

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

2012 MSPB 66

Docket No. DC-0752-10-0264-I-4

**Nellie M. Ingram,
Appellant,**

v.

**Department of Defense,
Agency.**

April 27, 2012

Nellie M. Ingram, La Grange, North Carolina, pro se.

Rachael L. Orejana, Esquire, Fort Lee, Virginia, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The agency petitions for review of the initial decision, issued July 6, 2011, that reversed the appellant's demotion. For the reasons set forth below, the Board GRANTS the agency's petition, VACATES the initial decision, and REMANDS the appeal for further adjudication.

BACKGROUND

¶2 The agency demoted the appellant from her noncritical-sensitive Supervisory Store Associate position to a Lead Store Associate position, based upon the loss of her eligibility for access to classified information and occupancy of a sensitive position. MSPB Docket No. DC-0752-10-0264-I-1 Initial Appeal

File (AF-1), Tab 3, Subtabs 4c, 4e, 4k. The agency's notice of proposed demotion did not state the underlying reasons for the loss of eligibility, although the agency file referenced proceedings before the Washington Headquarters Services Consolidated Adjudications Facility (CAF). AF-1, Tab 3, Subtabs 4c, 4e.

¶3 On appeal, the agency submitted the agency file developed during the demotion proceeding and moved to dismiss the appeal pending the resolution of a related appeal pending before the U.S. Court of Appeals for the Federal Circuit. AF-1, Tab 3. The administrative judge then dismissed this appeal without prejudice to refiling. AF-1, Tab 7. Although the related Federal Circuit appeal was dismissed as withdrawn, the administrative judge later similarly dismissed this appeal twice more pending the Board's resolution of *Conyers v. Department of Defense*, [115 M.S.P.R.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). MSPB Docket No. DC-0752-10-0264-I-2 Initial Appeal File (AF-2), Tab 6; MSPB Docket No. DC-0752-10-0264-I-3 Initial Appeal File (AF-3), Tab 4. After the Board decided *Conyers* and *Northover*, the administrative judge afforded the parties the chance to submit closing evidence and argument in the current appeal. MSPB Docket No. DC-0752-10-0264-I-4 Initial Appeal File (AF-4), Tab 3. For the first time, the agency submitted documents pertaining to the CAF loss of eligibility proceeding. AF-4, Tab 4. Those documents showed that the agency informed the appellant of the reasons it was examining whether to end her eligibility (i.e., financial problems), that the agency afforded the appellant both the opportunity to respond to those reasons and to appeal its decision, and that the appellant, in fact, availed herself of these opportunities. *Id.* at 30-41, 52-54 of 55; 6-16 of 84.

¶4 Upon considering the closing submissions, the administrative judge reversed the appellant's demotion, finding that the agency denied the appellant due process in effecting the action. AF-4, Tab 5. Specifically, she found that the Board's decision in *Conyers* governs the present case and that the Supreme

Court's decision in *Department of the Navy v. Egan*, [484 U.S. 518](#), 530-31 (1988), limiting the Board's scope of review of agency security clearance determinations, does not limit the Board's authority to examine the merits of the demotion at issue here. AF-4, Tab 5 at 2-3. She then found that she need not reach the merits of the demotion action because the agency's failure to provide the appellant with the specific reasons for the adverse action deprived the appellant of due process. *Id.* at 4-5. In reaching this conclusion, the administrative judge recognized the evidence showing that the agency provided the appellant with the detailed information that led the CAF to revoke the appellant's access during that prior process, but she concluded that the appellant's opportunity to review this information during that prior proceeding did not "cure the fatal flaw" in the agency's demotion proceeding. *Id.* at 4.

¶5 The agency has petitioned for review, asserting that the Board decided *Conyers* and *Northover* incorrectly and that, in any event, the Board should not apply the standard set forth in those cases because they are currently pending on review with the U.S. Court of Appeals for the Federal Circuit. Petition for Review File, Tab 1. The agency also argues that it did not violate the appellant's due process rights. *Id.*

ANALYSIS

¶6 We first find no merit to the agency's argument that *Conyers* and *Northover* should not apply because those decisions are not final. Pursuant to [5 U.S.C. § 7703](#)(d), the Office of Personnel Management (OPM) may seek review of a final Board order or decision under certain circumstances. In permitting OPM to seek review of *Conyers* and *Northover*, our reviewing court found that those decisions were final as to the Board's authority to review the merits of the agency's decisions. *Berry v. Conyers*, 435 F. App'x 943, 944-45 (Fed. Cir. 2011). The agency, therefore, has not shown that the administrative judge erred in applying *Conyers* and *Northover*, and it has not set forth any basis upon which

to stay these proceedings pending the outcome of OPM's petition for review before the court.

¶7 We agree, however, with the agency's assertion that it did not violate the appellant's due process rights. Due process requires an agency to provide an employee with, among other things, notice of the reasons for the adverse action. *See, e.g., Gray v. Department of Defense*, [116 M.S.P.R. 461](#), ¶ 6 (2011). The record shows that, during the eligibility proceeding, the agency both informed the appellant of the reasons it was examining whether to end her eligibility, specifically identifying her financial problems, and afforded the appellant the opportunity to respond to those reasons and to appeal its decision. AF-4, Tab 4 at 30-42 of 44; 6-8 of 84. The record also shows that the appellant, in fact, availed herself of these opportunities, and her replies demonstrated that she understood the charges and was able to present a meaningful response. *Id.* at 52-53 of 55; 14-16 of 84. Thus, the appellant was aware of the underlying reasons for the loss of her eligibility, even though the agency did not again provide this information in its demotion action. The administrative judge found that the agency's failure to include the documents from the eligibility proceeding in the demotion proceeding was "fatal" to the agency's case. AF-4, Tab 5 at 4. We disagree.

¶8 The record shows that the appellant received notice and opportunity to reply to the underlying reasons for the eligibility determination. Because the appellant received the required notice of the specific charges against her in the eligibility proceeding, and given that the eligibility determination formed the basis of her demotion, we find that the agency has not denied the appellant due process in effecting her demotion. *Cf. Hinton v. Department of the Navy*, [61 M.S.P.R. 692](#), 695-96 (1994) (when an agency bases an indefinite suspension on the revocation of access to security areas or information, the agency must provide the appellant with a meaningful opportunity to respond to the reasons for the indefinite suspension by ensuring that either in the advance notice of that action or in the earlier access determination, he has been notified of the cause that led to

the access determination). Adjudication of the merits of the appellant's demotion is, therefore, required.

¶9 In *Conyers* and *Northover*, the Board held that, in appeals such as the present case, when the charge concerns an agency's withdrawal of an employee's qualification for a position, the Board's adjudicatory authority extends to a review of the merits of that withdrawal. *Conyers*, [115 M.S.P.R. 572](#), ¶¶ 10, 14, 21; *Northover*, [115 M.S.P.R. 451](#), ¶¶ 10, 14, 21; *see also Adams v. Department of the Army*, [105 M.S.P.R. 50](#), ¶ 10 (2007), *aff'd*, 273 F. App'x 947 (Fed. Cir. 2008). Here, the administrative judge declined to reach the merits of the demotion action having overturned it on the grounds that it was procedurally defective. AF-4, Tab 5 at p. 4-5. We therefore remand for a decision on the merits. In doing so, we also note that the acknowledgment order in the refiled appeal now before us, like the previous orders in the refiled appeals, was silent regarding the appellant's hearing election. AF-4, Tab 2. The administrative judge set a date for the record's close "[b]ecause the appellant ha[d] not requested a hearing." AF-4, Tab 3 at 1. Because the administrative judge never afforded the appellant an opportunity either to request a hearing in light of the new standard set forth for deciding cases such as the present one or to object to the determination that the appellant had waived her right to a hearing, we find remand for affording the appellant this opportunity warranted. *Perez Peraza v. Office of Personnel Management*, [114 M.S.P.R. 457](#), ¶ 15 (2010); *Blaha v. Office of Personnel Management*, [106 M.S.P.R. 265](#), ¶ 12 (2007).

ORDER

¶10 Accordingly, we REMAND this appeal for further adjudication. On remand, the administrative judge should afford the appellant the opportunity to request a hearing in her appeal. If the appellant makes this request, the administrative judge should conduct the hearing and decide the merits of the

agency's action. If the appellant again declines a hearing, the administrative judge should decide the merits on the basis of the existing record.

FOR THE BOARD:

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