



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for March 1, 2019

Note: These summaries are descriptions prepared by individual MSPB employees. They do not represent official summaries approved by the Board itself, and they are not intended to provide legal counsel or to be cited as legal authority. Instead, they are provided only to inform and help the public locate Board precedents.

COURT DECISIONS

PRECEDENTIAL:

Petitioner: Shawn A. Hornseth
Respondent: Department of the Navy
Tribunal: U.S. Court of Appeals for the Federal Circuit
Case Number: [2018-1188](#)
Issuance Date: February 27, 2019
MSPB Docket No. SF-0752-17-0271-I-1

Indefinite suspension based on suspended security clearance/access to classified information
--Due process

Mr. Hornseth worked as a combined trade supervisor at the Puget Sound Naval Shipyard and Intermediate Maintenance Facility (Shipyard). Every position at the Shipyard required a security clearance because the facility housed nuclear-powered vessels. On December 12, 2016, Mr. Hornseth was informed that the Commander of the Shipyard intended to suspend his access to classified information and his assignment to a sensitive position. Three days later, the Commander issued a letter notifying Mr. Hornseth that his security clearance was suspended. On the same day, the Navy proposed to indefinitely suspend

him. Mr. Hornseth responded to the proposal and the agency assigned supervisor C.C. to be the deciding official. While the proposed suspension was pending before him, supervisor C.C. had numerous communications with Shipyard Human Resources (HR) staff. Supervisor C.C. issued the suspension on January 20, 2017.

Mr. Hornseth filed an appeal and argued that he was denied minimum due process for two reasons: (1) the reply period was an empty formality because supervisor C.C. did not have the ability to take or recommend alternative agency action, and (2) supervisor C.C. and the Shipyard HR staff engaged in improper ex parte communications. The administrative judge noted that a due process violation may occur when a deciding official lacks the ability to take or recommend an alternative agency action based on the employee's response; the administrative judge determined *sua sponte*, however, that Mr. Hornseth was given due process because supervisor C.C. could have provided him with investigative leave. Regarding the ex parte communications, the administrative judge credited supervisor C.C.'s testimony—that his ex parte contacts with HR staff were to clarify the arguments raised in Mr. Hornseth's response and that HR staff drafted the decision letter after he had made his decision—as "forthright, plausible, reasonable, and consistent with or at least not contradicted by other evidence." The administrative judge determined that there was no due process violation or harmful procedural error, and he affirmed the suspension action. The initial decision became the final decision of the Board, and Mr. Hornseth appealed that decision to the court.

HOLDING: The court concluded that Mr. Hornseth received the procedural protections to which he was entitled and the communications between supervisor C.C. and Shipyard HR staff were cumulative and did not constitute a due process violation.

Mr. Hornseth raised two arguments before the court (1) the administrative judge erred in finding no due process violation, and (2) supervisor C.C.'s ex parte contacts with HR staff constituted a due process violation.

Regarding the first argument, the court noted that a review of adverse actions stemming from security clearance determinations is limited to determining (1) whether a security clearance was denied, (2) whether the security clearance was a requirement of the position, and (3) whether the procedures set forth in 5 U.S.C. § 7513 were followed. The parties did not dispute that Mr. Hornseth's security clearance was revoked and that maintaining it was a requirement for his position. Therefore, the court focused on the procedures identified in section 7513, which included at least 30 days' written notice, a reasonable time (but not less than 7 days)

to answer orally and in writing and to furnish affidavits and other documentary evidence, representation by an attorney or other representative, and a written decision and the specific reasons therefor at the earliest practicable date. The court found that the procedures were satisfied in this case because Mr. Hornseth received notice, had an opportunity to respond and be represented, and he was provided with a written decision with reasons.

The court noted that the administrative judge erred in his analysis of this issue because he concluded that an alternative position must be available to comport with due process. The court noted that an employee has a right to be transferred to a nonsensitive position only if that right is conferred by a statute or regulation; here, if there is no alternative position authorized by statute, the deciding official was not authorized to create one. The court found that the administrative judge's error was harmless because Mr. Hornseth was given all of the procedural protections to which he was entitled.

Regarding ex parte contacts, the court determined that the administrative judge applied the relevant factors under *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368 (Fed. Cir. 1999): (1) whether the ex parte communication merely introduces "cumulative" information or new information; (2) whether the employee knew of the error and had a chance to respond to it; and (3) whether the ex parte communications were of the type likely to result in undue pressure upon the deciding official to rule in a particular manner. The court concluded that the administrative judge's finding that the communications were cumulative was supported by substantial evidence.