UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

WILLIAM E. DYSON III,
Appellant,

v.

DEPARTMENT OF DEFENSE,
Agency.

DOCKET NUMBER
DC-0752-13-1235-I-1

DATE: December 8, 2014

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

Windell W. Thomas, Esquire, Silver Spring, Maryland, for the appellant.

Amy Josselyn, Edward A. Kendall, Jr., and Jack W. Rickert, Springfield, Virginia, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member
Vice Chairman Wagner issues a separate concurring and dissenting opinion.

FINAL ORDER

¶1 The appellant has filed a petition for review of the initial decision, which affirmed the agency's removal. Generally, we grant petitions such as this one only when: the initial decision contains erroneous findings of material fact; the

[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. *See* Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115). After fully considering the filings in this appeal, and based on the following points and authorities, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review. We AFFIRM the administrative judge's findings that the agency proved its charge, afforded the appellant the procedural protections under 5 U.S.C. § 7513, complied with its own regulations in removing him, and that the agency's action promoted the efficiency of the service. However, we MODIFY the administrative judge's analysis regarding the appellant's constitutional due process claim, still finding that the agency afforded the appellant with minimum due process of law.

BACKGROUND

¶2 Prior to his removal, the appellant was a Geospatial Intelligence Analyst with the agency's National Geospatial Intelligence Agency (NGA). Initial Appeal File (IAF), Tab 9 at 70. The appellant's position required him to obtain and retain a Top Secret security clearance with access to Sensitive Compartmented Information (SCI).[2] *Id.* at 43. By memorandum dated March 1, 2012, the agency's Security Office informed the appellant of its preliminary decision to

[2] SCI consists of particularly sensitive classified information relating to intelligence sources, methods, or analytical processes. *See Roach v. Department of the Army*, 82 M.S.P.R. 464, ¶ 22 (1999); Department of Defense 5200.2-R, Personnel Security Program, ¶ DL1.1.30 (Feb. 23, 1996) (referencing SCI when discussing Special Access authorization), http://www.dtic.mil/whs/directives/corres/pdf/520002r.pdf.

revoke his eligibility for access to SCI. *Id*. at 75, 114. The Security Office provided a Statement of Reasons (SOR) underlying its tentative determination and explained that an investigation into the appellant's personal history had raised questions about his trustworthiness, reliability, and judgment. *Id*. at 75-79.

¶3 The appellant responded to the SOR, and on April 13, 2012, the Adjudications Branch issued a Letter of Revocation (LOR) revoking the appellant's eligibility for access to SCI effective that date. *Id*. at 59-60. The appellant elected to appeal the LOR to the Personnel Security Appeals Board (PSAB), and on November 15, 2012, PSAB issued a decision affirming the LOR. *Id*. at 39.

¶4 On May 31, 2013, the agency proposed to remove the appellant based on the revocation of his Top Secret security clearance and access to SCI. *Id*. at 35-36. The notice stated that the removal action was based on the PSAB's decision. *Id*. at 35. The notice of proposed removal further explained that maintaining a Top Secret security clearance and access to SCI were conditions of employment with the agency. *Id*. The agency informed the appellant that he had the right to submit a written and/or verbal response to the proposal notice within 10 calendar days of receipt and identified the name, postal address, and telephone address of the deciding official. *Id*. at 36. The agency further informed the appellant that he had the right to submit affidavits or other evidence in support of his reply and to be represented by a representative of his choice. *Id*. The appellant responded to the notice of proposed removal, and on July 17, 2013, the deciding official notified the appellant of his decision to remove the appellant effective July 29, 2013. *Id*. at 32-33.

¶5 Thereafter, the appellant filed an appeal contesting his removal and requesting a "trial." IAF, Tab 1. Without holding a hearing, the administrative

judge issued an initial decision affirming the agency's removal action.[3] IAF, Tab 15, Initial Decision (ID). The administrative judge found that the agency proved the basis for its charge, and that it afforded the appellant his procedural rights under 5 U.S.C. § 7513. ID at 5. The administrative judge further found that the agency established nexus and the reasonableness of the penalty. ID at 5-6. In addition, the administrative judge found that there was nothing in the record to suggest the agency failed to follow its own procedures in connection with the revocation of the access to SCI. ID at 5. Furthermore, the administrative judge found that the appellant was provided with a meaningful opportunity to respond to the allegations against him before being removed because the agency provided him with detailed and specific notices explaining the bases for the security eligibility determination. ID at 5.

¶6 The appellant has timely filed a petition for review. Petition for Review (PFR) File, Tab 1. On review, the appellant contends that the administrative judge failed to make findings regarding whether the appellant was delusional, that the administrative judge erred in not holding an evidentiary hearing, and that the agency violated his constitutional due process rights. *Id*. The agency has filed a response to the appellant's petition. PFR File, Tab 5.

DISCUSSION OF ARGUMENTS ON REVIEW

¶7 As noted by the administrative judge, in an appeal of a removal action under chapter 75 based on the revocation of an employee's eligibility to access classified information, the Board may not review the merits of the underlying eligibility determination. *See Department of the Navy v. Egan*, 484 U.S. 518, 526-30 (1988); *Flores v. Department of Defense*, 121 M.S.P.R. 287, ¶¶ 7-8

[3] The administrative judge did not hold an evidentiary hearing because he found that there were no genuine issues of material fact. IAF, Tab 12; IAF, Tab 15, Initial Decision at 1. He offered to hold a hearing limited to the presentation of legal argument but the appellant elected to have the appeal decided on the written record. IAF, Tab 12.

(2014); ID at 3. Rather, the Board may review, inter alia, whether the position required eligibility to access classified information, whether that eligibility was revoked, and whether the agency complied with the procedural requirements specified under 5 U.S.C. § 7513(b). *See Cheney v. Department of Justice*, 479 F.3d 1343, 1352 (Fed. Cir. 2007) (defining the Board's scope of review in a case involving an indefinite suspension based on the suspension of the appellant's security clearance); *Hesse v. Department of State*, 217 F.3d 1372, 1376 (Fed. Cir. 2000) (same).

¶8 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). An employee also has a right to minimum due process of law in connection with an adverse action based on a security eligibility determination. *See Buelna v. Department of Homeland Security*, 121 M.S.P.R. 262, ¶ 13 (2014) (finding that the agency was required to provide the appellant with due process in connection with an indefinite suspension based on the suspension of the appellant's security clearance).

The agency proved the propriety of its action.

¶9 There is no dispute that the appellant's position required eligibility to access SCI and the agency revoked his eligibility for access to SCI.[4] Accordingly, the agency proved its charge by preponderant evidence. *See*

[4] These are the only relevant factual disputes that can be raised regarding a charge based on the revocation of access to SCI. *See Buelna*, 121 M.S.P.R. 262, ¶ 23 (where an agency proposes to indefinitely suspend an employee based on the suspension of his security clearance, the only relevant factual disputes that could be raised are whether the position required a security clearance and whether the clearance was suspended). Regarding the appellant's contention that the administrative judge erred in not making findings as to whether he was delusional, this issue relates to the merits of the security eligibility determination and therefore is not reviewable by the Board. *See Egan*, 484 U.S. at 526-30.

Flores, 121 M.S.P.R. 287, ¶ 8 (upholding a charge of denial of eligibility to occupy a sensitive position where the appellant's position was non-critical sensitive and where the appellant was denied eligibility to occupy a sensitive position); *Buelna*, 121 M.S.P.R. 262, ¶ 11 (upholding a charge of suspension of a security clearance where the position required a security clearance and the clearance was suspended).

¶10 We further find that the agency provided the appellant the procedural protections required by statute. In particular, the agency provided the appellant with 30 days' advance written notice of the proposed removal, reasons for the proposed action, and a reasonable opportunity to respond. IAF, Tab 9 at 35-36; *see* 5 U.S.C. § 7513(b)(1)-(2). The agency also provided the appellant with a written decision letter and notified him of his right to representation. IAF, Tab 9 at 32-33, 36; *see* 5 U.S.C. § 7513(b)(3)-(4). The appellant has not argued that the agency violated any of its specific policies or regulations in effecting his removal, and, in any event, we discern no such violation. *Cf. Schnedar*, 120 M.S.P.R. 516, ¶¶ 8-12 (finding that an agency violated its procedures relating to personnel security by indefinitely suspending the appellant prior to the appellant's receipt of the final decision by the PSAB); *Ulep v. Department of the Army*, 120 M.S.P.R. 579, ¶¶ 5-6 (2014) (reversing an appellant's indefinite suspension after finding that his employing agency did not follow the procedures set forth in applicable regulations for adverse actions based on security clearance determinations).

The appellant has failed to establish that the agency violated his constitutional due process rights.

¶11 On review, the appellant reiterates his contention that the agency denied him minimum due process of law in connection with his removal. PFR File, Tab 1 at 4-7. In providing the appellant with his burden of proof on his constitutional due process claim, the administrative judge cited to the Board's decision in *McGriff v. Department of the Navy*, 118 M.S.P.R. 89, ¶ 25 (2012). IAF, Tab 4 at

4; ID at 4. In *McGriff*, the Board found that in determining the requirements of due process, it would apply the balancing test employed in *Gilbert v. Homar*, 520 U.S. 924 (1997), and consider the following factors: (1) the private interest affected by the official action; (2) the risk of erroneous deprivation of the interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest. *McGriff*, 118 M.S.P.R. 89, ¶¶ 27-28 (citing *Homar*, 520 U.S. at 931-32 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

¶12 While this appeal was pending below, the U.S. Court of Appeals for the Federal Circuit issued its decision in *Garguilo v. Department of Homeland Security*, 727 F.3d 1181, 1184-85 (Fed. Cir. 2013), which held that the Board did not have the authority to conduct an inquiry into the merits of an agency's decision to suspend or revoke a security clearance. Following the issuance of *Gargiulo*, the Board issued its decision in *Buelna*, in which it reaffirmed its authority to determine whether an agency afforded an appellant due process in taking an adverse action based on a security clearance determination but clarified its recent analysis of the *Homar*—or more accurately, the *Mathews* factors—in *McGriff*. *See Buelna*, 121 M.S.P.R. 262, ¶¶ 15, 18. The administrative judge did not have the benefit of *Buelna* when the initial decision was issued; accordingly, to the extent the administrative judge's analysis of the appellant's due process claim is inconsistent with *Buelna*, it is hereby modified.

¶13 The second *Mathews* factor—the risk of erroneous deprivation of the interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards—is decisive in this case. *See id.*, ¶ 21. In considering this factor, the Board clarified in *Buelna* that, for purposes of responding to the charge, due process does not require an opportunity to contest the merits of the security eligibility determination. *Id.*, ¶¶ 23-24. Further, as to the charge, an agency is not required as a matter of constitutional due process to notify an employee of the specific reasons for a security eligibility determination.

Id., ¶ 25. Rather, it is sufficient for an agency to inform the employee of the grounds for the adverse action—here, that the appellant's position required eligibility to access SCI and that he could no longer hold his position once his eligibility to access SCI was revoked. *Id.*; *Ryan v. Department of Homeland Security*, 121 M.S.P.R. 460, ¶ 5 (2014). The appellant in this case received adequate notice of these essential facts with the notice of proposed removal. Accordingly, we find that the agency provided the appellant with minimum due process of law with regard to the charge.

¶14 Regarding the penalty, the appellant contends that the agency denied him minimum due process of law because he was denied the opportunity to invoke the discretion of a deciding official with authority to select alternatives to removal. PFR File, Tab 1 at 4-5. As the Board found in *Buelna*, due process does not demand that the deciding official consider alternatives that are prohibited, impracticable, or outside management's purview. *Buelna*, 121 M.S.P.R. 262, ¶ 27. However, to the extent there may have existed viable alternatives to removal, the appellant had a due process right to invoke the discretion of a deciding official with authority to select such alternatives. *Id.*, ¶ 28.

¶15 The appellant has not identified any viable alternatives to removal in this case, and we find no such alternatives. The agency's Division Chief of Personnel Security declared under penalty of perjury that all NGA employees were required to obtain and maintain a Top Secret security clearance with access to SCI. IAF, Tab 9 at 43. The appellant does not contest these facts. Accordingly, the declaration of the Division Chief of Personnel Security is sufficient evidence to prove these facts. *Woodall v. Federal Energy Regulatory Commission*, 30 M.S.P.R. 271, 273 (1986) (a declaration subscribed as true under penalty of perjury, if uncontested, proves the facts it asserts). Given the record evidence establishing that all positions within NGA required eligibility to access SCI, any alternative to removal that would have retained the appellant in his Geospatial Intelligence Analyst position, reassigned him to another position

within NGA, or indefinitely assigned him to duties not requiring eligibility to access SCI without his being assigned to a position in the civil service was either prohibited, impracticable, or outside the purview of NGA management. *Brown v. Department of Defense*, 121 M.S.P.R. 584, ¶ 15 (2014); *see* 5 U.S.C. § 2105(a)(1) (defining "employee" as an individual appointed in the civil service); 5 U.S.C. § 2101(1) (the "civil service" consists of all appointive positions in the executive, judicial, and legislative branches). Moreover, because there was no pending adjudication of the appellant's eligibility to access SCI, placement on administrative leave was not a viable alternative in this case. *See Brown*, 121 M.S.P.R. 584, ¶ 16. Based on the foregoing, we find that the appellant has not established a due process violation in the absence of a showing that there were viable alternatives to his removal. *See id*.

The agency's action is sustained.

¶16 It is well settled that, where an adverse action is based on the failure to maintain a security clearance required by the job description, the action promotes the efficiency of the service because "the absence of a properly authorized security clearance is fatal to the job entitlement." *Robinson v. Department of Homeland Security*, 498 F.3d 1361, 1365 (Fed. Cir. 2007). Because the appellant's position required eligibility to access SCI, the revocation of his eligibility to access SCI was fatal to the job requirement. *See Flores*, 121 M.S.P.R. 287, ¶ 12 (finding that the revocation of the appellant's eligibility to occupy a sensitive position was fatal to the job requirement where the appellant's position required eligibility to occupy a sensitive position). Moreover, consideration of the factors set forth in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981), would be inappropriate in determining the penalty in this case. *See Munoz v. Department of Homeland Security*, 121 M.S.P.R. 483, ¶ 15 (2014) (finding that the traditional *Douglas* factor analysis does not apply in cases involving adverse actions based on

security clearance or eligibility determinations). We therefore sustain the agency's action.[5]

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

The initial decision, as supplemented by this Final Order, constitutes 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 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.

[5] The appellant's contention that the administrative judge improperly denied him an evidentiary hearing does not provide a basis for review. 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 issues of material fact. *Jezouit v. Office of Personnel Management*, 97 M.S.P.R. 48, ¶ 13 (2004), *aff'd*, 121 F. App'x 865 (Fed. Cir. 2005). Because the appeal does not raise factual disputes, the appellant is not entitled to an evidentiary hearing. *See Crispin v. Department of Commerce*, 732 F.2d 919, 922-24 (Fed. Cir. 1984) (remanding the case where the appellant's claim raised factual disputes and where the presiding official had denied the appellant an evidentiary hearing).

Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, http://www.mspb.gov/appeals/uscode.htm. 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.

If you are interested in securing pro bono representation for your court appeal, you may visit our website at http://www.mspb.gov/probono for a list of attorneys who have expressed interest in providing pro bono representation for Merit Systems Protection Board appellants before the court. The Merit Systems Protection Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board

Washington, D.C.

CONCURRING AND DISSENTING OPINION OF ANNE M. WAGNER

in

William E. Dyson III v. Department of Defense

MSPB Docket No. DC-0752-13-1235-I-1

¶1 I agree with the majority that the agency proved its charge of revocation of the appellant's Top Secret security clearance and access to Sensitive Compartmented Information (SCI), that it complied with the procedural requirements specified under 5 U.S.C. § 7513(b), and that the appellant failed to establish that the agency violated any of its policies or regulations in effecting his removal. However, as further discussed below, I dissent from the majority's analysis of the appellant's constitutional due process claim and I would remand this appeal for an evidentiary hearing and further development of the record regarding that claim.

¶2 The agency proposed to remove the appellant based on the revocation of his Top Secret security clearance and access to SCI. Initial Appeal File (IAF), Tab 9 at 35-36. Maintaining a Top Secret security clearance and access to SCI were conditions of employment with the agency. *Id*. at 43. The appellant responded to the notice of proposed removal, and the deciding official thereafter notified the appellant of his decision to remove him. *Id*. at 32-33.

¶3 Without holding a hearing, the administrative judge issued an initial decision affirming the agency's removal action, finding that the agency proved the basis for its charge, that it afforded the appellant his procedural rights under 5 U.S.C. § 7513, and that it established nexus and the reasonableness of the penalty. IAF, Tab 15, Initial Decision (ID) at 5-6. The administrative judge also found that the agency afforded the appellant a meaningful opportunity to respond to the allegations against him because it gave him detailed and specific notices explaining the bases for the security eligibility determination. ID at 5.

¶4 On review, the appellant contends, inter alia, that the administrative judge erred in not holding an evidentiary hearing. Petition for Review (PFR) File, Tab 1 at 2-3. I agree. It appears that the administrative judge found that he was not required to hold an evidentiary hearing and that he only offered the appellant a hearing limited to the presentation of legal issues. IAF, Tab 12; ID at 1. On review, the appellant's representative states that he declined the offer, in part, because the administrative judge informed him that the hearing would be limited to 5 minutes. PFR File, Tab 1 at 3.

¶5 The majority states that 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. Majority Opinion, ¶ 16 n.5. It states that, because this appeal does not raise factual disputes, the appellant is not entitled to an evidentiary hearing. *Id.* I strongly disagree and believe that this view is patently inconsistent with longstanding precedent to the effect that the Board lacks authority to dispose of appeals via summary judgment.

¶6 In *Crispin v. Department of Commerce*, 732 F.2d 919, 922-24 (Fed. Cir. 1984), the U.S. Court of Appeals for the Federal Circuit held that the Board does not have the power to grant summary judgment, i.e., a party appealing under 5 U.S.C. § 7701 is entitled to receive a hearing regarding his appeal. This is the case even where there is no dispute of material facts. *See Bennett v. Department of Justice*, 119 M.S.P.R. 685, ¶¶ 10-11 (2013) (remanding the appeal for further adjudication of the appellant's due process claim where the record on this issue was insignificantly developed); *Gowan-Clark v. Office of Personnel Management*, 84 M.S.P.R. 116 (1999); *Coben v. Office of Personnel Management*, 48 M.S.P.R. 168, 170 (1991) (an appellant has a right to a hearing even where there is no dispute of material facts; however, the right to a hearing is subject to the authority of the administrative judge to make evidentiary rulings

under 5 C.F.R. § 1201.41(b), including the authority to exclude evidence determined to be irrelevant, immaterial, or unduly repetitious).

¶7 Here, denying the appellant an evidentiary hearing on the ground that there are no material facts in dispute is tantamount to granting the agency summary judgment. Moreover, the appellant's contention that the deciding official lacked the authority to select an alternative to removal raises a disputed issue of material fact. The administrative judge did not address the appellant's constitutional due process claim in the initial decision, and the record does not establish whether the deciding official had the authority to select an alternative to removal.[6] The appellant was entitled to an evidentiary hearing on this issue.

¶8 The majority's reliance on *Brown v. Department of Defense*, 121 M.S.P.R. 584, ¶¶ 14-16 (2014), as a basis for denying the appellant an evidentiary hearing is also misplaced. Although the Board in *Brown* determined that the appellant did not establish a due process violation in the absence of a showing that there were viable alternatives to his removal, in that case the appellant was afforded an evidentiary hearing. Moreover, extending the rationale in *Brown* to serve as a basis for denying an evidentiary hearing serves as yet another unwarranted step toward relegating the Board's role in security-based adverse action cases to acting as a rubber-stamp of agency decisions without even maintaining a pretense of adhering to the process envisioned by the statute.

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[6] *Jezouit v. Office of Personnel Management*, 97 M.S.P.R. 48, ¶¶ 12-13 (2004), *aff'd*, 121 F. App'x 865 (Fed. Cir. 2005), is distinguishable. In that case, the Board, citing *Carew v. Office of Personnel Management*, 878 F.2d 366, 367-68 (Fed. Cir. 1989), determined that the administrative judge was not required to hold an evidentiary hearing in a retirement appeal that presented solely questions of law. In particular, the Board noted that there were no witnesses with relevant testimony that the appellant could have offered to contest the propriety of the agency's method of computing the appellant's service credit and average pay. *Jezouit*, 97 M.S.P.R. 48, ¶ 12. Because this is not a retirement appeal, *Carew* is not controlling. Moreover, unlike *Jezouit*, the appellant's due process claim appeal does not present solely questions of law.

¶9 Accordingly, I respectfully dissent from the majority's decision to not remand this appeal for an evidentiary hearing and further development of the record regarding the appellant's constitutional due process claim.

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Anne M. Wagner
Vice Chairman