. She also opined that an individual could not realistically expect full agency review procedures every 12 months (if the reinstatement request is continuously renewed and denied). *Id*. at 9. She concluded that the appellant received all the process he was entitled to in connection with the original revocation. *Id*. at 6-7, 9, 13.

¶14 We find the administrative judge's reasoning unpersuasive. Although Section 8.7 does not expressly provide for further procedures or appeals, the rest of AFI31-501, Chapter 8, relates to the procedures for unfavorable administrative actions (and generally incorporates 5200.2-R). *See* IAF, Tab 8, Exhibit 4i; Tab 13, Br. Ex. 2. Given that nothing in Section 8.7 states that the procedures in the balance of the chapter do not apply, the inference that the procedures do apply is at least equally plausible. *See generally Brodsky v. Office of Personnel Management*, 108 M.S.P.R. 228, ¶ 16 (2008) (regulatory provisions should be considered in their appropriate context).

¶15 Moreover, the agency also has a regulation that suggests that an individual seeking reinstatement of a clearance may be entitled to the same procedural protections as an individual challenging the denial of a clearance. AFI31-501, Section 8.6.6 provides that, upon receiving the individual's rebuttal [response to

the agency's statement of the reasons for a proposed negative security determination], "the CAF will determine whether a security clearance should be reinstated, revoked, or denied and a final response provided to the individual." IAF, Tab 8, Subtab 4i at 7. Unless reinstatement has a different meaning here than in Section 8.7, it would appear to apply to the appellant's situation.[8]

¶16 Furthermore, we note that 5200.2-R, Section C3.7, expressly provides for reinvestigations based upon new negative information about a clearance holder, routine reinvestigations of current clearance holders, and reinvestigations upon a request to assess the current eligibility of an individual who previously received an unfavorable adjudication after a prior investigation. IAF, Tab 17, Att. 1 at Sections C3.7.1.1 to C.3.7.1.3. The appellant was apparently reinvestigated (presumably under Section C3.7.1.1) in connection with his 2002 revocation, *see* IAF, Tab 13, Aff. Ex. 1, and the agency has never disputed that the revocation resulting from that reinvestigation triggered full procedural protections, *see* IAF, Tab 20 at 2-3. The commander's request to reinstate the appellant's clearance raises a question as to whether it is a request for a reinvestigation under Section C.3.7.1.3, and, if so, whether the denial of a security clearance resulting from this reinvestigation would trigger procedural protections.

¶17 In addition, the denial of the request to reinstate did not rely solely upon the original revocation to justify the denial. Rather, it emphasized subsequent events, including the appellant's travel in 2006 and 2007. IAF, Tab 8, Subtab 4e. This raises a question as to whether the appellant's opportunity to respond to negative information in a 2002 investigation would justify him being denied the opportunity to respond to new negative information generated in a subsequent

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[8] Admittedly, the DoD regulations provide for the "reinstatement" of civilian employees, but "reinstatement" there refers only to rehiring an employee who was previously removed over a security issue under this regulation. *See* 5200.2-R, Section C8.3.1. Thus, the appellant does not appear to qualify for "reinstatement" as defined in the DoD regulation.

reinvestigation.[9] We also note that the denial letter expressly stated that the commander "may request reinstatement of Subject's security clearance 12 months from the date of this letter." IAF, Tab 8, Subtab 4e. This statement appears to be a clear invocation of Section 8.7. However, Section 8.7 is applicable only "after the effective date of revocation or denial or decision of the PSAB" of an employee's security clearance. IAF, Tab 8, Subtab 4i at 8. This suggests that the agency treated the denial of the request to reinstate as essentially equivalent to a denial of a security clearance.[10]

¶18 Finally, as discussed above, the agency actually removed the appellant based on the charge of "failure to obtain a Secret security clearance, as required for [his] permanent position of Aerospace Engineer," *id.*, Subtab 4c; *see also id.*, Subtab 4b (emphasis added). Moreover, as also noted above, the position did not require a security clearance between 2003 and 2008. Thus, on its face, the agency's action would appear to be more akin to the denial of a security clearance, i.e., an "unfavorable Personnel Security Determination," than the denial of the reinstatement of a security clearance for a position that had not required one for 5 years.

¶19 The current record raises questions and the proper application of the regulations to the appellant's circumstances is not clear. *See generally Rothlisberger*, 111 M.S.P.R. 662, ¶¶ 17-18 (remand was required because the record was not clear regarding whether the appellant received all of the necessary procedures under the agency regulations). The parties should have the first

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[9] Although the appellant focuses his appeal on the relevant regulations, we note that the opportunity to provide a meaningful reply to the loss of a clearance which results in an adverse action is a requirement of minimum due process. *See, e.g., Cheney*, 479 F.3d at 1352.

[10] The administrative judge's conclusion that an employee could not reasonably expect full agency review procedures "every 12 months" is not necessarily persuasive. It does not take into account that the commanding officer must make any such request. *See* IAF, Tab 8, Subtab 4i at 8.

opportunity to address the unresolved issues upon remand, including the interrelationship between the DoD and agency regulations, whether AFI31-501, Section 8.6.6 applies to the appellant, how the agency and DoD define the word "reinstate" in their respective regulations, whether the commander's request to reinstate the appellant's clearance constituted a reinvestigation under the DoD regulations, how the denial of a request to reinstate differs from the denial of a security clearance in the appellant's circumstances, and whether there are any prior applications of the relevant DoD and agency regulations to circumstances like the appellant's.[11] *See generally Romero I*, 527 F.3d at 1329-30. If the administrative judge determines that the agency has failed to follow its own regulations, she should consider whether the procedural deficiency resulted in harmful error. *Romero I*, 527 F.3d at 1328, 1330 & n.2; *see also Romero v. Department of Defense*, 658 F.3d 1372, 1380 (Fed. Cir. 2011) (*Romero II*).

ORDER

¶20 Accordingly, the Board GRANTS the appellant's petition for review, VACATES the initial decision, and REMANDS the appeal for further proceedings consistent with this Opinion and Order.

FOR THE BOARD:

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

[11] As noted by the administrative judge, the parties also failed to file all relevant sections of the regulations upon which they relied. IAF, Tab 21 at 9 n.4. The parties are directed to do so on remand. *See generally Rothlisberger*, 111 M.S.P.R. 662, ¶ 17.