

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
2012 MSPB 89**

Docket No. PH-0752-11-0214-I-1

**Larry French Diehl,
Appellant,**

v.

**Department of the Army,
Agency.**

July 18, 2012

Beverly Diehl, Hanover, Maryland, for the appellant.

Michael E. Hokenson, Fort Belvoir, Virginia, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant petitions for review of the July 26, 2011 initial decision that sustained the indefinite suspension action. For the reasons set forth below, we REVERSE the initial decision and DO NOT SUSTAIN the indefinite suspension action.

BACKGROUND

¶2 The appellant is an Intelligence Specialist (Operations) with the Intelligence and Security Command (INSCOM), Polygraph Branch. Initial Appeal File (IAF), Tab 5 at 13. As a condition of employment, he must maintain

a top secret level security clearance. *Id.* at 171, 173. On July 16, 2010, Michael Hale with INSCOM's Field Support Center issued a memorandum, which notified the appellant that his access to classified information was suspended in accordance with Army Regulation 380-67 until the U.S. Army Central Personnel Security Clearance Facility (CCF) finally adjudicated the matter. *Id.* at 160. Hale stated that the security clearance suspension was based on: (1) the appellant's disregard for the importance of integrity in the polygraph program, the ethics of federal service, and regulations; and (2) the appellant's lack of candor in failing to immediately notify quality control of his apparent deliberate manipulation of polygraph chart results and in failing to notify anyone of polygraph software problems upon realizing that problems existed. *Id.*

¶3 On August 3, 2010, Perry Taylor with the U.S. Army's Office of the Deputy Chief of Staff for Intelligence proposed to indefinitely suspend the appellant based on his ineligibility for access to classified information. *Id.* at 156-158. The appellant responded to the proposed indefinite suspension action both orally and in writing. *Id.* at 31-113. On January 21, 2011, Michael Bochna with INSCOM's Field Support Center issued a decision indefinitely suspending the appellant effective January 24, 2011.¹ *Id.* at 13, 15-16.

¶4 The appellant filed a Board appeal of the indefinite suspension action, alleging that the agency committed harmful procedural error and denied him due process. IAF, Tab 1, Tab 17, Appellant's Prehearing Submissions. After holding a hearing, the administrative judge affirmed the indefinite suspension action. IAF, Tab 34, Initial Decision (ID) at 2, 13. He found that the Board lacks the authority to review the merits of the underlying security clearance determination, but may determine whether the agency afforded the appellant his procedural

¹ Although the January 21, 2011 decision letter states that the indefinite suspension is effective "January 24, 2010", the record indicates that the suspension was effective January 24, 2011. *See* IAF, Tab 5 at 6, 13.

rights under 5 U.S.C. chapter 75 in effecting the adverse action. ID at 6; *see Department of the Navy v. Egan*, [484 U.S. 518](#), 530 (1988). Further, the administrative judge determined that the appellant's position requires access to classified information, that the appellant's access was suspended, and that the agency was not required by law or regulation to reassign the appellant to a position that does not require a security clearance. ID at 8. The administrative judge also found that the agency afforded the appellant a meaningful opportunity to respond to the proposed indefinite suspension action based on the following: (1) the proposal notice set forth the specific reasons underlying the proposed indefinite suspension; (2) the appellant, who was represented by an attorney, made detailed written and oral responses to Bochna after being afforded multiple extensions of the deadline to respond; (3) the appellant presented no evidence that his post-traumatic stress disorder symptoms denied him a meaningful opportunity to respond to the proposed action; and (4) Bochna credibly testified that he considered the appellant's responses in deciding to indefinitely suspend the appellant. ID at 9-13. Finally, the administrative judge found that, even if Bochna predetermined the indefinite suspension action as the appellant alleged, the agency still would have indefinitely suspended the appellant based on the suspension of his security clearance, which prevents the appellant from performing his duties. ID at 12-13. The appellant has filed a petition for review, reasserting that the agency denied him due process.² Petition for Review File (PFR) File, Tab 1. The agency has responded in opposition. *Id.*, Tab 3.

² On review, the appellant also alleges that the administrative judge engaged in *ex parte* communications with the agency's representative and that the administrative judge failed to consider evidence that he submitted regarding the alleged falsity of Taylor's hearing testimony. Petition for Review File, Tab 1 at 3. However, in light of our decision not to sustain the indefinite suspension, the appellant's claims of adjudicatory error do not affect the disposition of this appeal and, thus, we need not address them on review.

ANALYSIS

¶5 In *McGriff v. Department of the Navy*, [118 M.S.P.R. 89](#), ¶ 24 (2012), the Board addressed what procedures are due when an agency indefinitely suspends an employee based upon the suspension of access to classified information, or pending its investigation regarding that access, where the access is a condition of employment. The Board explained that, although it lacks the authority to review the merits of the agency's decision to suspend an employee's access to classified material, it may review whether the agency provided the employee with the procedural protections set forth in [5 U.S.C. § 7513](#) in taking an adverse action, whether the agency committed harmful error in failing to follow its applicable regulations, and whether the agency afforded him due process with respect to his constitutionally-protected property interest in his employment. *McGriff*, [118 M.S.P.R. 89](#), ¶¶ 24-25; see *Buelna v. Department of Homeland Security*, [118 M.S.P.R. 115](#), ¶ 10 (2012).

¶6 In both *McGriff* and *Buelna*, the Board found that a tenured federal employee who is indefinitely suspended based on an agency's security clearance determination is constitutionally entitled to due process, i.e., notice of the reasons for the suspension and a meaningful opportunity to respond. *Buelna*, [118 M.S.P.R. 115](#), ¶ 11; *McGriff*, [118 M.S.P.R. 89](#), ¶¶ 26, 28. The Board also recognized that, under *Gilbert v. Homar*, [520 U.S. 924](#) (1997), due process in this context may not necessarily encompass a right to have such notice and opportunity to respond prior to the suspension, as required in a removal action under *Cleveland Board of Education v. Loudermill*, [470 U.S. 532](#), 546 (1985). *Buelna*, [118 M.S.P.R. 115](#), ¶ 11; *McGriff*, [118 M.S.P.R. 89](#), ¶ 27. Rather, because due process relates to time, place and circumstances, its parameters in any given case will be a function of the demands of the particular situation. *Buelna*, [118 M.S.P.R. 115](#), ¶ 11 (citing *Homar*, 520 U.S. at 930). In this regard, the Court has instructed that we look at the following three 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. *Buelna*, [118 M.S.P.R. 115](#), ¶ 11 (citing *Homar*, 520 U.S. at 931-32).

¶7 Consistent with our holdings in *McGriff* and *Buelna*, we find that the appellant was entitled to constitutional due process, i.e., notice and a meaningful opportunity to respond, upon being indefinitely suspended based on the agency's security clearance decision. We therefore consider the *Homar* factors in order to determine whether the timing, place and circumstance of the procedures used in this case afforded the appellant his right to due process.

¶8 Concerning the first factor, the private interest affected by the agency action, the record indicates that the appellant has been suspended for approximately 1½ years. *See* IAF, Tab 5 at 13. Such a length of time represents a significant deprivation of the appellant's property interest. However, here, as in *McGriff*, the appellant was afforded notice and an opportunity to respond to the reasons for the suspension of his security clearance prior to the imposition of the indefinite suspension. *Id.* at 31-113. Consequently, despite the prolonged nature of the suspension at issue here, we cannot conclude that the “timing” of the notice and opportunity to respond rendered the process afforded the appellant constitutionally defective. *See McGriff*, [118 M.S.P.R. 89](#), ¶ 29.

¶9 Regarding the third factor, the government's interest, the agency undoubtedly has a compelling interest in withholding national security information from unauthorized persons. *See Buelna*, [118 M.S.P.R. 115](#), ¶ 13. Thus, this factor arguably weighs in favor of the government's authority to take immediate action without providing the appellant with notice and opportunity to respond prior to suspending him. *See id.* However, given that the agency did provide the appellant with prior notice and an opportunity to respond in this case, its interest as a factor relative to the timing of the process afforded the appellant is somewhat inconsequential to the ultimate issue as to whether the appellant received the process due him under the Constitution. *See id.*

¶10 In discussing the second factor in *Homar*, i.e., the risk of erroneous deprivation of the property interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, the Court focused on the need to ensure that the procedures used provide adequate assurance that the agency had reasonable grounds to support the adverse action. *Buelna*, [118 M.S.P.R. 115](#), ¶ 14 (citing *Homar*, 520 U.S. at 933-34). Here, based on the totality of the evidence, we find that the agency did have reasonable grounds to support the indefinite suspension. Specifically, the August 3, 2010 notice proposed the appellant's indefinite suspension based on the suspension of the appellant's access to classified information and states the agency's reliance upon the July 16, 2010 memorandum regarding the suspension of the appellant's access to classified information. IAF, Tab 5 at 156-58, 160. As set forth above, the July 16, 2010 memorandum states that the suspension of the appellant's access to classified information was based on the appellant's disregard for the importance of integrity in the polygraph program, the ethics of federal service, and regulations, and the appellant's lack of candor in failing to immediately notify quality control of his apparent deliberate manipulation of polygraph chart results and in failing to notify anyone of polygraph software problems upon realizing that problems existed. *Id.* at 160.

¶11 Additionally, we find that the memorandum regarding the suspension of the appellant's security clearance, coupled with the notice proposing his indefinite suspension, did not deny the appellant a meaningful opportunity to respond by failing to provide him with the specific reasons for the action before he responded to the proposal notice. As set forth above, the July 16, 2010 memorandum and the August 3, 2010 proposal notice informed the appellant of the basis for the indefinite suspension action. *See* IAF, Tab 5 at 156-158, 160. The appellant responded to Bochna regarding the merits of the suspension of his security clearance, thus showing that he understood the accusations against him. *See id.* at 31-113.

¶12 Providing an appellant with a reasonable opportunity to reply that satisfies constitutional due process requires more than mere notice; the reply opportunity may not be an empty formality, and the deciding official should have authority to take or recommend agency action based on the reply. *McGriff*, [118 M.S.P.R. 89](#), ¶ 33. In other words, the agency does not afford an individual with a meaningful opportunity to respond by merely providing an empty process for presenting his defense against the agency's adverse action. *Id.* The deciding official must have the authority to change the outcome of the indefinite suspension action by either reinstating the appellant's access to classified information or reassigning him to a position not requiring access to classified information. *Id.*, ¶¶ 33-36.

¶13 It is especially important that the deciding official have the authority to change the outcome of a proposed indefinite suspension by either reinstating the appellant's access to classified information or reassigning him to a position not requiring access to classified information, when, as in the instant case, the employee did not have a meaningful opportunity to respond to the reasons for the suspension of the security clearance in the earlier access determination. *Id.*, ¶ 33. Otherwise, an indefinite suspension would become the automatic penalty based on a security clearance determination, even though the security clearance determination lacked any procedural due process protection at the time the indefinite suspension action was taken. *Id.* Thus, the Board has held that, if the deciding official lacks the authority to do anything but affirm the indefinite suspension action, the procedures used in effecting the appellant's indefinite suspension sufficiently run the risk of an erroneous deprivation of his property interest in employment such as to find that the agency violated his right to constitutional due process. *Id.*, ¶ 36.

¶14 Here, as in *McGriff* and *Buelna*, the record establishes that the deciding official lacked the authority to change the outcome of the indefinite suspension action. The proposal notice expressly states that “[o]nly CCF can reinstate your access to classified material. This command and your previous command are

unable to affect your access. . . . This command does not have the option of placing you in another position while you await adjudication of your case by CCF.” IAF, Tab 5 at 157. In the decision notice, Bochna reiterated that only the CCF can reinstate the appellant’s access to classified material. *Id.* at 15. This is further corroborated by the hearing testimony of Colonel Michael Bokner, the Brigade Commander of the Army Field Services Center. Hearing Transcript at 40. Moreover, Bochna explained in the decision notice that “Comptroller General case law prohibits the agency from granting administrative leave for an indefinite amount of time while awaiting the adjudication of [the appellant’s] security clearance.” IAF, Tab 5 at 15. Based on the foregoing, we find that Bochna lacked the authority to change the outcome of the adverse action, and therefore the agency failed to afford the appellant a meaningful opportunity to respond to the proposed indefinite suspension action. Thus, we find that the agency violated the appellant’s constitutional due process rights, and therefore the indefinite suspension action must be cancelled. Accordingly, we REVERSE the initial decision and DO NOT SUSTAIN the indefinite suspension action.

ORDER

¶15 We ORDER the agency to cancel the indefinite suspension action and to restore the appellant effective January 24, 2011. *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.

¶16 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 and/or Postal Service Regulations, 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.

¶17 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).

¶18 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).

¶19 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.

¶20 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 Clerk of the Board.

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

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 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 court no later than 60 calendar days after receipt by your representative. 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](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.ca9.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.

FOR THE BOARD:

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.