UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 71

Docket No. DA-0752-10-0202-R-1

John Gaitan,

Appellant,

v.

Department of Homeland Security,

Agency.

May 7, 2012

Lawrence A. Berger, Esquire, Glen Cove, New York, for the appellant.

Andrew Han and Remy Savin, Esquire, Arlington, Virginia, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 Upon further consideration, we hereby REOPEN this appeal pursuant to 5 C.F.R. § 1201.118, VACATE our April 27, 2012 Opinion and Order in its entirety, and SUBSTITUTE the following decision.

¶2 The appellant petitions for review of the May 12, 2010 initial decision that sustained his indefinite suspension. For the reasons set forth below, the Board AFFIRMS the initial decision as MODIFIED by this Opinion and Order.

BACKGROUND

¶3 The appellant, a Federal Air Marshal (FAM) with the Transportation Security Administration (TSA), is required to hold a Top Secret security clearance. Initial Appeal File (IAF), Tab 5, Subtabs 1 at 1, 4J; Tab 13, Jt. Stip. 2. The record indicates that the agency placed him on administrative leave on April 17, 2009, *id.*, Tab 5, Subtab 4B at 3, Subtab 4D at 2, and that it issued him a July 22, 2009 Notice of Determination to Revoke Access to Classified Information, which it subsequently rescinded, *id.*, Subtab 4E at 1. On October 22, 2009, the Office of Security, Personnel Security Division Deputy Associate Director Larry Smith issued two documents: (1) a Determination to Revoke Access to Classified Information, addressed to Special Agent in Charge (SAC) Joanne Oxford, and advising her that the Personnel Security Division had decided to revoke the appellant's access to classified information and had suspended his security clearance effective immediately; and (2) a Notice of Determination To Revoke Access to Classified Information to the appellant. *Id.*, Subtabs 4E, 4F.

¶4 On October 28, 2009, Assistant Special Agent in Charge (ASAC) Derek Tinkey proposed the appellant's indefinite suspension based on a charge entitled "Revocation of Top Secret Security Clearance." IAF, Tab 5, Subtab 4D. The appellant received the proposal on October 30, 2009. *Id.* After providing the appellant with an opportunity to respond to the proposed indefinite suspension, ASAC Emmett Baylor issued a December 15, 2009 decision sustaining the indefinite suspension effective when the appellant received the decision, i.e., December 18, 2009. IAF, Tab 1 at 2, Tab 5, Subtab 4B. The appellant filed an appeal, *id.*, Tab 1, subsequently withdrawing his request for a hearing, *id.*, Tabs 8, 9.

¶5 The administrative judge sustained the appellant's indefinite suspension. She found as follows: The applicable procedural protections are in TSA's Management Directive (MD) No. 1100.75-3 and its Handbook. The appellant did not dispute that he was required to have a security clearance and that it was

suspended. The record showed that the notices of security clearance suspension and proposed indefinite suspension informed the appellant of the specific reasons for the actions and afforded him an opportunity to respond to the actions, thus giving him the requisite procedural protections. The administrative judge therefore sustained the charge. She further found that the agency set a condition subsequent, that the agency's action promoted the efficiency of the service, and that the penalty was reasonable. IAF, Tab 15. The appellant filed a petition for review of the initial decision, Petition for Review File (PFR File), Tab 1, and the agency filed a response opposing the petition, *id.*, Tab 4.

¶6 The Board determined that this appeal presents similar legal issues to those presented in three other appeals.[1] The Board therefore issued a request for briefing to the parties, PFR File, Tab 5, and also issued a notice of opportunity to file amicus briefs, 76 Fed. Reg. 59171 (Sept. 23, 2011). The request and notice explained the background of the appeal and applicable law and set forth the following issues: (1) Should the Board apply the balancing test set forth in *Gilbert v. Homar*, 520 U.S. 924 (1997), in determining whether an agency violates an employee's constitutional right to due process in indefinitely suspending him or her pending a security clearance determination; (2) If so, does that right include the right to have a deciding official who has the authority to change the outcome of the proposed indefinite suspension; and (3) If the Board finds that an agency did not violate an employee's constitutional right to due process in this regard, how should the Board analyze whether the agency committed harmful procedural error in light of the restrictions set forth in *Department of the Navy v. Egan*, 484 U.S. 518 (1988), on the Board's authority to analyze the merits of an agency's security clearance determination. *Id.* The

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[1] Those appeals are *McGriff v. Department of the Navy*, MSPB Docket No. DC-0752-09-0816-I-1; *Gargiulo v. Department of Homeland Security*, MSPB Docket No. SF-0752-09-0370-I-1; and *Buelna v. Department of Homeland Security*, MSPB Docket No. DA-0752-09-0404-I-1.

parties submitted additional argument and amici submitted briefs.[2] PFR File, Tabs 7, 10-11, 13-15, 18-20, 22. The record closed on November 21, 2011. *Id.*, Tabs 17, 21. The Board has considered the entire record in ruling on this appeal.

ANALYSIS

¶7 The appellant argues that the issue is whether the agency violated his due process rights when it did not provide him with an opportunity to reply to the decision to suspend his security clearance when that decision was the sole predicate for his involuntary suspension. He asserts that, in deciding to indefinitely suspend him, Baylor had no authority to consider the merits of his security clearance suspension. He further asserts that, although he was given notice and an opportunity to be heard on the merits of the permanent revocation of his security clearance, he has not yet received the materials on which the agency relied and the opportunity to be heard. He contends that he had a property right in his continued employment under the applicable management directive, and that the agency violated his right to due process under *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985). PFR File, Tab 1.

The general principles that apply in analyzing whether employees covered under 5 U.S.C. chapter 75 have been denied statutory, regulatory, or minimum due process rights also apply in analyzing whether TSA employees have been denied those rights.

¶8 As the administrative judge implicitly found, because the appellant is an employee of the TSA, this appeal is governed by the provisions of the Aviation and Transportation Security Act (ATSA). *See Connolly v. Department of*

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[2] The amici are Peter B. Broida, Esquire, the U.S. Office of Special Counsel, the American Federation of Government Employees, the National Federation of Federal Employees, National Treasury Employees Union, the Government Accountability Project, and the Metropolitan Washington Employment Lawyers Association. PFR File, Tabs 7, 13-15, 18-20. We have also considered a late-filed brief from John Futuran, Esquire.

Homeland Security, 99 M.S.P.R. 422, ¶ 9 (2005). Under the ATSA, TSA employees are covered by the personnel management system that is applicable to employees of the Federal Aviation Administration (FAA) under 49 U.S.C. § 40122, except to the extent the Administrator of the TSA modifies that system as it applies to TSA employees. 49 U.S.C. § 114(n); *Connolly*, 99 M.S.P.R. 422, ¶ 9; *Lara v. Department of Homeland Security*, 97 M.S.P.R. 423, ¶ 9 (2004). Under 49 U.S.C. § 40122(g)(2), many of the provisions of title 5 do not apply, including, notably, chapter 75. Thus, the Board has held that chapter 75 does not apply to the FAA and, instead, the FAA's internal procedures are applicable. *See Hart v. Department of Transportation*, 109 M.S.P.R. 280, ¶¶ 10-11 (2008).

¶9 Pursuant to the ATSA, the Administrator of the TSA modified the FAA's system by issuing an updated version of MD No. 1100.75-3, "Addressing Unacceptable Performance and Conduct," and a related Handbook on January 2, 2009. IAF, Tab 5, Subtabs 4H, 4I. Neither MD No. 1100.75-3 nor the Handbook purport to modify the list of title 5 provisions that are expressly applicable to the FAA and thus, only the title 5 provisions that are set forth in 49 U.S.C. § 40122(g)(2) apply to the TSA. *See Winlock v. Department of Homeland Security*, 110 M.S.P.R. 521, ¶ 6 (2009) (interpreting a prior, but substantively similar version of MD No. 1100.75-3), *aff'd*, 370 F. App'x 119 (Fed. Cir. 2010). Those provisions do not include chapter 75, as we have indicated above. *See* 49 U.S.C. § 40122(g)(2); *Hart*, 109 M.S.P.R. 280, ¶ 10. Therefore, as the administrative judge correctly found, the provisions of MD No. 1100.75-3 and the Handbook, rather than chapter 75, apply to this appeal. *Winlock*, 110 M.S.P.R. 521, ¶ 6; *see* IAF, Tab 15.

¶10 Nevertheless, the procedural requirements for effecting an adverse action set forth in MD No. 1100.75-3 are similar to those set forth in 5 U.S.C. § 7513(b). *See* IAF, Tab 5, Subtab 4I. Further, in its response to the appellant's petition for review, the agency acknowledges that it must afford the appellant

minimum due process under its management directive. PFR File, Tab 4, Resp. at 6-9.

As explained in *McGriff v. Department of the Navy*, 2012 MSPB 62, the appellant was entitled to due process when the agency indefinitely suspended him based on a suspension of access to classified information.

¶11 In *McGriff*, 2012 MSPB 62, the Board recently addressed the question as to what, if any, process is due a tenured federal employee who is suspended based upon the suspension of access to classified information, or pending its investigation regarding that access, where the access is a condition of employment. The Board explained that, although it lacks the authority to review the merits of the agency's decision to suspend an employee's access to classified material, it may review whether the agency provided the employee with the procedural protections set forth in 5 U.S.C. § 7513 in taking an adverse action, whether the agency committed harmful error in failing to follow its applicable regulations, and whether the agency afforded him minimum due process with respect to his constitutionally-protected property interest in his employment. *Id.*, ¶¶ 24-25.

¶12 Specifically, the Board found that a tenured federal employee who is indefinitely suspended based on an agency's security clearance determination is constitutionally entitled to due process, i.e., notice of the reasons for the suspension and a meaningful opportunity to respond. *McGriff*, 2012 MSPB 62, ¶ 28. We also recognized that under *Homar*, due process in this context may not necessarily encompass a right to have such notice and opportunity to respond prior to the suspension as required in a removal action under *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). *Id.*, ¶ 27. Rather, because due process relates to time, place and circumstances, its parameters in any given case will be a function of the demands of the particular situation. *Id.* (citing *Homar*, 520 U.S. at 930). Consequently, in order to determine what process is due, the

Court has instructed that we balance the following three factors: (1) the private interest affected by the official action; (2) the risk of erroneous deprivation of the interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest. *Homar*, 520 U.S. at 931-32 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

¶13 Consistent with our holding in *McGriff*, we find that the appellant was entitled to constitutional due process, i.e., notice and a meaningful opportunity to respond, upon being indefinitely suspended based on the agency's security clearance decision. We therefore consider the *Homar* factors in order to determine whether the timing, place, and circumstances of the procedures used in this case afforded the appellant his right to due process. Concerning the first factor, we find that the appellant's indefinite suspension represents a significant deprivation of the appellant's property interest. However, here, as in *McGriff*, the appellant was, in fact, afforded notice and an opportunity to respond to the reasons for the revocation of his security clearance prior to the imposition of the suspension based on that revocation. Thus we cannot conclude that the "timing" of the notice and opportunity to respond rendered the process afforded him constitutionally defective.

¶14 Regarding the third factor, the agency undoubtedly has a compelling interest in withholding national security information from unauthorized persons. *See Egan*, 484 U.S. at 527. Thus, this factor arguably weighs in favor of the government's authority to take immediate action without providing the appellant with notice and opportunity to respond prior to suspending him. However, again, given that the agency did, in fact, provide the appellant with prior notice and an opportunity to respond in this case, its interest as a factor relative to the timing of the process afforded the appellant is somewhat inconsequential to the ultimate issue of whether the appellant received the process due him under the Constitution.

¶15 In discussing the second factor in *Homar*, i.e., the risk of erroneous deprivation of the property interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, the Court focused on the need to ensure that the procedures used provide adequate assurance that the agency had reasonable grounds to support the adverse action. *Homar*, 520 U.S. at 933-34. Here, based on the totality of the evidence, we find that the agency did have reasonable grounds to support the suspension. Specifically, the October 22, 2009 Notice of Determination to Revoke Access to Classified Information stated that it was taken in accordance with Exec. Order No. 12,968 and its Adjudicative Guidelines. It stated that it was "based on information contained in a Department of Homeland Security (DHS) Office of Inspector General (OIG) Report of Investigation (ROI), 106-TSA-HOU-17157, dated March 26, 2009, in which you were alleged to be involved in an insurance fraud scheme." It stated that, in addition, "we considered details of your August 10, 2008 arrest for DWI, contained in the Transportation Security Administration (TSA) Office of Inspection (OI) ROI #I080351." It described the Adjudicative Guidelines, specifically Guideline E, Personal Conduct, Guideline G, Alcohol Consumption, and Guideline J, Criminal Conduct. IAF, Tab 5, Subtab 4E.

¶16 The October 22, 2009 Notice further cited four "issues" underlying its determination. Under the first, it stated that the DHS OIG had initiated an investigation after receiving information from the United States Attorney's Office regarding the appellant's alleged involvement in an insurance fraud scheme. It specified that a former FAM alleged that the appellant arranged for the FAM's vehicle to be stolen so that the FAM could obtain insurance proceeds, that the FAM reported that the appellant bragged that he had collected money from his insurance company after staging the theft of his own vehicle, and that further investigation disclosed that the appellant received an insurance payment for his stolen vehicle. The notice also stated that the appellant denied any involvement in the thefts in a 2006 sworn statement but that a 2008 polygraph examination by

the Federal Bureau of Investigation concluded that he was deceptive. Under the other three issues, it specified that the appellant was involved in an August 10, 2008 altercation that resulted in his DWI arrest; that he refused to take a breathalyzer test; that he identified himself as a federal law enforcement officer and asked the arresting officer to let him go; and that he subsequently pleaded nolo contendere and was found guilty of DWI. IAF, Tab 5, Subtab 4E.

¶17 The October 28, 2009 notice proposing the appellant's indefinite suspension referred back to the October 22, 2009 determination. It stated that the October 22, 2009 Notice was based on "personal conduct, alcohol consumption and criminal conduct," and included "allegations regarding your involvement in an insurance fraud scheme." It further specified that the Notice was based upon an August 10, 2008 incident in which the appellant was involved in a verbal altercation that resulted in his arrest, during which he failed to submit to a breathalyzer test and made comments that created the appearance that he was attempting to use his position to avoid arrest. IAF, Tab 5, Subtab 4D.

¶18 As noted above, the appellant's main argument is that the agency should not have indefinitely suspended him until it made a final determination on his security clearance, and that his right to challenge the permanent revocation of his security clearance before the agency's security office was irrelevant because the basis for his indefinite suspension was the suspension of his security clearance. However, as discussed in *McGriff*, 2012 MSPB 62, both the Board and our reviewing court have held that an agency may indefinitely suspend an employee pending a determination on the security clearance issue. *Id.*, ¶ 24; *see, e.g.*, *Gonzalez v. Department of Homeland Security*, 114 M.S.P.R. 318, ¶ 13 (2010); *Jones v. Department of the Navy*, 48 M.S.P.R. 680, 689, *aff'd as modified on recons.*, 51 M.S.P.R. 607 (1991), *aff'd*, 978 F.2d 1223 (Fed. Cir. 1992). We also note that the appellant has not contested the agency's evidence that he was placed on administrative leave on April 17, 2009. Thus, he was apparently on

administrative leave for approximately 8 months before the agency effected his indefinite suspension on December 18, 2009.

¶19 In addition, we find that the notice suspending the appellant's security clearance, coupled with the notice proposing his indefinite suspension, did not deny the appellant a meaningful opportunity to respond by failing to provide him with the specific reasons for the action before he responded to the proposal notice. As set forth above, the notices specifically informed the appellant of the bases for the actions. This information suffices to provide adequate notice. *See, e. g.*, *King v. Alston*, 75 F.3d 657, 662 (Fed. Cir. 1996) (finding that the agency provided the employee with sufficient information to make an informed reply when it notified him that his security clearance was being suspended because of "a potential medical condition"); *cf. Cheney v. Department of Justice*, 479 F.3d 1343, 1353 (Fed. Cir. 2007) (finding that the employee was not provided with the opportunity to make a meaningful response to the notice of proposed suspension from duty where the limited information he was provided put him in the position where he had to guess at the reasons for his security clearance suspension). Indeed, the appellant conceded that he was afforded notice of the underlying charges. IAF, Tab 12 at 1.

¶20 Moreover, the record indicates that the appellant had an opportunity to respond to the Personnel Security Division's determination to revoke his access to classified information before his indefinite suspension was effected. Specifically, the October 22, 2009 Notice stated that it was not a final decision and that the appellant had a right to respond to the determination. It informed the appellant that he could reply to the Chief Security Officer (CSO) in writing or in person within 30 days of receipt of the letter and that he could request an extension of time. It further informed him that he could request documents, records, and reports upon which the action was based. It also stated that, if the CSO decided to uphold the determination, the appellant would have the

opportunity to appeal the decision to the DHS Security Appeals Panel. IAF, Tab 5, Subtab 4E.

¶21 Although the agency issued the notice of proposed indefinite suspension 6 days after the Personnel Security Division issued the Notice of Determination to Revoke Access to Classified Information, the appellant requested and received a 10-day extension to submit his reply to the notice of proposed indefinite suspension and submitted a reply on November 16, 2009. IAF, Tab 5, Subtab 1 at 2, Subtab 4C. Moreover, the agency did not indefinitely suspend the appellant until December 18, 2009, IAF, Subtab 4B, and, as previously noted, the appellant has not disputed that he was on administrative leave until that time. Thus, the appellant had the 30 days to respond provided in the October 22, 2009 notice before he was indefinitely suspended. Although he suggested that he was denied an opportunity to be heard on, and provided evidence concerning, the security clearance matter, he did not specifically assert that he attempted to obtain any information from the agency or explain why he did not challenge the revocation during this time, *id.*, Tab 5, Subtab 4C. Therefore, we are not persuaded by the appellant's argument that he was denied due process when the agency effected his indefinite suspension prior to a final determination on his security clearance. *Cf. Henton v. U.S. Postal Service*, 102 M.S.P.R. 572, ¶ 13 (2006) (finding that the agency did not deny the appellant due process, even though it did not issue a notice proposing his removal before issuing its decision to remove him, noting that he was well aware of the basis for the removal, the agency afforded him an opportunity to file a grievance before the effective date of the removal, the notice informed him that he had a right to file a Board appeal of his removal, and that such pre- and post-removal procedures were all the minimum due process required by *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985)).

¶22 The appellant further asserts that he was unable to argue the merits of the security clearance suspension in the indefinite suspension proceedings because

Baylor had no authority to entertain such arguments. We acknowledge Baylor's statements that he based the indefinite suspension on the appellant's security clearance suspension. IAF, Tab 5, Subtab 4B. We note, though, that Baylor also referred to the misconduct underlying the suspension of the security clearance. He further stated that the appellant offered him no evidence to consider and specified that the appellant did not submit evidence that warranted mitigating the proposed action. *Id.* Moreover, the agency claims that Baylor had the authority to impose any other penalty deemed appropriate, citing MD No. 1100.75-3, which states that an indefinite suspension may be imposed when an employee's security clearance has been suspended, denied or revoked, and a security clearance is a condition of employment or is otherwise required for the position. PFR File, Tab 10, Resp. at 9; IAF, Tab 5, Subtab 4I.

¶23 In any event, even if the record does not show that Baylor had authority to change the outcome of the indefinite suspension, as explained above, the appellant could have requested an opportunity to respond to the security clearance determination before his indefinite suspension was effected. Indeed, Baylor referred to the detailed explanation provided by the Personnel Security Division in the October 22, 2009 Notice and stated that that notice provided the appellant with a point of contact in the Office of Security to assist with questions about his rights and the appeal process related to his security clearance suspension. IAF, Tab 5, Subtab 4E. The appellant has not asserted, and we find no indication, that the CSO lacked authority to change the outcome of the security clearance determination. Due process requires only that the appellant receive a meaningful opportunity to respond to someone with authority to change the outcome of the security clearance determination in either the security clearance proceeding or the adverse action proceeding. That is so because an employee lacks a property interest in access to classified information and therefore the suspension or revocation of a security clearance does not implicate constitutional procedural due process concerns. *See, e.g., Robinson v. Department of Homeland Security,*

498 F.3d 1361, 1364-65 (Fed. Cir. 2007); *Hesse v. Department of State*, 217 F.3d 1372, 1381 (Fed. Cir. 2000).

¶24 Thus, the appellant's opportunity to respond to the security clearance determination before he was indefinitely suspended weighs in favor of upholding the suspension. In that regard, this case is distinguishable from *McGriff*, where the record did not clearly indicate that the appellant was provided with an opportunity to contest the security clearance determination before the agency imposed his indefinite suspension and it was unclear whether the deciding official on the indefinite suspension had authority to change the outcome of that adverse action. *McGriff*, 2012 MSPB 62, ¶¶ 33-35; *see Satterfield v. Department of the Navy*, 58 M.S.P.R. 152, 157-58 (1993) (Parks, concurring) (finding that the agency afforded the appellant the requisite due process, even though it proposed his indefinite suspension based only on its Central Adjudication Facility's pending determination on his security clearance, where the Central Adjudication Facility notified the appellant of the specific reasons for suspending his security access and the agency did not indefinitely suspend him until nearly 3 months after the notification); *accord Alexander v. Department of the Navy*, 58 M.S.P.R. 147, 151-52 (1993) (Parks, concurring).

¶25 The appellant has similarly not shown that the agency's action should be reversed because of harmful error. As a general matter, the Board has found that compliance with 5 U.S.C. chapter 75 procedural requirements satisfies minimum due process requirements. *See Markland v. Office of Personnel Management*, 73 M.S.P.R. 349, 357 (1997), *aff'd*, 140 F.3d 1031 (Fed. Cir. 1998). As previously discussed, the directive at issue here requires similar procedures to chapter 75. Absent a specific allegation that the agency committed harmful error by violating one of its regulations, therefore, the appellant has shown no other basis for reversing his indefinite suspension. In that regard, we note the agency's statement that it does not have a policy that allows an individual whose security clearance has been suspended to work in another position that does not require a

clearance. IAF, Tab 5, Subtab 1 at 8. The appellant has not contested that statement.

¶26 Finally, the appellant has not challenged and we discern no reason to disturb the administrative judge's findings that the appellant's indefinite suspension included an ascertainable end, the agency established a nexus, and an indefinite suspension was reasonable. Accordingly, we AFFIRM the initial decision as MODIFIED by this Opinion and Order.

ORDER

¶27 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 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:

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