

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD**

**2013 MSPB 16**

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Docket No. DE-0752-11-0343-I-1

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**James Schnedar,  
Appellant,**

**v.**

**Department of the Air Force,  
Agency.**

February 22, 2013

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James Schnedar, Albuquerque, New Mexico, pro se.

Basil R. Legg, Jr., Joint Base Andrews, Maryland, for the agency.

**BEFORE**

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

**OPINION AND ORDER**

¶1 The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. For the reasons set forth below, we GRANT the appellant's petition for review, VACATE the initial decision, and REMAND the case to the field office for further adjudication in accordance with this Opinion and Order.\*

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\* Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for

## BACKGROUND

¶2 The agency proposed to remove the appellant from a GS-13 Information Technology (IT) position based on Department of the Air Force Central Adjudication Facility (CAF) notification that his security clearance had been revoked. Initial Appeal File (IAF), Tab 12, Subtab 4i. After considering the appellant's response to the notice, including his statement that he had an appeal of the CAF notification pending with the Personnel Security Appeals Board (PSAB), the deciding official mitigated the removal to an indefinite suspension that would end when the PSAB made its final determination. IAF, Tab 13, Subtab 4k. The appellant appealed the agency's action, IAF, Tab 1, and the administrative judge affirmed the indefinite suspension, IAF, Tab 21.

¶3 The appellant has petitioned for review. Petition for Review (PFR) File, Tab 1. The agency has responded in opposition to the petition. PFR File, Tab 3.

## ANALYSIS

¶4 The appellant asserts on review that the agency violated its internal regulations by taking administrative action against him prior to the PSAB's decision on his appeal from the CAF revocation decision. The appellant quotes a section of Department of Defense (DoD) Regulation 5200.2-R, as follows:

Unfavorable Administrative Procedures.

Except as provided for below, no unfavorable administrative action shall be taken under the authority of this Regulation unless the individual concerned has been:

. . . .

Provided a final written decision by the PSAB, including a rationale, to any submission under subparagraph C8.2.2.4., above, stating the final disposition of the appeal. This will nominally be accomplished within 60-calendar days of receipt of the written appeal from the individual if no personal appearance was requested, or within

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review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

30-calendar days from receipt of the [Administrative Judge's] recommendation if a personal appearance was requested.

PFR File, Tab 1 at 4-5. The appellant did not provide a complete copy of the regulatory provision that he referenced, and, although the agency responded to the appellant's petition for review, it did not respond to the appellant's argument regarding the DoD regulation.

¶5 The appellant's ellipsis excludes large parts of the regulatory provision in question. However, in *Rahgozar v. Department of the Air Force*, [118 M.S.P.R. 37](#), ¶ 10 (2012), the Board summarized the regulatory provision referenced by the appellant as follows:

Pursuant to 5200.2-R, Sections C8.2.1, C8.2.2, no "final unfavorable personnel security clearance" determination will be made nor an "unfavorable administrative action" taken under this regulation without granting the individual the procedural benefits provided for in Section C8.2.2. These procedural benefits include receiving a statement of the reasons for the unfavorable administrative action, the opportunity to respond, a written decision, the opportunity to appeal to the relevant PSAB, and a written decision from the PSAB.

(internal citations omitted). The Board in *Rahgozar* did not need to decide whether the agency may take an unfavorable administrative action prior to the issuance of the decision on a PSAB appeal, but the Board's summary of the regulation suggests that the appellant's interpretation of it may be correct.

¶6 Generally, the Board will not consider an argument raised for the first time in a petition for review absent a showing that it is based on new and material evidence not previously available despite the party's due diligence. *Banks v. Department of the Air Force*, [4 M.S.P.R. 268](#), 271 (1980). However, because the appellant alleged a violation of agency regulation that could provide a basis to reverse the agency's action, the Board found it appropriate to order the agency to file evidence and argument regarding the applicability of 5200.2-R and whether that regulation prohibits an unfavorable administrative action (including an indefinite suspension) while a PSAB appeal is pending.

¶7 In its response, the agency argued, among other things, that DoD Regulation 5200.2-R does not provide a basis for relief. PFR File, Tab 5 at 9. The agency argues that an internal DoD regulation cannot grant jurisdiction to the Board to review and possibly reverse an adverse action. *Id.*

¶8 In an appeal under [5 U.S.C. § 7513](#) based on the denial or revocation of a security clearance, the Board does not have authority to review the substance of the underlying security clearance determination. *Department of the Navy v. Egan*, [484 U.S. 518](#), 530-31 (1988). The Board may only determine whether: the appellant's position required a security clearance; his security clearance was denied; transfer to a nonsensitive position was not feasible; and he was provided with the procedural requirements of [5 U.S.C. § 7513](#). *Egan*, 484 U.S. at 530-31; *Hesse v. Department of State*, [217 F.3d 1372](#), 1376 (Fed. Cir. 2000).

¶9 In *Romero v. Department of Defense*, [527 F.3d 1324](#), 1329 (Fed. Cir. 2008), the U.S. Court of Appeals for the Federal Circuit acknowledged that the Board may not review the substance of a security clearance revocation decision. The court vacated the Board's decision and remanded the matter, however, because the Board did not address whether Romero had shown that the agency committed harmful error in failing to follow its own procedures when revoking his Secret security clearance. *Id.* at 1328–30. The court found that *Egan* and other decisions did not preclude the Board from reviewing whether the agency complied with its own regulations and procedures in revoking Romero's security clearance. *Id.* at 1329. The statutory basis for such review is [5 U.S.C. § 7701\(c\)\(2\)\(A\)](#), which provides that the Board may not sustain an action on appeal if the appellant shows “harmful error in the application of the agency's procedures in arriving at [its] decision.” *Id.* at 1328. At issue in *Romero* were the procedures by which the security clearance determination itself was made, whereas the present case involves the procedures by which the agency may take an adverse action based on a security clearance determination. However, we find that the review authorized under *Romero* encompasses review of both sets of

procedures. We therefore find that the Board can consider whether the agency complied with its own procedures in suspending the appellant.

¶10 The agency also argues that it was not required to follow the procedures set forth in DoD regulation 5200.2-R because the appellant was not indefinitely suspended under the authority of that regulation. PFR File, Tab 5 at 10. Rather, the agency argues that the action was taken under the authority of [5 U.S.C. § 7513](#). PFR File, Tab 5 at 10. However, the agency's argument is inconsistent with *Romero*, in which the court found that the agency had complied with [5 U.S.C. § 7513](#) but remanded the appeal for the Board to determine whether the agency had committed harmful error in the application of its own procedures. *Romero*, 527 F.3d at 1328 (“Section 7513 is not the only source of procedural protections for employees subject to adverse actions based on security clearance decisions; agencies must also follow the procedures established by their own regulations.”).

¶11 An agency's interpretation of its own regulation is ordinarily entitled to deference. *See Connolly v. Department of Homeland Security*, [99 M.S.P.R. 422](#), ¶ 15 (2005). Although we reject the agency's assertion that the Board cannot review whether the agency complied with its own regulations and procedures in indefinitely suspending the appellant, we afford the agency an opportunity to interpret DoD regulation 5200.2-R in light of the appellant's assertions. Accordingly, we remand this appeal to the Denver Field Office to allow the parties to submit evidence and argument on the issue of whether DoD regulation 5200.2-R prohibits taking administrative action against an employee prior to the PSAB's decision on his appeal from the CAF revocation decision. *See Romero*, 527 F.3d at 1329–30.

¶12 If, on remand, it is determined that DoD regulation 5200.2-R prohibits taking administrative action against an employee prior to the PSAB's decision on his appeal from the CAF revocation decision and that the agency therefore committed procedural error in taking administrative action against the appellant,

such error warrants reversal of the agency action only if 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. *Stephen v. Department of the Air Force*, [47 M.S.P.R. 672](#), 681 (1991). Rather, the appellant bears the burden of proving harm. *Helms v. Department of the Army*, [114 M.S.P.R. 447](#), ¶ 6 (2010); [5 C.F.R. § 1201.56\(b\)\(1\)](#). A procedural error is harmful where the error was 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\(c\)\(3\)](#); *see Stephen*, 47 M.S.P.R. at 685.

#### ORDER

¶13 Accordingly, we VACATE the initial decision and REMAND the appellant's indefinite suspension to the Denver Field Office to allow the parties to submit evidence and argument on the issue of whether DoD regulation 5200.2-R prohibits taking administrative action against an employee prior to the PSAB's decision on his appeal from the CAF revocation decision and, if it is determined that the agency committed procedural error under DoD regulation 5200.2-R, whether the appellant has met his burden to show that the error was harmful.

FOR THE BOARD:

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William D. Spencer  
Clerk of the Board  
Washington, D.C.