UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

GARY BIGGERS, Appellant, v. DEPARTMENT OF THE NAVY, Agency.	DOCKET NUMBER SF-0752-10-0268-I-1 DATE: November 13, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

John A. Futoran, Esquire, Ventura, California, for the appellant.

Henry Karp, Washington Navy Yard, D.C., for the agency.

BEFORE

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

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[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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).

The appellant's arguments on review, that the administrative judge and the Board have misinterpreted *Department of the Navy v. Egan*, 484 U.S. 518, 530-31 (1988), which sets forth the Board's limited scope of review over security clearance determinations, and that his suspension was improper because agency policy required it to grant him back pay after the agency ended his indefinite suspension and restored him to duty, are without merit. Petition for Review (PFR) File, Tab 1 at 5-12. The Board has recently reaffirmed longstanding precedent holding that *Egan* bars Board examination of the underlying basis for the suspension of a security clearance. *McGriff v. Department of the Navy*, 118 M.S.P.R. 89, ¶ 24 (2012).

The appellant's assertion that agency policy required it to grant him back pay after the agency ended his indefinite suspension and restored him to duty also fails to provide a basis for disturbing the initial decision's conclusion that the agency properly indefinitely suspended the appellant.[2] The Board has found that, under the circumstances at issue here, an indefinite suspension based upon the suspension of a required security clearance, agency regulations requiring the

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[2] The appellant's claim that the agency improperly denied him back pay is not independently reviewable because no law, rule, or regulation provides for Board jurisdiction over agency denials of back pay per se. *See Spezzaferro v. Federal Aviation Administration*, 24 M.S.P.R. 25, 28 (1984); *Bradford v. Department of the Army*, 2 M.S.P.R. 598, 600 (1980). In the absence of a Board order reversing or mitigating a personnel action, or an enforceable settlement agreement, back pay issues are generally to be resolved between the employee and the agency. *See Bradford*, 2 M.S.P.R. at 600. If the agency and the employee are unable to resolve the dispute, the Office of Personnel Management has authority to resolve "claims involving Federal civilian employees' compensation and leave." 31 U.S.C. § 3702(a)(2); *see* 5 C.F.R. part 178, subpart A. We also note, however, that OPM's regulations concerning such claims provide that nothing therein precludes a claimant from bringing an action for back pay in an appropriate United States court. *See* 5 C.F.R. § 178.107(b).

agency to reimburse the appellant for lost pay when the agency ultimately reinstates a suspended security clearance pertain to one of the balancing factors used to determine whether the agency has denied the appellant due process in effecting the indefinite suspension. *Buelna v. Department of Homeland Security*, 118 M.S.P.R. 115, ¶ 12 n.5 (2012).

Undertaking a due process analysis, however, is not necessary here because the appellant has not claimed that the agency denied him constitutional due process. This case is, therefore, distinguishable from the Board's recent decisions in otherwise similar cases, where the appellants all specifically alleged that the agency denied them constitutional due process in effecting their indefinite suspensions based upon the revocation or suspension of their security clearances. *See Gaitan v. Department of Homeland Security*, 118 M.S.P.R. 180, ¶ 7 (2012); *Gargiulo v. Department of Homeland Security*, 118 M.S.P.R. 137, ¶ 19 (2012); *Buelna*, 118 M.S.P.R. 115, ¶ 6; *McGriff*, 118 M.S.P.R. 89, ¶¶ 7, 10, 13. In making this finding, we recognize that the appellant used the term "due process" below, in identifying alleged agency errors in effecting his indefinite suspension. Initial Appeal File (IAF), Tab 20 at 4-6. The appellant's explanation of this claim, however, and his later submissions, indicate that he mainly alleged that the agency committed harmful procedural error by not following its regulations and that he was not, in fact, raising the type of constitutional due process claim at issue in the recent cases just cited. *Id.*; IAF, Tab 34 at 4-5, 9-15; PFR File, Tab 1. Moreover, to the extent that the appellant's assertion may be construed as a claim of harmful procedural error, the claim fails because the agency's decision to indefinitely suspend the appellant preceded the allegedly improper denial of back pay, and therefore could not have been the result of it. *See* 5 U.S.C. § 7701(c)(2)(A) (the agency's decision will not be sustained if the appellant "shows harmful error in the application of the agency's procedures *in arriving* at such decision") (emphasis added).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review. Except as modified by this Final Order, the initial decision of the administrative judge is the Board's final decision.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

This is the Board's final decision in this matter. 5 C.F.R. § 1201.113. 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.