

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

JIMMY T. DO,

Appellant,

DOCKET NUMBER

SF-0752-11-0002-I-1

v.

DEPARTMENT OF THE NAVY,

Agency.

DATE: August 10, 2012

**THIS ORDER IS NONPRECEDENTIAL<sup>1</sup>**

Jimmy T. Do, San Diego, California, pro se.

Diana L. King, Esquire, San Diego, California, 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 in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge

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<sup>1</sup> A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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\(c\)](#).

made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)). For the reasons discussed below, we GRANT the appellant's petition for review and REMAND the case to the regional office for further adjudication in accordance with this Order.

### DISCUSSION OF ARGUMENTS ON REVIEW

The administrative judge properly found that the agency afforded the appellant statutory and regulatory protections in indefinitely suspending him based upon the suspension of his access to classified information. Initial Appeal File (IAF), Tab 24, Initial Decision at 4-13. We discern no reason to disturb these well-reasoned findings on review.<sup>2</sup> See *Crosby v. U.S. Postal Service*, [74 M.S.P.R. 98](#), 106 (1997); see also *Broughton v. Department of Health & Human Services*, [33 M.S.P.R. 357](#), 359 (1987).

However, in addition to reviewing whether an agency has provided an employee with statutory and regulatory protections in indefinitely suspending him based upon a security clearance matter, the Board may also determine whether the agency afforded him minimum due process with respect to his constitutionally-protected property interest in his employment. *McGriff v. Department of the Navy*, [118 M.S.P.R. 89](#), ¶ 25 (2012). The appellant contended below that the agency failed to afford him minimum due process. IAF, Tab 12 at 2. As discussed below, we find that it is necessary to remand this case for further argument and discovery regarding this issue.

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<sup>2</sup> For the first time on review, the appellant appears to assert that the agency should have referenced SSC San Diego Instruction 12572.2 rather than SSC San Diego Instruction 12572.1 in its notice of proposed indefinite suspension. Petition for Review File, Tabs 1, 3 at 9; IAF, Tab 4, Subtab 4g, Tab 18. Because the appellant has failed to show that this argument is based on new and material evidence not previously available despite his due diligence, the Board need not consider it. See *Banks v. Department of the Air Force*, [4 M.S.P.R. 268](#), 271 (1980).

In *McGriff and Buelna v. Department of Homeland Security*, [118 M.S.P.R. 115](#) (2012), the Board found that a tenured federal employee who is indefinitely suspended based on an agency's security clearance decision 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](#), ¶ 28. The Board also recognized that, under *Gilbert v. Homar*, [520 U.S. 924](#) (1997), 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](#), 546 (1985). *Buelna*, [118 M.S.P.R. 115](#), ¶ 11; *McGriff*, [118 M.S.P.R. 89](#), ¶ 27. Rather, insofar as due process relates to time, place, and circumstances, 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 safeguards; and (3) the government's interest. *Homar*, 520 U.S. at 931-32 (quoting *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976)).

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. Therefore, we consider the factors outlined above in order to determine whether the timing, place, and circumstance of the procedures used in this case were sufficient to meet the appellant's due process rights.

Concerning the first factor, the private interest affected by the agency action, it is not clear from the record how long the appellant was ultimately suspended.<sup>3</sup> In any event, even if the appellant was suspended for a length of

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<sup>3</sup> The appellant was indefinitely suspended without pay based on the suspension of his access to classified information effective September 1, 2010. IAF, Tab 4, Subtabs 4i, 4j. Although the Department of the Navy Central Adjudication Facility issued a letter

time representing a significant deprivation of his property interest, the appellant was afforded notice and an opportunity to respond to the reasons for the suspension of his access to classified information prior to the imposition of the indefinite suspension. IAF, Tab 4, Subtab 4g at 2. Consequently, 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. *Id.*, ¶ 30. 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. *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, i.e., the risk of erroneous deprivation of the property interest through 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. *McGriff*, [118 M.S.P.R. 89](#), ¶ 31 (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 agency issued the appellant a July 6, 2010 notice proposing his indefinite suspension based on the suspension of his

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of intent to revoke the appellant’s security clearance on December 16, 2010, it is unclear from the record if and when the appellant’s security clearance was revoked. IAF, Tab 15 at 2.

access to classified information and referenced the June 28, 2010 Commanding Officer's letter which suspended the appellant's access to classified information. IAF, Tab 4, Subtabs 4e, 4g. In the June 28, 2010 letter, the Commanding Officer advised the appellant that the agency was suspending his access to classified information after receiving information from the Navy Civilian Investigative Service about a criminal investigation it was conducting regarding the appellant's alleged abuse of a government credit card. *Id.*, Subtab 4e.

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 him a meaningful opportunity to respond by failing to provide him with the specific reasons for the action before he responded to the proposal notice. *See McGriff*, [118 M.S.P.R. 89](#), ¶ 32. As set forth above, the letter notifying the appellant of the suspension of his access to classified information and the notice of proposed indefinite suspension advised the appellant of the basis for the indefinite suspension action. IAF, Tab 4, Subtabs 4e, 4g.

Nonetheless, we find that a significant question exists as to whether the appellant had a meaningful opportunity to respond to the proposed indefinite suspension. Providing an appellant with a reasonable opportunity to reply that satisfies constitutional due process requires more than 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.<sup>4</sup> *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 appears to be the case here, 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.<sup>5</sup> *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, as in *McGriff* and *Buelna*, the record lacks sufficient information for us to make a determination concerning the second factor. *See Buelna*, [118 M.S.P.R. 115](#), ¶¶ 16-18; *see also McGriff*, [118 M.S.P.R. 89](#), ¶¶ 34-36. In spite of 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.

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<sup>4</sup> If, instead, the appellant did have a meaningful opportunity to respond in the security clearance proceedings, then the agency has met the appellant's due process rights. *See Gaitan v. Department of Homeland Security*, [118 M.S.P.R. 180](#), ¶ 23 (2012). 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 adverse action proceeding. *Id.*

<sup>5</sup> The agency provided the appellant with both the letter suspending his access to classified information and the notice of proposed indefinite suspension during a July 14, 2010 meeting. IAF, Tab 11, Agency's Supplemental Response to Appeal at 2 n.1.

It appears that, although the Commanding Officer provided the appellant with a point of contact regarding the suspension of his access to classified information, the appellant's access to classified information was suspended with no advance notice or opportunity to respond to the merits of the action. IAF, Tab 4, Subtab 4e; Tab 11, Agency's Supplemental Response to Appeal at 2 n.1. Further, it appears that David Marsh, the deciding official, had little authority to change the Commanding Officer's initial determination to suspend the appellant's access to classified information. IAF, Tab 4, Subtab 4e. Specifically, in the decision notice, Marsh stated that the appellant's "indefinite suspension will continue until [his] eligibility for a clearance has been adjudicated by [the Department of the Navy Central Adjudication Facility] and a final agency administrative decision is made in writing to you or upon the completion of any subsequent administrative action e.g., additional evidence which would indicate your removal should be proposed for misconduct." IAF, Tab 4, Subtab 4i at 2. However, Marsh did state in the decision notice that he considered reassignment but found that there were no vacant positions that did not require access to classified information. *Id.* at 1.

Unfortunately, like in *McGriff*, the current record does not establish whether the deciding official in fact possessed the authority to reinstate the appellant's access to classified information, or reassign him to a position not requiring access to classified information. *See McGriff*, [118 M.S.P.R. 89](#), ¶ 35. 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 Marsh's authority with respect to the appellant's indefinite

suspension, we find that further adjudication is warranted. On remand, the administrative judge shall provide the parties with the opportunity to engage in further discovery and present additional argument regarding this issue. Further, the administrative judge shall provide the parties with the opportunity to engage in discovery and present argument regarding whether the appellant had a meaningful opportunity to respond to the reasons for the suspension of his access to classified information in the earlier access determination.

### **ORDER**

For the reasons discussed above, we REMAND this case to the regional office for further adjudication in accordance with this Remand Order.

FOR THE BOARD:

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William D. Spencer  
Clerk of the Board

Washington, D.C.