UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2014 MSPB 9

Docket No. PH-0752-12-0397-I-1

Ignacio B. Ulep,

Appellant,

v.

Department of the Army,

Agency.

February 14, 2014

Ignacio B. Ulep, Virginia Beach, Virginia, pro se.

Robert Preziosi and Sean P. Mahoney, Aberdeen Proving Ground, Maryland, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The agency has petitioned for review of the initial decision that reversed the agency's decision to indefinitely suspend the appellant. For the reasons set forth below, we DENY the agency's petition and AFFIRM the initial decision as

MODIFIED by this Opinion and Order.[1] The indefinite suspension action is NOT SUSTAINED.

BACKGROUND

¶2 At all times relevant to this appeal, the appellant was an Information Technology (IT) Specialist in the agency's Test and Evaluation Command at Aberdeen Proving Ground in Maryland. Initial Appeal File (IAF), Tab 9 at 4. It is undisputed that the position requires a security clearance, i.e., eligibility for access to classified information.[2] IAF, Tab 12 at 15, 16. The appellant was arrested in Virginia on March 16, 2012, and, on April 2, 2012, local command notified the appellant of its decision to informally suspend his security clearance[3] based on his self-disclosure of his arrest and pending criminal case. *Id*. at 10-11. By notice dated March 29, 2012, the agency proposed to indefinitely suspend the appellant for failure to maintain a necessary condition and qualification of his employment due to the suspension of his security clearance. *Id*. at 19-20. The

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[1] Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

[2] Under Department of Defense (DoD) regulations, the term "security clearance" refers to a determination that a person is eligible for access to classified information. 32 C.F.R. § 154.3(t). The issuance of a security clearance is distinct from the granting of access to classified information. 32 C.F.R. § 154.47(a). Clearance determinations are within the purview of an authorized adjudicatory entity, e.g., the U.S. Army Central Clearance Facility, while access to classified information is granted by command to cleared individuals on a need-to-know basis. *See King v. Alston*, 75 F.3d 657, 659 (Fed. Cir. 1996); Exec. Order No. 12,968, §§ 1.2(c), 2.5, 3.1, 60 Fed. Reg. 40245 (Aug. 7, 1995); 32 C.F.R. §§ 154.48, 154.49.

[3] DoD regulations provide that, if information exists which raises serious concerns as to an individual's ability or intent to protect classified information, local command may suspend the individual's access to classified information. 32 C.F.R. § 154.55(c)(1). We assume without deciding that local command also had authority to suspend the appellant's clearance, but it is by no means clear that this is the case.

appellant did not respond to the notice, and, on April 30, 2012, the agency issued a decision suspending the appellant effective May 6, 2012. *Id*. at 21-22.

¶3 The appellant filed a timely Board appeal. IAF, Tab 1. In her initial decision, the administrative judge reversed the action, finding that the agency had denied the appellant due process by failing to provide a meaningful opportunity to respond to the deciding official. IAF, Tab 13. On petition for review, the agency contests the administrative judge's finding that the appellant was denied due process.[4] Petition for Review (PFR) File, Tab 1. Following the issuance of the Federal Circuit's decision in *Gargiulo v. Department of Homeland Security*, 727 F.3d 1181 (Fed. Cir. 2013), the Board offered the parties an opportunity to brief the possible application of *Gargiulo* to the appellant's due process claims. PFR File, Tab 6. Both parties responded. PFR File, Tabs 7, 8.

ANALYSIS

¶4 Generally, in an appeal of an adverse action based on the denial, revocation, or suspension of a security clearance, the Board will only review: (1) whether the employee's position required a security clearance; (2) whether the clearance was denied, revoked, or suspended; and (3) whether the employee was provided with the procedural protections specified in 5 U.S.C. § 7513. *Hesse v. Department of State*, 217 F.3d 1372, 1376 (Fed. Cir. 2000) (citing *Department of the Navy v. Egan*, 484 U.S. 518, 530-31 (1988)). However, section 7513 is not the only source of procedural protections for employees subject to adverse actions; agencies must also comply with the procedures set forth in their own regulations. *Romero v. Department of Defense*, 527 F.3d 1324, 1328 (Fed. Cir. 2008); *see Drumheller v. Department of the Army*, 49 F.3d 1566, 1569-72 (Fed. Cir. 1995).

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[4] The appellant has alleged that the agency failed to comply with the administrative judge's interim relief order. PFR File, Tabs 3, 4. Given the disposition of this appeal, the issue of the agency's compliance with the interim relief order is now moot, and we therefore do not decide it.

Under 5 U.S.C. § 7701(c)(2)(A), the Board may not sustain an agency's decision to impose an adverse action if the employee can show "harmful error in the application of the agency's procedures in arriving at such decision." Hence, the Board may review whether the agency complied with its own procedures in imposing an adverse action based on a security clearance determination. *Schnedar v. Department of the Air Force*, 120 M.S.P.R. 516, ¶ 8 (2014); *see Romero*, 527 F.3d at 1329.

¶5 DoD has promulgated regulations, codified at 32 C.F.R. part 154, subpart H, setting forth agency-wide procedures for "unfavorable administrative action[s]" relating to personnel security.[5] The term "unfavorable administrative action" is defined to include both an unfavorable personnel security determination and an adverse action taken as a result of a personnel security determination. 32 C.F.R. §§ 154.3(bb), 155(a). With exceptions not relevant here, 32 C.F.R. § 154.56(b) provides that "no unfavorable administrative action shall be taken under the authority of this part" unless the individual concerned has been afforded the procedures set forth under that paragraph. These procedural benefits include: (1) provision of a written statement of reasons for the unfavorable administrative action, signed by an adjudicatory official within the DoD component's designated Central Adjudication Facility; (2) an opportunity to respond in writing; (3) a written response to the reply, stating the final reasons therefor; and (4) an opportunity to appeal to a higher level authority designated by the component concerned. *Id.*; *see* 32 C.F.R. § 154.41; *cf. Schnedar*, 120

[5] The regulation states that it "is intended only to provide guidance for the internal operation of [DoD] and is not intended to, does not, and may not be relied upon, to create or enlarge the jurisdiction or review authority of any court or administrative tribunal, including the Merit Systems Protection Board." 32 C.F.R. § 154.55(a). However, as we explained in *Schnedar*, 120 M.S.P.R. 516, ¶ 9, the Board's authority to review whether the agency complied with its own regulations in imposing an adverse action derives from our preexisting statutory obligation under 5 U.S.C. § 7701(c)(2)(A) and does not stand in need of creation or enlargement.

M.S.P.R. 516, ¶ 10 (interpreting parallel provisions of DoD regulation 5200.2-R); *Rahgozar v. Department of the Air Force*, 118 M.S.P.R. 37, ¶ 10 (2012) (same).[6]

¶6 Here, the agency violated its own regulations by imposing an adverse action based on the suspension of the appellant's security clearance without providing any of the procedures set forth under 32 C.F.R. § 154.56(b). The error was plainly harmful, for if the agency had complied with its own regulations it would not have taken the action without first providing those procedural guarantees. *See Schnedar*, 120 M.S.P.R. 516, ¶ 12. Consequently, the indefinite suspension cannot be sustained, regardless of whether it would otherwise promote the efficiency of the service. *See* 5 U.S.C. § 7701(c)(2)(A); *Schnedar*, 120 M.S.P.R. 516, ¶ 12. Because we reverse the action on this basis, we need not and do not decide whether the agency provided the appellant constitutional due process.

ORDER

¶7 We ORDER the agency to cancel the suspension and retroactively restore the appellant effective May 6, 2012. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶8 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Back Pay Act and/or Postal Service Regulations, as appropriate, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest

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[6] As we noted in *Schnedar*, 120 M.S.P.R. 516, ¶ 10 n.3, DoD 5200.2-R differs slightly from 32 C.F.R. § 154.45(b) in explicitly requiring receipt of a written decision on appeal.

due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶9 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶10 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶11 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

¶12 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 RIGHT TO REQUEST ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of

the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. §§ 1201.201, 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit. 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 the date of this order. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27, 2012). 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) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website. 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.

DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
   a. Outside earnings with copies of W2's or statement from employer.
   b. Statement that employee was ready, willing and able to work during the period.
   c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts.

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.

2. The following information must be included on AD-343 for Restoration:

   a. Employee name and social security number.
   b. Detailed explanation of request.
   c. Valid agency accounting.
   d. Authorized signature (Table 63)
   e. If interest is to be included.
   f. Check mailing address.
   g. Indicate if case is prior to conversion. Computations must be attached.
   h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)

2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.

3. Outside earnings documentation statement from agency.

4. If employee received retirement annuity or unemployment, provide amount and address to return monies.

5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)

6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

   a. Must provide same data as in 2, a-g above.
   b. Prior to conversion computation must be provided.
   c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.