

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

LEE E. JOHNSON,
Appellant,

DOCKET NUMBER
DC-0752-11-0888-I-1

v.

DEPARTMENT OF HOMELAND
SECURITY,
Agency.

DATE: August 7, 2012

THIS ORDER IS NONPRECEDENTIAL¹

Lee E. Johnson, Pembroke, Massachusetts, pro se.

Christina Cotter, Esquire, Washington D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

REMAND ORDER

The appellant has filed a petition for review of the November 17, 2011 initial decision that affirmed his indefinite suspension. For the reasons set forth below, we GRANT the appellant's petition for review, VACATE the initial

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. See [5 C.F.R. § 1201.117\(c\)](#).

decision, and REMAND the appeal to the Washington Regional Office for further adjudication.

BACKGROUND

The appellant is a Chemical Security Inspector with the Office of Infrastructure Protection (OIP), National Protection and Programs Directorate. Initial Appeal File (IAF), Tab 6 at 27. As a condition of employment, he must maintain a secret level security clearance. *Id.* at 61. On June 10, 2011, Kimberly Lew, the Chief of the Personnel Security Division (PSD), informed the appellant that his access to classified information was suspended based on three incidents of misconduct that allegedly occurred while the appellant was employed by the Federal Protective Service (FPS)²: (1) the appellant altered official Immigrations and Customs Enforcement firearms posters and was uncooperative during an investigation of the incident; (2) the appellant assigned a Nextel telephone to a contract employee in violation of regional policy and left the contract employee an inappropriate voicemail message on the aforementioned telephone; and (3) the appellant scheduled the removal of Mobile Data Terminals (MDTs) from patrol cars without consent, agreed for Transcor IT to service the MDTs without payment from FPS, and demonstrated a lack of candor on his SF-86 in failing to disclose that FPS disciplined him and placed him on administrative leave based on the MDT incident and that his departure from FPS was under unfavorable circumstances. *Id.* at 56-59.

On June 13, 2011, Fred Taylor, the Acting Region 2 Commander of OIP, proposed the appellant's indefinite suspension based on the suspension of his access to classified information. *Id.* at 49-50. The appellant responded in writing to the proposed indefinite suspension action. *Id.* at 38-44. Deciding Official

² We note that FPS was a component of the Immigration & Customs Enforcement up until October 28, 2009, when it became a component of the National Protection and Programs Directorate.

Donald Keen, the Acting Eastern District Commander, indefinitely suspended the appellant effective July 14, 2011. *Id.* at 27-32.

The appellant timely filed a Board appeal of his indefinite suspension.³ IAF, Tab 1. The administrative judge apprised the parties of the Board's limited authority to review an adverse action based on the suspension of an employee's access to classified information and explained the procedural protections afforded under [5 U.S.C. § 7513](#)(b).⁴ IAF, Tab 7. Because there were no issues of material fact, the appellant withdrew his request for a hearing. *Id.*

Based on the written record, the administrative judge affirmed the indefinite suspension action. IAF, Tab 8, Initial Decision (ID) at 1, 7. He found that: (1) the agency indefinitely suspended the appellant based on the suspension of his access to classified information and, thus, the Board lacks the authority to review the substance of the underlying security clearance determination under *Department of Navy v. Egan*, [484 U.S. 518](#), 530 (1988); (2) the appellant's position requires access to classified information, his access was suspended, and the indefinite suspension action has an ascertainable end; (3) the agency afforded the appellant procedural protections under [5 U.S.C. § 7513](#); and (4) the indefinite suspension action comports with the agency's internal procedures and regulations and promotes the efficiency of the service. ID at 4-7.

The appellant has filed a petition for review, alleging that the administrative judge erred in finding that the agency afforded him due process. Petition for Review (PFR) File, Tab 1. Among other things, he asserts that the

³ To the extent the appellant alleges that FPS took an adverse action against him by placing alleged derogatory information in his personnel file and that it did so in reprisal for his whistleblowing activity, these matters will be adjudicated in separate decisions. *See* IAF, Tab 1.

⁴ The appellant did not dispute that the proposal notice set forth the specific reasons for the proposed indefinite suspension, that the agency provided him with 30 days advanced notice of the proposed action, and that he responded in writing to the proposal notice. IAF, Tab 7.

deciding official lacked the authority to change the outcome of the indefinite suspension action and, thus, he was denied a meaningful opportunity to respond to the proposed indefinite suspension action under *Buelna v. Department of Homeland Security*, [118 M.S.P.R. 115](#) (2012) and *McGriff v. Department of the Navy*, [118 M.S.P.R. 89](#) (2012).⁵ *Id.* at 10-11. He alleged that his case should be remanded to the regional office for further adjudication. *Id.* at 11. The agency has responded in opposition. PFR File, Tab 5.

ANALYSIS

In *McGriff*, [118 M.S.P.R. 89](#), ¶ 24, the Board addressed what procedures are due when an agency indefinitely suspends an employee 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 due process with respect to his constitutionally-protected property interest in his employment. *McGriff*, [118 M.S.P.R. 89](#), ¶¶ 24-25; *see Buelna*, [118 M.S.P.R. 115](#), ¶ 10.

In both *McGriff* and *Buelna*, 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. *Buelna*, [118 M.S.P.R. 115](#), ¶ 11; *McGriff*, [118 M.S.P.R. 89](#), ¶¶ 26, 28. We also recognized that, under *Gilbert v. Homar*, [520 U.S. 924](#) (1997), due process in this

⁵ The Board issued *McGriff* and *Buelna* after the administrative judge issued the November 17, 2011 initial decision.

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](#), 546 (1985). *Buelna*, [118 M.S.P.R. 115](#), ¶ 11; *McGriff*, [118 M.S.P.R. 89](#), ¶ 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. *Buelna*, [118 M.S.P.R. 115](#), ¶ 11 (citing *Homar*, 520 U.S. at 930). In this regard, the Court has instructed that we look at 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. *Buelna*, [118 M.S.P.R. 115](#), ¶ 11 (citing *Homar*, 520 U.S. at 931-32).

Consistent with our holdings in *McGriff* and *Buelna*, 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 circumstance of the procedures used in this case afforded the appellant his right to due process.

Concerning the first factor, the private interest affected by the agency action, the record indicates that the appellant has been suspended for approximately one year. *See* IAF, Tab 6 at 27. We recognize that such a deprivation of the appellant's property interest is significant. However, here, as in *McGriff*, the appellant was afforded notice and an opportunity to respond to the reasons for the suspension of his security clearance prior to the imposition of the indefinite suspension. *Id.* at 38-44. Consequently, despite the prolonged nature of the suspension at issue here, we cannot conclude that the "timing" of the notice and opportunity to respond rendered the process afforded the appellant constitutionally defective. *See McGriff*, [118 M.S.P.R. 89](#), ¶ 29.

Regarding the third factor, the government's interest, the agency undoubtedly has a compelling interest in withholding national security information from unauthorized persons. *See Buelna*, [118 M.S.P.R. 115](#), ¶ 13. 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. *See id.* However, given that the agency did 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 as to whether the appellant received the process due him under the Constitution. *See id.*

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. *Buelna*, [118 M.S.P.R. 115](#), ¶ 14 (citing *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 indefinite suspension. Specifically, the June 13, 2011 notice proposed the appellant's indefinite suspension based on the suspension of the appellant's access to classified information and states that the agency relied upon the June 10, 2011 letter from Lew. IAF, Tab 6 at 49-50. As set forth above, the June 10, 2011 letter from Lew states that the suspension of the appellant's access to classified information was based on three allegations of misconduct: (1) the appellant altered firearms posters and was uncooperative during an investigation of the incident; (2) the appellant assigned a Nextel telephone to a contract employee in violation of regional policy and left the contract employee an inappropriate voicemail message on the aforementioned telephone; and (3) the appellant scheduled the removal of MDTs from patrol cars without consent, agreed for Transcor IT to service the MDTs without payment from FPS, and

demonstrated a lack of candor on his SF-86 in failing to disclose that FPS disciplined him and placed him on administrative leave based on the MDT incident and that his departure from FPS was under unfavorable circumstances. *Id.* at 56-58.

Additionally, we find that the letter notifying the appellant of the suspension of his access to classified information, 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 June 10, 2011 letter from Lew and the June 13, 2011 proposal notice informed the appellant of the basis for the indefinite suspension action. *See id.* at 49-50, 56-59. The appellant responded to Keen regarding the merits of the suspension of his security clearance, thus showing that he understood the accusations against him. *See id.* at 42-44. Therefore, the agency provided the appellant with adequate notice of the reason for his security clearance suspension before the agency subjected him to an adverse action.

Providing an appellant with a reasonable opportunity to reply that satisfies constitutional due process requires more than mere notice; the reply opportunity may not be an empty formality, and the deciding official should have authority to take or recommend agency action based on the reply. *McGriff*, [118 M.S.P.R. 89](#), ¶ 33. In other words, the agency does not afford an individual with a meaningful opportunity to respond by merely providing an empty process for presenting his defense against the agency's adverse action. *Id.* The deciding official must have the authority to change the outcome of the indefinite suspension action by either reinstating the appellant's access to classified information or reassigning him to a position not requiring access to classified information. *Id.*, ¶¶ 33-36.

It is especially important that the deciding official have the authority to change the outcome of a proposed indefinite suspension when, as in the instant case, the employee did not have a meaningful opportunity to respond to the

reasons for the suspension of the security clearance in the earlier access determination. *Id.*, ¶ 33. Otherwise, an indefinite suspension would become the automatic penalty based on a security clearance determination, even though the security clearance determination lacked any procedural due process protection at the time the indefinite suspension action was taken. *Id.* Thus, the Board has held that, if the deciding official lacks the authority to do anything but affirm the indefinite suspension action, the procedures used in effecting the appellant's indefinite suspension sufficiently run the risk of an erroneous deprivation of his property interest in employment such as to find that the agency violated his right to constitutional due process. *Id.*, ¶ 36.

Here, the appellant alleges that Keen lacked the authority to change the outcome of the indefinite suspension action and, thus, he was denied due a meaningful opportunity to respond. PFR File, Tab 1 at 10-11. As in *McGriff* and *Buelna*, the record lacks sufficient information for us to make a determination concerning other issues affecting the second *Homar* factor. Notwithstanding our finding that the agency provided the appellant with adequate notice of the reasons for his security clearance suspension before the agency subjected him to an adverse action, a question still exists as to whether the appellant had a meaningful opportunity to respond to the proposed indefinite suspension action.

It appears that, although Lew informed the appellant that he could contact Alfreda Hester with any questions regarding the security clearance suspension action, his security clearance was suspended with no advance notice or opportunity to respond to the merits of the action. IAF, Tab 6 at 56-59. Further, it appears that Keen had very limited authority to affect the outcome of the proposed indefinite suspension. The decision notice states that “[t]he reason for your indefinite suspension from duty and pay is the fact that your access to classified information was suspended – not the reason(s) underlying PSD’s decision to suspend your security clearance.” *Id.* at 30 (emphasis in original). Keen further stated that “[t]he investigation and the adjudication of your

eligibility for a security clearance is a matter that is handled exclusively by the DHS Office of Security” and that, if the appellant’s eligibility for a security clearance is revoked, he will be “afforded all of the rights set forth in Executive Order 12968, including the right of appeal.” *Id.* at 30-31. Thus, like in *Buelna*, the evidence does not indicate that Keen had authority to consider the merits of the appellant’s security clearance suspension when determining the propriety of the indefinite suspension. *See Buelna*, [118 M.S.P.R. 115](#), ¶¶ 16-17. In addition, it is unclear whether Keen had the authority to take other remedial action, including temporarily reassigning the appellant to a position that did not require a secret level security clearance.

A reply procedure that compromises a deciding official’s authority or objectivity can constitute a constitutional due process violation. *Buelna*, [118 M.S.P.R. 115](#), ¶ 18; *McGriff*, [118 M.S.P.R. 89](#), ¶ 35. Therefore, under the circumstances of this case, a question exists regarding whether the agency afforded the appellant a meaningful opportunity to reply to the reason for the suspension of his security clearance before suspending him from his position, or whether instead the agency merely provided him with an empty formality. Because the record in this case is incomplete as to Keen’s authority vis-à-vis the appellant’s indefinite suspension, we find that further adjudication is warranted.

ORDER

Accordingly, we GRANT the petition for review, VACATE the initial decision that affirmed the indefinite suspension action, and REMAND the appeal to the Washington Regional Office for further adjudication consistent with this Order. Because the appellant previously withdrew his request for a hearing, the administrative judge is not required to afford the appellant an opportunity to request a hearing. Nonetheless, the administrative judge may hold a hearing if he deems it necessary to adjudicate the indefinite suspension. On remand, the

administrative judge shall issue a new initial decision adjudicating the indefinite suspension consistent with this Order.

FOR THE BOARD:

William D. Spencer
Clerk of the Board

Washington, D.C.