UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

MARK GERAGHTY WONDERS, Appellant,	DOCKET NUMBER AT-0752-13-0055-I-1
v.	
DEPARTMENT OF THE ARMY, Agency.	DATE: June 25, 2014

THIS ORDER IS NONPRECEDENTIAL[1]

Mark Geraghty Wonders, Ozark, Alabama, pro se.

Jack McKimm, Fort Rucker, Alabama, 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 of the initial decision, which sustained his removal. 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.

[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

BACKGROUND

The appellant served as a Public Affairs Specialist at the U.S. Army Garrison at Fort Rucker, Alabama. Initial Appeal File (IAF), Tab 6 at 13. The Public Affairs Specialist position required the incumbent to maintain a security clearance. *Id*. at 178-83. On October 7, 2010, the agency's Central Clearance Facility (CCF) provided the appellant with a Letter of Intent (LOI) notifying him of its intent to revoke his security clearance and of its decision to suspend his access to classified information pending a final decision.[2] IAF, Tab 6 at 155. Along with the notice, CCF provided instructions for responding to the notice and a Statement of Reasons (SOR) explaining the basis for the proposed revocation. *Id*. at 155-65. The appellant submitted a response through his union representative. *See id.* at 169. In a letter of decision dated June 9, 2011, the CCF notified the appellant of its final decision to revoke his security clearance. *Id*. at 169-72. The appellant was informed of his right to appeal the revocation either directly to the Personnel Security Appeals Board (PSAB) or by requesting a personal appearance before a Defense Office of Hearings and Appeals (DOHA) administrative judge. *Id*.

The appellant filed an appeal with DOHA. *Id*. at 210-36. After a hearing, the DOHA administrative judge issued a decision dated June 25, 2012, in which he recommended, inter alia, that the PSAB should overturn the action revoking the appellant's eligibility for a security clearance. *Id*. at 237-57. On August 9, 2012, however, the PSAB issued a final decision denying the appellant's appeal of his security clearance revocation. *Id*. at 176.

The agency thereafter issued a notice dated September 6, 2012, proposing to remove the appellant from his position for failure to maintain a condition of

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[2] The appellant was also subject to an indefinite suspension, effective November 16, 2010, which he challenged in a grievance under the governing collective bargaining agreement. IAF, Tab 6 at 284-85. That grievance was resolved in a settlement agreement dated September 30, 2011. *Id*. at 276-80.

employment. *Id*. at 274-75. The supporting specification identified the appellant's loss of his security clearance as the condition of employment at issue. *Id*. The appellant submitted a written reply to the notice. *Id*. at 210-36. The agency thereafter supplemented its proposal notice with a letter that listed all documents that the agency relied upon for the proposed removal, and afforded the appellant an additional opportunity to submit a reply. *Id*. at 37. The appellant declined to submit an additional reply, and the agency thereafter removed the appellant effective October 15, 2012. *Id*. at 15-16.

The appellant filed a timely Board appeal of his removal. IAF, Tab 1. On May 3, 2013, following a telephonic hearing, the administrative judge issued an initial decision affirming the removal. IAF, Tab 41, Initial Decision (ID) at 1, 7. This petition for review followed. Petition for Review (PFR) File, Tab 1. The agency has responded to the petition for review, and the appellant has replied to the agency's response. PFR File, Tabs 3, 4.

ANALYSIS

Generally, in an appeal of an adverse action based on the denial or revocation of a security clearance, the Board may only review: (1) whether the employee's position required a security clearance; (2) whether the clearance was denied or revoked; 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)). Here, the appellant's position required a security clearance, his clearance was revoked, and the agency provided the procedural protections required by statute. *See* IAF, Tab 6 at 15-16, 37, 176, 178-83, 210-36, 274-75.[3]

[3] As a general matter, 5 U.S.C. § 7513(b) provides employees facing an adverse action with (1) "at least 30 days' advance written notice"; (2) "a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other

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); *Schnedar v. Department of the Air Force*, 120 M.S.P.R. 516, ¶ 8 (2014). Under 5 U.S.C. § 7701(c)(2)(A), the Board may not sustain an adverse action decision if the employee can show "harmful error in the application of the agency's procedures in arriving at such decision." The Board may also review whether the agency complied with its own procedures for taking an adverse action based on a security clearance revocation. *Romero*, 527 F.3d at 1328-30.

Army Regulation (AR) 380-67 implements the Department of Defense (DOD) and the agency's Personnel Security Program.[4] IAF, Tab 6 at 51-114. Chapter 8 of AR 380-67 sets forth agency procedures relating to an "unfavorable administrative action." *Id*. at 90-94. An unfavorable administrative action includes any adverse action wthat is taken as a result of a personnel security determination, and any unfavorable personnel security determination.[5] AR 380-67, ¶ 8-1; IAF, Tab 20, DOD 5200.2-R, ¶¶ C8.1.1, DL1.1.29; *see* 32 C.F.R. §§ 154.3(bb), 155(a). An "unfavorable personnel security determination"

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documentary evidence in support of the answer"; (3) a right to representation; and (4) "a written decision and the specific reasons therefor at the earliest practicable date."

[4] AR 380-67 incorporates all of DOD 5200.2–R (Personnel Security Program), published in part at 32 C.F.R. Part 154, Subpart H. IAF, Tab 6 at 53, Tab 20.

[5] The regulation states that it "is intended only to provide guidance for the internal operation of the Department of Defense 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." AR 380-67, ¶ 8-1; DOD 5200.2-R, ¶ C8.1.1; *see* 32 C.F.R. § 154.55(a). However, as we held in *Schnedar*, the Board's authority to review whether the agency complied with its regulations derives from our preexisting obligation under 5 U.S.C. § 7701(c)(2)(A), and does not stand in need of creation or enlargement. 120 M.S.P.R. 516, ¶ 9; *see Romero*, 527 F.3d at 1328. To the extent the regulation may purport to restrict that authority, we do not follow it, as the agency is without authority to so relieve the Board of its statutory obligations. *Schnedar*, 120 M.S.P.R. 516, ¶ 9.

includes a denial or revocation of clearance for access to classified information and denial or revocation of access to classified information. IAF, Tab 6 at 150; *see* 32 C.F.R. § 154.3(cc). Accordingly, we will consider whether the agency complied with chapter 8 of AR 380-67 in reaching its decision to remove the appellant.

With exceptions not relevant here, paragraph 8-2 of chapter 8 provides that "[n]o unfavorable administrative action . . . may be taken by the organization to which the individual is assigned for duty without affording the person the full range of protections contained in paragraph 8-6." AR 380-67, ¶ 8-2(a); *see* 32 C.F.R. § 154.56(b) (providing that no unfavorable administrative action will be taken under the authority of Part 154 unless the person concerned has been given the procedures set forth under that paragraph). These procedural benefits include provision of a statement of the reasons for the unfavorable administrative action, the opportunity to respond to the CCF, a written decision from the CCF, the opportunity to appeal to the relevant PSAB, and a written decision from the PSAB. AR 380-67, ¶ 8-6; *see* DOD 5200.2–R, ¶ C8.2.2; *Schnedar*, 120 M.S.P.R. 516, ¶ 10. Thus, in *Schnedar*, we held that an agency may not take an adverse action pursuant to DOD 5200.2–R if the employee concerned has filed an appeal with PSAB and is still awaiting a written decision on that appeal. 120 M.S.P.R. 516, ¶ 10.

Here, unlike *Schnedar*, the agency proposed and effected the appellant's removal after the PSAB had issued its written decision denying his appeal. Nonetheless, as discussed below, the record shows that the agency did not comply with the requirements of AR 380-67 and DOD 5200.2-R, chapter 8.

In his decision recommending that the PSAB overturn the action revoking the appellant's eligibility for a security clearance, the DOHA administrative judge addressed two "procedural issues." IAF, Tab 6 at 157-58. The first procedural issue concerned the appellant's requests under the Freedom of Information Act for "documents needed in his defense to both Appellant's

command and the . . . CCF." IAF, Tab 6 at 239. As the DOHA administrative judge found, DOD 5200.2-R requires the Central Adjudicative Facility (CAF)[6] to provide copies of releasable records of the personnel security investigation upon request. IAF, Tab 6 at 239; *see* DOD 5200.2-R ¶ C8.2.2.1 ("CAF will provide within 30 calendar days, upon request of the individual, copies of releasable records of the personnel security investigation."); AR 380-67, ¶ 8-6(b)(2). The DOHA administrative judge found that, although such documents would have provided the appellant with the basis for CCF's revocation decision, they "either had not been received, or if received, were so heavily redacted to be of little use." IAF, Tab 6 at 239. Indeed, it is undisputed that CCF did not identify the documents that were the basis for the agency's decision until several months after the appellant had submitted his response to the LOI and after CCF had issued its June 9, 2011 letter of decision revoking the appellant's clearance. *Id*. at 239-40. The DOHA administrative judge found, and the agency does not dispute, that the appellant was not provided with copies of those documents until approximately 2 weeks before the DOHA hearing.[7] *Id*. at 240.

The second procedural issue addressed in the DOHA administrative judge's decision concerned consideration by CCF of new evidence after the appellant had responded to the SOR. *Id*. Specifically, the DOHA administrative judge found that, several weeks after the appellant submitted his response to the SOR, his garrison commander provided CCF a detailed letter stating his reasons why the appellant's clearance should be revoked and raising new information that the appellant did not have the opportunity to refute or rebut. *Id*. The DOHA

[6] AR 380-67 uses the term "CCF" rather than "CAF." *See, e.g.*, AR 380-67, ¶ 8-2.

[7] The DOHA administrative judge concluded that, because "an appellant has a legal and regulatory right to be provided from a Central Adjudication Facility enough information to enable him or her to make a meaningful response to the loss of a security clearance," LOIs should not be issued until all documents used to make the decision are clearly identified, and a determination made that the CAF can release the documents. IAF, Tab 6 at 240.

administrative judge concluded that, although the commander's letter was not specifically addressed in CCF's revocation decision, it would be unusual for the CCF not to consider a commander's recommendation, and that doing so without the appellant's knowledge and the opportunity to provide explanation was a denial of due process, fundamental fairness, and called into question the impartiality of the process. *Id*. For purposes of harmful error analysis, we find that to the extent CCF considered this new information, it violated AR 380-67, ¶ 8-6, which provides that "no unfavorable administrative action shall be taken under the authority of this regulation unless the person concerned has been given a written statement of the reasons why the unfavorable administrative action is being taken," which "shall be as comprehensive and detailed as the protection of sources afforded confidentiality under the provisions of the Privacy Act of 1974 (5 USC 552a) and national security permit."[8] AR 380-67, ¶ 8-6.

Notwithstanding the foregoing, an agency's procedural error does not warrant reversal of an employee's removal unless the employee has shown that the error was harmful under 5 U.S.C. § 7701(c)(2)(A). When an agency commits a procedural error in the course of an adverse action, the Board may not assume that the employee was harmed. *Handy v. U.S. Postal Service*, 754 F.2d 335, 337-38 (Fed. Cir. 1985); *Stephen v. Department of the Air Force*, 47 M.S.P.R. 672, 681 (1991). Rather, the appellant bears the burden of proving harm. *Ward v. U.S. Postal Service*, 634 F.3d 1274, 1281-82 (Fed. Cir. 2011); *Helms v. Department of the Army*, 114 M.S.P.R. 447, ¶ 6 (2010); 5 C.F.R. § 1201.56(b)(1), (c)(3). A procedural error is harmful where the record shows that the error was

[8] The appellant contends on review that he was denied due process when he was denied a meaningful opportunity to respond to the agency's decision to suspend his security clearance. PFR File, Tab 1 at 3-4. Because the appellant had no due process rights with respect to the procedures used to determine whether to suspend or revoke his security clearance, he had no constitutional right to the documentary evidence before the suspension or revocation took effect. *Gargiulo v. Department of Homeland Security*, 727 F.3d 1181, 1185 (Fed. Cir. 2013).

likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. 5 C.F.R. § 1201.56(c)(3); *Stephen*, 47 M.S.P.R. at 685.

Here, the administrative judge conducted a telephonic hearing that was limited to providing the appellant the opportunity to present oral argument, over the appellant's objection. IAF, Tabs 13-15. An appellant has a right to a hearing on the merits in an appeal that is within the Board's jurisdiction. 5 U.S.C. § 7701(a)(1); 5 C.F.R. § 1201.24(d). Whether an administrative judge must hold an evidentiary hearing or may hold a hearing consisting of the presentation of legal argument depends on whether there are genuine issues of material fact. *Jordan v. Office of Personnel Management*, 108 M.S.P.R. 119, ¶ 20 (2008). Thus, the Board has held that, in appeals where there are no genuine issues of material fact and the purpose of the hearing is merely to allow the appellant the opportunity to present oral argument, the administrative judge may hold a telephonic hearing on the legal issues involved in the appeal. *Jezouit v. Office of Personnel Management*, 97 M.S.P.R. 48, ¶ 13 (2004), a*ff'd*, 121 F. App'x 865 (Fed. Cir. 2005).

Here, however, we find that there exists a genuine issue of material fact concerning whether the agency's procedural errors were harmful, i.e., whether they were likely to have caused either the CCF or the PSAB to reach a conclusion different from the one it would have reached in the absence or cure of the errors. *Canary v. U.S. Postal Service*, 119 M.S.P.R. 310, ¶ 12 (2013). Accordingly, the appellant was entitled to a full evidentiary hearing to offer evidence and testimony on that issue.

ORDER

For the reasons discussed above, we VACATE the initial decision and 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.