UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 63

Docket No. DA-0752-09-0404-I-1

Alexander Buelna,
Appellant,
v.
Department of Homeland Security,
Agency.

April 26, 2012

Jeffrey H. Jacobson, Esquire, Tucson, Arizona, for the appellant.

Michael W. Gaches, Esquire, Daniela Murch, and Steven E. Colon, Esquire, Arlington, Virginia, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman

OPINION AND ORDER

¶1 The appellant petitions for review of the July 31, 2009 initial decision that sustained his indefinite suspension. For the reasons set forth below, the Board GRANTS the appellant's petition under 5 C.F.R. § 1201.115(d), VACATES the initial decision, and REMANDS the appeal for further adjudication.

BACKGROUND

¶2 The appellant, a Federal Air Marshal (FAM) with the Transportation Security Administration (TSA), was required to hold a Top Secret security

clearance.[1] Initial Appeal File (IAF), Tab 6, Subtabs 1 at 1-2, 4I, 4L; Tab 8, Jt. Stip. 3; Tab 14 at 1. On February 20, 2009, the Office of Security, Personnel Security Division Deputy Associate Director Larry Smith issued two memoranda entitled "Suspension of Access to National Security Classified Information," which advised Assistant Special Agent in Charge (ASAC) David Ballinger and the appellant that the appellant's Top Secret security clearance was suspended effective immediately pending an agency review. IAF, Tab 6, Subtabs 4H, 4I. The notice informed Ballinger that the suspension was based on derogatory information developed from the U.S. Army Criminal Investigation Division (CID) and Department of Homeland Security/Office of Inspector General (OIG) concerning fraudulent claims.[2] *Id.*, Subtab 4H. The notice to the appellant added that the claims raised questions about his honesty, integrity, trustworthiness and ability to protect national security information. *Id.*, Subtab 4I.

¶3 On March 3, 2009, Ballinger proposed the appellant's indefinite suspension based on the suspension of his security clearance and the OIG's ongoing investigation into the appellant's alleged misconduct. Ballinger provided the appellant with 7 days after his March 4, 2009 receipt of the proposal to respond to the deciding official, SAC Jerry Patton. IAF, Tab 6, Subtab 4G. Patton subsequently granted the appellant part of his requested extension of time to respond, *id.*, Subtabs 4D, 4F, and the appellant responded orally and in writing, *id.*, Subtabs 4B, 4E. Patton issued an April 2, 2009 decision sustaining the indefinite suspension effective that date. *Id.*, Subtab 4B. The appellant filed an

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[1] In a November 29, 2011 initial decision that became the Board's final decision when neither party filed a petition for review, the administrative judge stated that the agency removed the appellant effective September 19, 2011; the appellant filed an appeal; and the appellant subsequently withdrew his appeal of the removal with prejudice. *Buelna v. Department of Homeland Security*, MSPB Docket No. DA-0752-11-0701-I-1 (Initial Decision, Nov. 29, 2011). Therefore, the appellant is apparently no longer employed by the agency.

[2] The appellant was also a U.S. Army Reserve Officer.

appeal, IAF, Tab 1, subsequently withdrawing his request for a hearing, *id.*, Tab 7.

¶4 The administrative judge sustained the appellant's indefinite suspension from his position. The administrative judge explained that the indefinite suspension is not governed by 5 U.S.C. chapter 75, but rather by the agency's Management Directive (MD) No. 1100.75-3, and recited the parties' stipulations. He then found that the appellant's position requires a security clearance and it was suspended, the agency granted the appellant minimum due process under its internal regulations, and the indefinite suspension had a condition subsequent that would bring the suspension to an end. He thus concluded that the agency had supported its decision to indefinitely suspend the appellant. IAF, Tab 16. The appellant filed a petition for review, Petition for Review File (PFR File), Tab 1, and the agency filed a response opposing the petition, *id.*, Tab 3.

¶5 The Board determined that this appeal presents similar legal issues to those presented in three other appeals.[3] The Board therefore issued a request for briefing to the parties, PFR File, Tab 5, and also issued a notice of opportunity to file amicus briefs, 76 Fed. Reg. 59171 (Sept. 23, 2011). The request and notice explained the background of the appeal and applicable law and set forth the following issues: (1) Should the Board apply the balancing test set forth in *Gilbert v. Homar*, 520 U.S. 924 (1997), in determining whether an agency violates an employee's constitutional right to due process in indefinitely suspending him or her pending a security clearance determination; (2) If so, does that right include the right to have a deciding official who has the authority to change the outcome of the proposed indefinite suspension; and (3) If the Board finds that an agency did not violate an employee's constitutional right to due

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[3] Those appeals are *McGriff v. Department of the Navy*, MSPB Docket No. DC-0752-09-0816-I-1; *Gargiulo v. Department of Homeland Security*, MSPB Docket No. SF-0752-09-0370-I-1; and *Gaitan v. Department of Homeland Security*, MSPB Docket No. DA-0752-10-0202-I-1.

process in this regard, how should the Board analyze whether the agency committed harmful procedural error in light of the restrictions set forth in *Department of the Navy v. Egan*, 484 U.S. 518 (1988), on the Board's authority to analyze the merits of an agency's security clearance determination. *Id.* The parties submitted additional argument and amici submitted briefs.[4] PFR File, Tabs 7, 11-12, 14-16, 20-22, 24. The record closed on November 21, 2011. *Id.*, Tabs 19, 24. The Board has considered the entire record in ruling on this appeal.

ANALYSIS

¶6 The appellant argues that the agency indefinitely suspended him without constitutional due process. He asserts that, by virtue of MD No. 1100.75-3, he has a property interest in his continued employment protected by due process. He contends that the agency's Office of Security summarily suspended his security clearance based on information developed from the U.S. Army CID, the agency proposed his indefinite suspension based solely on the security clearance suspension, and the agency never provided him with the material relied on in suspending his security clearance or an opportunity to contest the propriety of the security clearance suspension. He further contends that Patton had no authority to entertain any argument regarding the underlying merits of the agency's decision to suspend his security clearance because security clearance determinations are within the exclusive jurisdiction of the Office of Security. He argues that under *Cheney v. Department of Justice*, 479 F.3d 1343 (Fed. Cir. 2007), which construed analogous provisions of 5 U.S.C. § 7513, the agency must provide him with a meaningful opportunity to respond to the reasons for the

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[4] The amici are Peter B. Broida, Esquire, the U.S. Office of Special Counsel, the American Federation of Government Employees, the National Federation of Federal Employees, the National Treasury Employees Union, the Government Accountability Project, and the Metropolitan Washington Employment Lawyers Association. PFR File, Tabs 9, 15-17, 20-22. We have also considered a late-filed brief from John Futuran, Esquire.

indefinite suspension by ensuring that, either in the advance notice of the action, or in the earlier access determination, he was notified of the cause that led to the security clearance determination. PFR File, Tab 1; *see also* IAF, Tabs 1, 11.

The general principles that apply in analyzing whether employees covered under 5 U.S.C. chapter 75 have been denied statutory, regulatory, or constitutional due process rights also apply in analyzing whether TSA employees have been denied those rights.

¶7 As the administrative judge stated, because the appellant was an employee of the TSA, this appeal is governed by the provisions of the Aviation and Transportation Security Act (ATSA). *See Connolly v. Department of Homeland Security*, 99 M.S.P.R. 422, ¶ 9 (2005). Under the ATSA, TSA employees are covered by the personnel management system that is applicable to employees of the Federal Aviation Administration (FAA) under 49 U.S.C. § 40122, except to the extent the Administrator of the TSA modifies that system as it applies to TSA employees. 49 U.S.C. § 114(n); *Connolly*, 99 M.S.P.R. 422, ¶ 9; *Lara v. Department of Homeland Security*, 97 M.S.P.R. 423, ¶ 9 (2004). Under 49 U.S.C. § 40122(g)(2), many of the provisions of title 5 do not apply, including, notably, chapter 75. Thus, the Board has held that chapter 75 does not apply to the FAA and, instead, the FAA's internal procedures are applicable. *See Hart v. Department of Transportation*, 109 M.S.P.R. 280, ¶¶ 10-11 (2008).

¶8 Pursuant to the ATSA, the Administrator of the TSA modified the FAA's system by issuing an updated version of MD No. 1100.75-3, "Addressing Unacceptable Performance and Conduct," and a related Handbook on January 2, 2009. IAF, Tab 6, Subtabs 4J, 4K. Neither MD No. 1100.75-3, nor the Handbook, purports to modify the list of title 5 provisions that are expressly applicable to the FAA, and, thus, only the title 5 provisions that are set forth in 49 U.S.C. § 40122(g)(2) apply to the TSA. *See Winlock v. Department of Homeland Security*, 110 M.S.P.R. 521, ¶ 6 (2009) (interpreting a prior, but substantively similar version of MD No. 1100.75-3), *aff'd*, 370 F. App'x 119 (Fed. Cir. 2010). Those provisions do not include chapter 75, as we have

indicated above. *See* 49 U.S.C. § 40122(g)(2); *Hart*, 109 M.S.P.R. 280, ¶ 10. Therefore, as the administrative judge correctly found, the provisions of MD No. 1100.75-3 and the Handbook, rather than chapter 75, apply to this appeal. *Winlock,* 110 M.S.P.R. 521, ¶ 6; *see* IAF, Tab 16.

¶9 Nevertheless, the procedural requirements for effecting an adverse action set forth in MD No. 1100.75-3 are similar to those set forth in 5 U.S.C. § 7513(b). *See* IAF, Tab 6, Subtab 4J. Further, in its response to the appellant's petition for review, the agency acknowledges that it must afford the appellant constitutional due process under its management directive. PFR File, Tab 3, Resp. at 4.

As explained in *McGriff v. Department of the Navy*, 2012 MSPB 62, the appellant was entitled to due process when the agency indefinitely suspended him based on a suspension of access to classified information.

¶10 In *McGriff*, 2012 MSPB 62, the Board recently addressed the question of 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. *Id.*, ¶¶ 24-25.

¶11 Specifically, 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. *McGriff*, 2012 MSPB 62, ¶ 28. We also recognized that under *Homar,* 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 (1985). *McGriff*, 2012 MSPB 62, ¶ 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. *Id.* (citing *Homar,* 520 U.S. at 930). Consequently, in order to determine what process is due, the Court has instructed that we balance 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. *Homar,* 520 U.S. at 931-32 (quoting *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976)).

¶12 Consistent with our holding in *McGriff*, 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. Concerning the first factor, the record indicates that the appellant was ultimately suspended for approximately 2½ years. We find that such a length of time represents a significant deprivation of the appellant's property interest.[5] However, here, as in *McGriff,* the appellant was, in fact, afforded notice and an opportunity to respond to the reasons for the revocation of his security clearance *prior* to the imposition of the suspension based on that revocation. As such, despite the prolonged nature of the suspension at issue here, we cannot conclude that the "timing" of the notice

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[5] The record does not reveal whether the agency's regulations regarding indefinite suspensions required it to reimburse the appellant for lost pay should the agency ultimately rule in the appellant's favor. We find that this matter may be relevant to the first or second *Homar* factors. 520 U.S. at 932.

and opportunity to respond rendered the process afforded him constitutionally defective.

¶13 Regarding the third factor, the agency undoubtedly has a compelling interest in withholding national security information from unauthorized persons. *See Egan*, 484 U.S. at 527. 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. However, again, given that the agency did, in fact, 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.

¶14 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. 520 U.S. at 933-934. Here, based on the totality of the evidence, we find that the agency did have reasonable grounds to support the suspension. Specifically, as previously indicated, the February 20, 2009 memorandum to the appellant suspending his security clearance stated that the suspension was "based on derogatory information developed from U.S. Army and DHS/IG concerning fraudulent claims which raises questions about your honesty, integrity, trustworthiness and ability to protect[ ] national security information." IAF, Tab 6, Subtab 4I. The March 3, 2009 notice proposed the appellant's indefinite suspension based on two charges: (1) Suspension of Top Secret Security Clearance and (2) Investigation into Misconduct. The specification underlying the first charge was almost identical to the stated basis for suspending the appellant's security clearance, adding that the fraudulent claims related "to time and attendance and travel vouchers pertaining

to military duty and FAM employment." The specification underlying the second charge stated that DHS/OIG was conducting an investigation into "alleged false or inaccurate time and attendance records submitted by you relating to your FAM employment." *Id.*, Subtab 4G.

¶15 In addition, we find that the notice suspending the appellant's security clearance, coupled with the notice proposing his indefinite suspension, did not deny him 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 notices informed the appellant of the basis for the action. The appellant responded to Patton that the military investigation into his time and attendance records as a Reserve Officer was only a "Commander's Inquiry" and did not warrant discipline, IAF, Tab 6, Subtab 4D at 2, thus showing that he understood the accusations against him, *see Alvarado v. Department of the Air Force*, 97 M.S.P.R. 389, ¶¶ 8-15 (2004). Therefore, the agency provided the appellant with adequate notice of the reason for his security clearance suspension before the agency subjected him to an adverse action. *See, e.g., King v. Alston*, 75 F.3d 657, 662 (Fed. Cir. 1996) (finding that the agency provided the employee with sufficient information to make an informed reply when it notified him that his security clearance was being suspended because of "a potential medical condition" and then informed him that he was being indefinitely suspended from duty based on the suspension of his security clearance); *cf. Cheney*, 479 F.3d at 1353 (finding that the employee was not provided with the opportunity to make a meaningful response to the notice of proposed suspension from duty where the limited information provided put him in the position where he had to guess at the reasons for his security clearance suspension).

¶16 Unfortunately, as in *McGriff*, the record lacks sufficient information for us to make a determination concerning other issues affecting the second *Homar* factor. In spite of our findings in ¶ 15 above, a question still exists as to whether the appellant had a meaningful opportunity to respond to the proposed indefinite

suspension. It appears that, although the Personnel Security Division stated that the appellant could contact a Personnel Security Specialist if he had further questions regarding the action, it suspended his security clearance with no advance notice or opportunity to respond to the merits of the action. IAF, Tab 6, Subtabs 4H, 4I. Further, it appears that Patton had very limited authority to affect the outcome of the proposed indefinite suspension. The parties stipulated that the appellant's indefinite suspension was based on "the suspension of his top secret security clearance and the investigation into his misconduct, not on the underlying merits or factual predicate for the suspension or the investigation." *Id.*, Tab 8, Jt. Stip. 10; Tab 14 at 1. In his decision sustaining the indefinite suspension, Patton stated that any review of the decision to suspend the appellant's security clearance "rests exclusively with the Personnel Security Division," and that the "process to appeal their decision concerning your security clearance is separate and distinct from the process to reply to the proposal to suspend you indefinitely." *Id.*, Tab 6, Subtab 4B at 2. The decision did not address the appellant's request to remain on administrative leave status pending the resolution of the security clearance matter. *Id.*

¶17 Thus, the evidence does not indicate that Patton had authority to consider the merits of the appellant's security clearance suspension when determining the propriety of the indefinite suspension. In addition, it appears that he did not have authority to take other remedial action, including temporarily reassigning the appellant to a position that did not require a Top Secret security clearance. *Id.*, Tab 9, Patton Decl., ¶ 5.

¶18 A reply procedure that compromises a deciding official's authority or objectivity can constitute a constitutional due process violation. *See, e.g., Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368, 1376-77 (Fed. Cir. 1999) (stating that actions that compromise the deciding official's objectivity in the reply process can constitute violations of constitutional due process); *cf. Holley v. Department of the Navy*, 62 M.S.P.R. 300, 304-05 (1994) (stating that

the appellant was afforded a meaningful opportunity to reply to a proposed indefinite suspension where the deciding official had authority to suspend the appellant's access to classified information). Therefore, under the circumstances of this case, a question exists regarding whether the agency afforded the appellant a meaningful opportunity to reply to the reason for the suspension of his security clearance before suspending him from his position, or whether instead the agency merely provided him with an empty formality.

As also explained in *McGriff*, 2012 MSPB 62, the Board will apply its traditional standards in analyzing whether the agency committed harmful error.

¶19 The Board also found in *McGriff* that, even if an agency did not violate an employee's right to minimum due process, the employee may still show that the agency committed harmful error in failing to follow statutory provisions or its own regulations. We noted that the employee bears the burden of proving harmful error. *McGriff*, 2012 MSPB 62, ¶¶ 37-39. *McGriff* addressed an employee's statutory rights under 5 U.S.C. chapter 75, *id.*, and, as discussed above, that statutory provision does not directly apply here. But as also discussed above, the same general principles apply in analyzing whether employees have been denied rights under 5 U.S.C. chapter 75 and in analyzing whether they have been denied rights under the agency's directives. Therefore, the Board will apply the same general principles in determining whether the appellant established that the agency committed harmful error by failing to follow its management directive.

ORDER

¶20 Accordingly, we remand the appeal to the Dallas Regional Office for further adjudication consistent with this Opinion and Order. On remand, the administrative judge shall afford the appellant the opportunity to request a hearing and shall issue a new initial decision adjudicating the indefinite suspension consistent with this Opinion and Order.

FOR THE BOARD:

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