

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD

SHIRLEY C. HILL,  
Appellant,

v.

DEPARTMENT OF THE AIR FORCE,  
Agency.

DOCKET NUMBER  
AT075289C0855

DATE:

AUG - 5 1991

C. E. Lanthier, Sr., Montgomery, Alabama, for the  
appellant.

J. Craig Schweitzer, Captain, Montgomery, Alabama,  
for the agency.

BEFORE

Daniel R. Levinson, Chairman  
Antonio C. Amador, Vice Chairman  
Jessica L. Parks, Member

Chairman Levinson issues a concurring opinion.

OPINION AND ORDER

This case is before the Board on a petition for enforcement of an initial decision which became the final decision of the Board on January 31, 1990. Appellant's removal was mitigated to a 60-day suspension with back pay from the period between the end of the suspension and the date of reinstatement. *Hill v. Department of the Air Force*, MSPB Docket No. AT075289C0855.

For the reasons set forth below, the Board finds that the Department of the Air Force (agency) is currently in compliance with the final decision.

#### BACKGROUND

The appellant, who was a Secretary, GS-05, at Maxwell Air Force Base in Alabama, was removed for failure to request leave in accordance with proper procedures and absence without official leave (AWOL). The administrative judge found that the agency had arbitrarily denied the appellant leave without pay from June 12 to June 16, 1989, and that the agency had failed to prove that the appellant had not followed proper procedures when requesting leave. The administrative judge sustained the charge of AWOL for the period from June 19 to July 5, 1989, and the charge that the appellant failed to follow the order to return to work. He found that the penalty of removal was excessive and reduced the penalty to a 60-day suspension.

The appellant filed a petition for enforcement on April 5, 1990, contending that she was not paid for the periods from June 12 to June 16, 1989, and July 6 to July 31, 1989, and that she was not returned to the position that she had occupied at the time of her removal. The agency responded that because the Board found that the appellant had properly requested leave for the period from June 12 to June 16, 1989, she was given the leave without pay that she had requested. The agency also stated that the appellant's absence during the period from July 6 to

July 31, 1989, was considered to be an absence without official leave because the appellant did not submit a leave request. The agency noted that this period was not included in the removal notice or action and was not addressed by the Board. The agency stated that because of letters that the appellant wrote to the agency while the termination was pending (no copies were provided) and a letter from the appellant's doctor, Compliance file, tab 3, exhibit 2B, it had established a special security file on the appellant which precludes her from holding a security clearance. The agency detailed her to the position of Legal Clerk (Receptionist), "a less sensitive position at the same pay ... [which] has substantially the same duties as the prior position." Compliance file, tab 3.

In a Recommendation that was issued on June 14, 1990, the administrative judge found that the agency had paid the appellant all the back pay to which she was entitled but that the agency had reassigned her to a GS-4, Clerk-Typist position and not the GS-5, Secretary position that she had held before the removal action. The administrative judge found that if the appellant's current position is classified at a GS-4, the duties could not be substantially similar regardless of whether the appellant was being paid at the GS-5 level. He concluded that the agency had not complied with the Board's decision to return the appellant to the position from which she had been removed.

The agency filed a response to the Recommendation stating that it could not comply for two reasons: (1) the appellant has been AWOL since June 8, 1990; and (2) the agency, in accordance with Air Force Regulation (AFR) 205-32, paragraph 8-14, established a special security file on the appellant which immediately suspends an employee's access to classified information.

#### ANALYSIS

When a removal action is cancelled, an agency is required to return an employee as nearly as possible to the *status quo ante*. *Kerr v. National Endowment for the Arts*, 726 F.2d 730, 733 (Fed. Cir. 1984). This does not require that the employee must always be returned to the former position. Where the agency has a strong overriding interest for not placing the employee in the identical position, the Board will analyze the legitimacy of the agency's proffered rationale in order to determine if it is sufficient to justify not returning the employee to the former position. *Mann v. Veterans Administration*, 29 M.S.P.R. 271, 274 (1985).

The agency has stated that the appellant was not returned to her former position because it has established a special security file on her and suspended her security clearance based on indications of instability. The indications cited included letters from appellant prior to her reinstatement, a letter from her doctor stating that her response to mistreatment could not be predicted and weekly

sessions with a mental health counselor and her physician. The agency argues that this suspension of the appellant's security clearance is a determination that the Board lacks authority to examine for underlying reasons.

The Board's authority to review the suspension of the appellant's security clearance is limited to determining that the appellant received minimal due process under the appropriate authority. See *Department of the Navy v. Egan*, 484 U.S. 518, 530 (1988); *Pangarova v. Department of the Army*, 42 M.S.P.R. 319, 322 (1989). The agency has included with its response a copy of the relevant regulation. The regulation states that a special security file is a documented history of information that tends to show that continuing an individual's security clearance may not be consistent with the requirements or interests of national security and the matter must be resolved by further investigative, administrative or adjudicative actions. AFR 205-32(C3), section C, \*8-10, a and b. The regulation also states that a special security file is established when questions of reliability arise upon receipt of any information concerning actual or alleged mental or emotional illness. AFR 205-32(C3), section B, \*1-7, j and section C, \*8-10, c and e. Establishing a special security file suspends the employee's access to classified information or assignment to sensitive duties. AFR 205-32(C3), 8-8. While the agency has not forwarded to the Board copies of the appellant's pre-reinstatement letters, her physician's

statement indicates that she is being treated for "moderately severe anxiety/depression." Compliance file, tab 3, exhibit 2B. The agency has requested additional information from the physician as part of its investigation. Compliance file, tab 3, exhibit 5A. It appears that the agency has received information of an alleged mental or emotional illness and that it is investigating the matter. The agency also included an affidavit from the individual handling the special security file who states that the investigation is still pending. Agency response dated June 26, 1990.

The position that the appellant held prior to her removal, Secretary (Stenography), GS-318-05, was a noncritical-sensitive position. Agency response dated June 26, 1990. The position in which the appellant was placed on reinstatement, Clerk-Typist, GS-322-4, is a nonsensitive position. The agency also included an affidavit from the law office manager stating that the position of Secretary that the appellant held prior to the removal action required the handling of classified materials necessitating a security clearance. Agency response dated June 26, 1990.

In light of the foregoing, the agency has afforded the appellant the due process to which she is entitled under AFR 205-32(C3). Further, the agency has established a compelling reason for not yet returning the appellant to the position that she held prior to the removal. Accordingly,

the Board finds that the agency, by detailing the employee to the Clerk-Typist position at the same pay as the Secretary position, has returned the appellant as nearly as possible to the *status quo ante*. However, if at the conclusion of the investigation the appellant is found to be eligible for security clearances, she must be appropriately reassigned.

#### CONCLUSION

Accordingly, we find that the agency is currently in compliance with the Board's decision. If on the completion of the agency's investigation the appellant is found to be qualified for a security clearance, and she is not reassigned to an appropriate GS-5 position, she may file an additional petition for enforcement of the Board's final decision in this case.

#### NOTICE TO THE APPELLANT

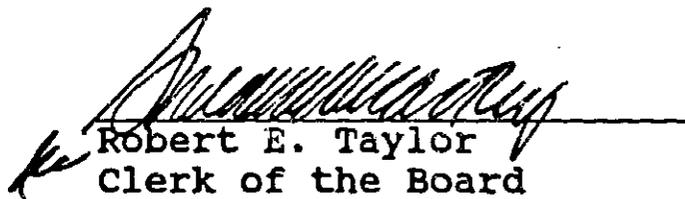
You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in this proceeding if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

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 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Washington, D.C.

  
Robert E. Taylor  
Clerk of the Board

CONCURRING OPINION OF  
CHAIRMAN DANIEL R. LEVINSON

In  
Hill  
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(ATO75289C0855)

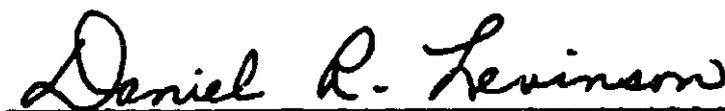
I concur with the majority's decision, but for different reasons. The agency was not required to reinstate the appellant to her old job in light of its decision to suspend her access to classified information, and the agency complied with its own procedural regulations.

I cannot, however, square the majority's decision in this case with the Board's decision in *Jones v. Department of the Navy*, PH07529010116 & PH07529010117 (July 5, 1991). The majority upholds the agency's action here because "the agency has afforded the appellant the due process to which she is entitled under AFR 205-32(C3)." While I agree, for the reasons given in my separate opinion in *Jones*, that agency compliance with its own due process regulations is the only relevant standard, the Board's decision in *Jones* laid down another test.

Under *Jones*, the agency is obliged to provide the appellant with "[n]otice of [its] security determination ... a statement of the reasons in support of the determination, and ... a opportunity to respond." *Jones*, slip op. at 16-17. Yet the majority opinion cites no evidence in the record to show that the appellant received such notice and opportunity to respond, and I see none. The agency's

regulations themselves impose no such obligations. While they generally call for notification when, as here, a "special security file" is established, no statement of reasons is required. AFR 205-32(C3) § 8-14(a). Indeed, notification itself is not required if, in the opinion of the base's Chief of Security Police, it would "compromise an ongoing ... investigation." *Id.* The full panoply of rights recognized in *Jones* is not required until the agency has formally proposed to "revoke or deny" clearance. *Id.* §§ 8-14(i), 8-20. Thus, the agency's action would seem improper under *Jones*.

Nevertheless, because I believe *Jones* does not correctly state the agency's legal obligations, I agree that its action should be upheld. The agency returned the appellant as nearly as possible to the *status quo ante* by detailing her to another position with no loss of grade or pay. In any event, the Board plainly cannot order the agency to return the appellant to her old job until her clearance is reinstated.

  
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Daniel R. Levinson  
Chairman

**JUL - 5 1991**  
\_\_\_\_\_  
Date