UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2014 MSPB 13

Docket No. DE-0752-12-0197-I-1

Jimmy R. Gamboa,

Appellant,

v.

Department of the Air Force,

Agency.

February 28, 2014

Jimmy R. Gamboa, Alamogordo, New Mexico, pro se.

Basil R. Legg, Jr. and Kyle Rodgers, Joint Base Andrews, Maryland, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision that affirmed his removal. For the reasons set forth below, we GRANT the petition for review, VACATE the initial decision, and REVERSE the appellant's removal.[1]

[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.

BACKGROUND

¶2 The agency removed the appellant from his non-critical sensitive, GS-6, Supply Technician position, effective December 14, 2010, based on the revocation of his security clearance, i.e., his "eligibility for access to classified information." Initial Appeal File (IAF), Tab 8 at 49, 55, 62, 66, 75, 102; *see Schnedar v. Department of the Air Force*, 120 M.S.P.R. 516, ¶¶ 2, 7 (2014) (a position requiring eligibility for access to classified information requires a security clearance). The agency contended that the appellant was required to maintain a security clearance as a condition of his employment and that he could not be reassigned because all positions in his work area were subject to this requirement. IAF, Tab 8 at 62.

¶3 The appellant timely[2] filed an appeal with the Board regarding his removal. IAF, Tab 1. He argued, among other things, that his position did not require a security clearance, noting that: (1) his position description did not indicate that a security clearance was required; and (2) the agency initially suspended his access to classified information[3] on March 26, 2007, but he continued working in his position until his removal nearly 4 years later. IAF, Tab 25 at 2-3; *see* IAF, Tab 8 at 82, 102-09.

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[2] The appellant first filed a formal equal employment opportunity (EEO) complaint. *See* IAF, Tab 8 at 14. The agency issued its Final Agency Decision (FAD) on February 1, 2012. *Id*. at 20-38. The administrative judge thus found that the appellant timely filed his appeal on March 1, 2012, after receiving the FAD. IAF, Tab 12 at 1; *see* 5 C.F.R. § 1201.154(b).

[3] Under Department of Defense regulations, the term "security clearance" refers to a determination that a person is eligible for access to classified information. *Ulep v. Department of the Army*, 2014 MSPB 9, ¶ 2 n.2; 32 C.F.R. § 154.3(t). The issuance of a security clearance is distinct from the granting of access to classified information. *Ulep*, 2014 MSPB 9, ¶ 2; 32 C.F.R. § 154.47(a). Clearance determinations are within the purview of an authorized adjudicatory entity, while access to classified information is granted by command to cleared individuals on a need-to-know basis. *Ulep*, 2014 MSPB 9, ¶ 2 n.2; *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. 40,245 (Aug. 2, 1995); 32 C.F.R. § 154.48, 154.49.

¶4 The administrative judge issued an initial decision, based on the written record, affirming the agency's removal action.[4] IAF, Tab 26, Initial Decision (ID). The administrative judge found that the agency proved by preponderant evidence that the appellant's position was subject to a security clearance requirement. ID at 7-8. The administrative judge also concluded that, even if the agency had not established that the appellant's position was subject to a security clearance requirement, the standard of review would be the same because the appellant's position was designated as non-critical sensitive. ID at 8 n.5; *see Kaplan v. Conyers*, 733 F.3d 1148, 1160 (Fed. Cir. 2013). The appellant has filed a petition for review, which the agency opposes, again arguing that the agency failed to establish that his position required a security clearance.[5] PFR File, Tab 1, Tab 3, Tab 4.

ANALYSIS

¶5 In an appeal under 5 U.S.C. § 7513 based on the denial or revocation of a security clearance, the Board does not have authority to review the substance of the underlying security clearance determination. *Department of the Navy v. Egan*, 484 U.S. 518, 530-31 (1988). Rather, the Board only has the authority to review whether: (1) the appellant's position required a clearance; (2) the

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[4] The appellant requested a hearing on his initial appeal form but subsequently withdrew his hearing request during the prehearing conference. IAF, Tab 1 at 5, Tab 24 at 1.

[5] On review, the appellant also argues that: (1) the agency revoked his security clearance because of his disability; (2) he requested an extension of time to respond to the proposed security clearance revocation, contrary to the agency's claim that he did not request an extension and failed to timely respond; (3) he was entitled to be reassigned to a position not requiring a security clearance as a reasonable accommodation; and (4) the agency removed him in retaliation for engaging in protected EEO activity. Petition for Review (PFR) File, Tab 1, Tab 3. With regard to the first argument, the Board does not have authority to review the agency's reasons for revoking the appellant's security clearance. We do not address the remaining arguments here, as we reverse the agency's removal action on other grounds.

clearance was denied or revoked; and (3) the employee was provided the procedural protections specified in 5 U.S.C. § 7513. *Hesse v. Department of State*, 217 F.3d 1372, 1376 (Fed. Cir. 2000) (citing *Egan*, 484 U.S. at 530-31). With respect to determining whether the appellant's position required a clearance, the Board does not have authority to review an agency's reasons for imposing a security clearance requirement, but may determine whether the position was subject to a security clearance requirement. *West v. Department of the Navy*, 63 M.S.P.R. 86, 88-89 (1994).

¶6 The administrative judge found it "more likely to be true than untrue that the appellant's position required a security clearance." ID at 7. The administrative judge acknowledged that the appellant's position description does not reference any security clearance requirement. ID at 8; *see* IAF, Tab 8 at 102-09. However, the administrative judge observed that "numerous other documents in the record do refer to the appellant requiring a security clearance," citing to: (1) the FAD issued regarding the appellant's EEO complaint; (2) the agency's proposal and decision letters regarding the removal action; (3) the initial and final letters regarding the revocation of the appellant's security clearance; (4) memoranda documenting communications agency management had with the appellant regarding the status of his response to the Statement of Reasons supporting the proposed security clearance revocation; and (5) the letter notifying the appellant of the suspension of his security clearance. ID at 8 (citing IAF, Tab 8, Subtabs 4b-4e, 4g-4l).

¶7 The administrative judge appears to have concluded that, even if the agency did not establish that the appellant's position was subject to a security clearance requirement, the charge could still be sustained because the appellant occupied a non-critical sensitive position. ID at 8 n.5. However, the Board is required to adjudicate an adverse action solely on the grounds invoked by the agency and may not substitute what it considers to be a more appropriate charge. *Guerrero v. Department of Veterans Affairs*, 105 M.S.P.R. 617, ¶ 6 (2007).

Although *Egan* applies equally to Board appeals under chapter 75 based on the revocation of a security clearance and those based on the revocation of eligibility to occupy a sensitive position, the removal action at issue in this appeal is based explicitly on the revocation of the appellant's security clearance. *Conyers*, 733 F.3d at 1160; IAF, Tab 8 at 49, 55, 62. Not all sensitive positions require a security clearance or entail access to classified information. *See Conyers*, 733 F.3d at 1160 ("*Egan* prohibits review of [Department of Defense] national security determinations concerning eligibility of an individual to occupy a sensitive position, *which may not necessarily involve access to classified information*." (emphasis added)); *see also Conyers v. Department of Defense*, 115 M.S.P.R. 572, ¶ 13 (2010) (the parties stipulated that the appellants' non-critical sensitive positions "did not require the incumbents to have a confidential, secret or top secret clearance . . . [or] access to classified information"), *rev'd and remanded on other grounds sub nom. Berry v. Conyers*, 692 F.3d 1223 (Fed. Cir. 2012), *reh'g granted en banc and vacated by Berry v. Conyers*, 497 F. App'x 64 (Fed. Cir. 2013). Thus, we discern no basis to conclude that the agency can prove its charge, as set forth in its proposal and decision letters, without proving by preponderant evidence that the appellant's position was subject to a security clearance requirement.

¶8 We find that the agency failed to prove by preponderant evidence that it established a security clearance requirement for the appellant's position. The Supply Technician position description indicates that the position is non-critical sensitive but does not state that the position requires a security clearance. IAF, Tab 8 at 102-09. The appellant submitted a Standard Form 50 (SF-50), documenting his change from the position of Electronics Technician to the lower-graded position of Supply Technician in February 2005, which also makes no mention of a security clearance requirement. IAF, Tab 1 at 20. Neither the position description, nor the SF-50, indicates that the position could entail access to classified information. We also note the absence of other documents in the

record which might reflect an established security clearance requirement, such as a vacancy announcement for the position of Supply Technician, an affidavit from an agency official,[6] or, more generally, an agency policy announcing such a requirement.

¶9 We do not agree with the administrative judge's conclusion that the various documents in the agency file which reference a security clearance requirement constitute preponderant evidence that the agency established such a requirement.[7] The documents the administrative judge cited were all created as part of adjudicatory processes: the security clearance adjudication process, the removal

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[6] The FAD indicates that the appellant's first- and second-level supervisors, the deciding official, and an agency Human Relations Specialist, all asserted that the appellant was required to maintain a security clearance as a condition of employment. IAF, Tab 8 at 29-30, 35. However, the record does not contain any sworn statements by these individuals. Further, these statements were made during the course of the agency's investigation of the appellant's EEO complaint. Thus, we find that the hearsay statements in the FAD are of minimal probative value. *See Borninkhof v. Department of Justice*, 5 M.S.P.R. 77, 87 (1981) (in assessing the weight to be accorded to hearsay evidence, the Board should consider, among other factors: (1) whether the statements of the out-of-court declarants were signed or in affidavit form, and whether anyone witnessed the signing; (2) the agency's explanation for failing to obtain signed or sworn statements; (3) whether the statements were routinely made; and (4) whether corroboration for statements can otherwise be found in the agency record); *see also Woodward v. Office of Personnel Management*, 74 M.S.P.R. 389, 395-96 (1997). Moreover, even if we accorded more weight to the hearsay statements in the FAD, they would still be insufficient to prove that the appellant's position was subject to a security clearance requirement because the FAD does not indicate that any of these individuals identified the source of this purported requirement.

[7] The administrative judge found that the appellant's request, in response to the proposed removal action, that his "security clearance be reinstated" constitutes evidence that the agency established a security clearance requirement for the appellant's position. ID at 8; IAF, Tab 8 at 58. We disagree. On its face, we see no concession in this statement that the agency established a security clearance requirement. The asserted basis for the proposed removal was the appellant's loss of his security clearance, so we find it reasonable that the appellant would request reinstatement of his security clearance hoping to avoid removal. We also note that the appellant was and is appearing pro se, and, moreover, there is evidence in the record that he did not fully understand the security clearance adjudication process. IAF, Tab 8 at 58, 69, 72-73.

process, and the adjudication of the appellant's EEO complaint. *Cf. Delancy v. U.S. Postal Service*, 88 M.S.P.R. 129, ¶ 8 (2001) (an agency's proposal notice cannot itself constitute evidence of the charged conduct and may only be considered as forming part of the agency's valid proof where the letter is not merely conclusory and is corroborated by other evidence); *cf. Trachy v. Defense Communications Agency*, 18 M.S.P.R. 317, 322 (1983) (the fact that a statement was solicited by the agency for litigation purposes only, rather than being the type of statement that is routinely made, constituted a factor tending to lessen the credibility of the statement), *modified on other grounds by Gill v. Department of the Navy*, 34 M.S.P.R. 308, 311 (1987). Further, all of these documents were created years after the appellant was appointed to his position and do not establish that the agency imposed a security clearance requirement at the time the appellant was appointed or at any time during his employment up until the agency took action to revoke his purported clearance and remove him.

¶10 We also find it curious that, despite suspending the appellant's access to classified information in March 2007, pending a determination on his eligibility for such access, the agency was able to retain him in his Supply Technician position[8] until rendering its removal decision in December 2010. IAF, Tab 8 at 35 (FAD indicating that the appellant's first-level supervisor "acknowledged that the [appellant] had been working as a Supply Technician without a security clearance for more than three years"), 55, 62 (proposal notice stating that the appellant would "remain in a duty status, until further notice"), 82. While the agency claims that "any duties requiring the handling of classified material had been referred to other employees with the proper security clearance," it is unclear how or why the agency maintained this alleged arrangement for nearly 4 years if

[8] The initial decision incorrectly states that the agency placed the appellant "in an alternate position." ID at 10.

eligibility for access and/or actual access to classified information was a requirement of the appellant's position. *Id.* at 35.

¶11 Based on the foregoing, we find that the agency has failed to meet its burden to prove its sole charge—that the appellant "fail[ed] to meet a condition of employment" "[a]s a result of [his] clearance revocation"—because it failed to prove by preponderant evidence that the appellant was required to maintain a security clearance, in the form of eligibility for access to classified information, as a condition of employment. *Id.* at 62. Thus, the appellant's removal must be reversed. *See, e.g.*, *Rodriguez v. Department of Homeland Security*, 108 M.S.P.R. 525 (2008) (ordering the agency to cancel the appellant's removal because it failed to prove its charges).

ORDER

¶12 We order the agency to cancel the appellant's removal and retroactively restore him to duty effective December 14, 2010. *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.

¶13 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, 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 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.

¶14 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).

¶15 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).

¶16 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.

¶17 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 further review of this final decision.

Discrimination Claims: Administrative Review

You may request review of this final decision on your discrimination claims by the Equal Employment Opportunity Commission (EEOC). *See* Title 5 of the United States Code, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). If you submit your request by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit your request via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, NE
Suite 5SW12G
Washington, D.C. 20507

You should send your request to EEOC no later than 30 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 EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States

district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 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 district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

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.