

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

**2012 MSPB 62**

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Docket No. DC-0752-09-0816-I-1

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**Corry B. McGriff,  
Appellant,**

**v.**

**Department of the Navy,  
Agency.**

April 26, 2012

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Laura A. O'Reilly, Esquire, and Neil C. Bonney, Esquire, Virginia Beach,  
Virginia, for the appellant.

William G. Haskin, Jr., Esquire, Portsmouth, 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 November 24, 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 served as an Information Technology Specialist with the agency's Naval Network Warfare Command.<sup>1</sup> Initial Appeal File (IAF), Tab 4, Subtabs 1 at 1, 4A, 4B. He was required to maintain a security clearance at the Secret level as a condition of employment. *Id.*, Subtabs 4B, 4C, 4E.

¶3 On April 28, 2009, the appellant's Commander issued him three notices. The first notice, signed by Terry L. Smith "by direction," stated that, in accordance with SECNAV M-5510.30, Chapter 10,<sup>2</sup> the appellant's access to classified material was suspended until further notice or adjudication by the Navy's Central Adjudication Facility (DONCAF) based on "recent and continual conduct that involve[d] questionable judgment, untrustworthiness, unreliability, and unwillingness to comply with rules and regulations." IAF, Tab 4, Subtab 4C. A Security Access Eligibility Report (SAER) to DONCAF's Director and signed by Chief of Staff M. L. Anderson described those charges in more detail. The SAER stated that the agency had investigated and disciplined the appellant with a letter of reprimand for his inability to comply with directions and for overstating his employee status; and described both his involvement with a company owned and operated by his wife, which created a conflict of interest with his official duties, and his failure to follow instructions prohibiting him from using government resources to further his wife's business. *Id.*, Subtab 4D.

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<sup>1</sup> With its October 17, 2011 brief, the agency submitted for the first time a September 10, 2010 settlement agreement in which the appellant agreed to resign from his then position with the agency's Commander, Navy Cyber Forces, effective that date. Petition for Review File, Tab 12, Att. 1; *see also id.*, Tab 4, Encl. 2 at 1 (stating that, as of January 26, 2010, the appellant became an employee of Commander, Navy Cyber Forces). As discussed below, we find that the settlement agreement has no effect on this appeal.

<sup>2</sup> Chapter 10 is entitled "Continuous Evaluation" and provides for personnel security determinations. IAF, Tab 4, Subtab 4Q.

¶4 The second notice, signed by Anderson, stated that the appellant was being placed on administrative leave because his position required him to have access to classified material, his access had been temporarily suspended, and there was no position to which he could be reassigned or detailed that did not require access to sensitive information. IAF, Tab 4, Subtab 4H. The third notice, also signed by Anderson, proposed the appellant's indefinite suspension pending final adjudication of his security clearance eligibility by DONCAF, noted that attached documents advised him of the temporary suspension of his security clearance, and provided him with an opportunity to respond to this proposal to Deputy Commander Terry A. Halvorsen. *Id.*, Subtab 4I.

¶5 In his May 28, 2009 response to the agency's indefinite suspension proposal, the appellant asserted that the action was taken without any due process, noting that DONCAF had not issued a letter of intent regarding his security clearance and that he had not had any opportunity to address DONCAF's allegations or concerns. IAF, Tab 4, Subtab 4J. He also asserted that the SAER lacked required specificity regarding his alleged involvement in his wife's company, and he requested additional information regarding the basis of the agency's allegations. *Id.*, Subtabs 4J, 4K, 4M. He contended that he is "entitled to have a meaningful opportunity to respond and attempt to influence the actions of the decisionmaker," and that he did not have that opportunity currently. *Id.*, Subtab 4J at 2.

¶6 On July 29, 2009, Halvorsen issued a decision indefinitely suspending the appellant effective July 30, 2009. *Id.*, Subtab 4N. Halvorsen cited SECNAV Instruction M-5510.30 as stating that, once a command has suspended an individual's access to classified information, DONCAF removes eligibility and the command cannot reinstate access until DONCAF adjudicates the issue. He cited a declaration from the agency's Office of Civilian Human Resources Director as stating that the agency's official policy was not to provide a reassignment following the loss of clearance or suspension of access to classified

information. *Id.* at 2; *see also* IAF, Tab 4, Subtab 4R. Citing a July 8, 2009 Inspector General (IG) Report, Halvorsen stated that it supported a finding that the appellant was conducting work for his wife's firm on government time using government resources and noted that it had been forwarded to DONCAF. IAF, Tab 4, Subtab 4N at 2. On September 11, 2009, DONCAF informed the appellant of both its preliminary decision to revoke his security clearance and his right to respond to this preliminary determination. *Id.*, Tab 4, Subtabs 4G.

¶7 On August 27, 2009, prior to DONCAF's preliminary decision to revoke his security clearance, the appellant filed an appeal asserting that the agency denied him due process in indefinitely suspending him. He contended that the agency failed to provide him with sufficient notice of the allegations against him to enable him to present a meaningful response and that the action was unwarranted. He requested an in-person hearing. IAF, Tab 1 at 1-2.

¶8 The administrative judge issued an order in which he explained that the Board's authority to review matters relating to security clearance determinations is limited, and that the merits of an agency's decision to deny, suspend, or revoke a security clearance are not within the Board's jurisdiction. He further explained, however, that an employee subjected to an appealable adverse action because of a decision regarding a security clearance is entitled to the procedural protections of [5 U.S.C. § 7513](#), and that, when an agency bases its adverse action on the denial, suspension, or revocation of a security clearance, the Board may determine whether a security clearance was suspended or denied, whether it was a requirement of the position, and whether the agency followed [5 U.S.C. § 7513](#). He also explained that an agency may indefinitely suspend an employee pending a final determination of whether his security clearance should be revoked. IAF, Tab 5 at 1-2.

¶9 The administrative judge then stated that, because the appellant's position required a security clearance and the agency suspended that clearance, the Board's review of the appellant's indefinite suspension from duty was limited to

considering whether the agency provided the required procedural protections. He explained that these protections included at least 30 days' advance written notice stating the specific reasons for the proposed action, a reasonable time to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer, the opportunity to be represented, and a written decision and the specific reasons therefor; and that the agency meets those requirements if the proposal notice provides the employee with an adequate opportunity to make a meaningful reply to the agency before the agency suspends him. He noted that the Board may also review whether an agency committed harmful error in failing to comply with its own regulations. IAF, Tab 5 at 2-3.

¶10 The administrative judge found that the agency's record belied the appellant's assertion that he was denied due process and showed that he was not denied any of the procedural protections of [5 U.S.C. § 7513\(b\)](#). The administrative judge also found that the record did not show that the agency failed to comply with its own procedures. He therefore directed the appellant to identify any reviewable material factual issues regarding this matter that he believed required an evidentiary hearing. IAF, Tab 5 at 3-4. In responding to the administrative judge's order, the appellant contended that the issue was whether he received due process in connection with his indefinite suspension. IAF, Tab 6 at 1. The administrative judge determined, however, that there were no reviewable material factual issues in dispute warranting an evidentiary hearing and noted that the appellant chose to present written argument in lieu of oral argument. *Id.*, Tab 7. Both parties submitted written arguments, the appellant asserting that the agency denied him an adequate opportunity to make a meaningful reply before suspending him and violated [5 U.S.C. § 7513](#) and its own regulations in not providing him with available documents relevant to the allegations against him. *Id.*, Tabs 8-9.

¶11 In his November 24, 2009 initial decision sustaining the appellant's indefinite suspension, the administrative judge found as follows: (1) The

appellant's position required access to classified information; (2) The agency suspended that access pending investigation, and it indefinitely suspended him pending a final decision on that matter; and (3) The agency afforded him the required procedural rights under [5 U.S.C. § 7513](#)(b) in indefinitely suspending him by providing him with advance written notice of the allegations against him, a reasonable time to respond, an opportunity to be represented, and a written decision explaining the basis for its action. Initial Decision (ID) at 5.

¶12 The administrative judge found to be without merit the appellant's claim that he did not have a reasonable opportunity to respond because the agency did not provide him with sufficient notice of the allegations against him. The administrative judge found that the SAER that the appellant received with the notice of proposed indefinite suspension included sufficient detail to inform him of the allegations against him, thereby enabling him to provide a meaningful response to the proposed indefinite suspension. ID at 6-7. He also found that the appellant failed to show that the agency violated its own regulations in not providing him with relevant documents, or that, even if it did, the appellant failed to show the error was harmful. *Id.* at 7-8. He concluded that the agency's suspension promoted the efficiency of the service and there were no positions to which the appellant could be reassigned. *Id.* at 8.

¶13 In his December 16, 2009 petition for review, the appellant reiterates his claim that the agency denied him due process when it indefinitely suspended him. Petition for Review (PFR) File, Tab 1. Specifically, he asserts that the Command's April 28, 2009 notice suspending his access to classified material was not a "letter of intent to revoke" his security clearance and that the agency had not issued such a letter when it proposed or decided to indefinitely suspend him. *Id.* at 4-5. He further asserts that the April 28, 2009 indefinite suspension proposal was insufficiently vague regarding his alleged misconduct. *Id.* at 5-8. He contends that the agency denied him his required meaningful opportunity to respond prior to effecting the indefinite suspension. *Id.* at 1, 4, 8. In addition, he

contends that the administrative judge incorrectly analyzed his claim that the agency had violated its own regulations. *Id.* at 7-8.

¶14 After filing his petition for review, the appellant submitted several new documents: (1) A May 14, 2010 decision from the Personnel Security Appeals Board (PSAB) stating that it would direct DONCAF to reinstate his security clearance, eligibility for access to Sensitive Compartmented Information (SCI) and eligibility for assignment to a sensitive position based on certain conditions, PFR File, Tab 4, Encl. 1 at 1; (2) a June 3, 2010 memorandum from the Commander, Navy Cyber Forces, signed by T. L. Smith by direction, stating that the appellant's security access eligibility was reinstated as of May 12, 2010, *id.*, Encl. 1 at 2-3; and (3) a June 3, 2010 memorandum from the Commander, signed by Chief of Staff John W. Smith, stating that, as a result of the PSAB's favorable decision regarding the appellant's security clearance eligibility "the decision to effect the indefinite suspension is rescinded and hereby cancelled."<sup>3</sup> *Id.*, Encl. 2 at 1.

¶15 The Chief of Staff's June 2010 memo also stated, however, that as of January 26, 2010, the appellant became an employee of Commander, Navy Cyber Forces; under SECNAV Instruction M-5510.30, commanding officers have the ultimate authority to determine who may have access to classified information; the appellant's new Commander had determined that the appellant continued to be a risk and that authorizing his access to classified information was imprudent; and therefore the Commander had "decided not to sponsor [the appellant's] access to classified information." *Id.* at 1-2. The memo then stated that the appellant's position required him to have access to "classified material"; that there was no position to which he could be reassigned or detailed that did not

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<sup>3</sup> Despite this language in the Chief of Staff's memo, the parties' July 9, 2010 settlement agreement and the filing of this appeal indicate that the agency did not actually rescind and cancel the indefinite suspension.

require access to “sensitive information”; and that, therefore, he was being placed on administrative leave beginning June 7, 2010. *Id.* at 2.

¶16 The appellant filed an appeal concerning the agency’s delay in returning him to duty after DONCAF’s favorable determination until his placement on administrative leave. *McGriff v. Department of the Navy*, MSPB Docket No. DC-0752-10-0610-I-1. On July 9, 2010, the parties settled the appeal. PFR File, Tab 12, Att. 2. On July 14, 2010, in an initial decision that became the Board’s final decision, the administrative judge dismissed the appeal as settled, retaining jurisdiction for enforcement purposes. *McGriff v. Department of the Navy*, MSPB Docket No. DC-0752-10-0610-I-1 (Initial Decision, July 14, 2010). As previously noted, the parties also reached a September 10, 2010 settlement agreement concerning the appellant’s subsequent proposed removal. *Infra*, n.1.

¶17 The Board determined that this appeal presents similar legal issues to those presented in three other appeals.<sup>4</sup> The Board therefore issued a request for briefing to the parties, PFR File, Tab 6, 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 process in this regard, how should the Board analyze whether the agency

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<sup>4</sup> Those appeals are *Buelna v. Department of Homeland Security*, MSPB Docket No. DA-0752-09-0404-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.



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.<sup>5</sup> PFR File, Tabs 8, 12, 14-17, 20-22, 24. The record closed on November 21, 2011. *Id.*, Tabs 19, 23. The Board has considered the entire record in ruling on this appeal.

### ANALYSIS

The parties' September 10, 2010 settlement agreement does not provide a basis for dismissing this appeal.

¶18 The agency asserts that the Board should dismiss this appeal because of the parties' September 10, 2010 settlement agreement. PFR File, Tab 12, Br. at 2, 6-7. It notes that the July 9, 2010 settlement agreement of the appellant's enforced leave appeal stated that "[t]his settlement shall not serve as a precedent for resolving other complaints, grievances or issues which have been or may be filed." *Id.* at 5; Att. 2, ¶ 5. It further notes that, in contrast, the September 10, 2010 settlement agreement of the proposed removal stated as follows:

The Appellant hereby waives any right to seek any further type of relief and/or damages, including but not limited to claims for back pay, separation pay, interest payments, or attorney fees; allegation of any violation of any law, rule or regulation; in connection with any matter relating to, arising out of or resulting from the facts and circumstances surrounding the above captioned proposed removal. The Appellant hereby agrees not to bring any of these matters in or before any person, court, board, commission or other administrative or judicial forum.

PFR File, Tab 12, Br. at 5; Att. 1, ¶ 1.

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<sup>5</sup> The amici are Peter B. Broida, Esquire; the 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 8, 14-16, 20-22. We have also considered a late-filed brief from John Futuran, Esquire.

¶19 The agency argues that the appellant’s petition for review is not properly before the Board because, in the September 10, 2010 settlement agreement, he waived his right to further review. It contends that the “facts and circumstances” surrounding the proposed removal are the same facts and circumstances upon which the agency based the suspension of his access to classified information and his indefinite suspension. It asserts that the petition for review is a matter “relating to, arising out of or resulting from the facts and circumstances surrounding . . . the proposed removal,” namely, that he inappropriately used government resources and official time to engage in activities on behalf of his wife’s company, and that he waived all rights to seek any relief associated with any matter arising out of these facts and circumstances, including the suspension of his access to classified information and the resulting indefinite suspension. It claims that the settlement agreement contains clear language evidencing the parties’ intent to resolve all matters associated with the facts and circumstances surrounding the proposed removal “to include the matter pending before the Board.” PFR File, Tab 12, Br. at 6-7.

¶20 Although the Board lacks authority to enforce the September 10, 2010 settlement agreement because it was reached outside of a Board proceeding, we will consider its effect on an action before the Board. *See Landers v. Department of the Air Force*, [117 M.S.P.R. 109](#), ¶ 5 (2011); *Johnson v. U.S. Postal Service*, [108 M.S.P.R. 502](#), ¶ 8 (2008), *aff’d*, 315 F. App’x 274 (Fed. Cir. 2009). It is well settled that a settlement agreement is a contract and the interpretation of its terms is a question of law. *Greco v. Department of the Army*, [852 F.2d 558](#), 560 (Fed. Cir. 1988). In construing a contract, one looks first to the terms of the agreement to determine the intent of the parties at the time they contracted, as evidenced by the contract itself. *Id.* Extrinsic evidence of intent should be considered only if the terms of the agreement are ambiguous. *Id.*; *see Sweet v. U.S. Postal Service*, [89 M.S.P.R. 28](#), ¶ 9 (2001).

¶21 We are not persuaded by the agency's argument that the appellant waived his right to review in this case by entering into the September 10, 2010 settlement agreement. Most significantly, the September 10, 2010 settlement agreement does not mention the appellant's pending petition for review of his indefinite suspension. If the agency intended that the September 10, 2010 settlement agreement would resolve the current appeal, it could have specifically identified it in the settlement agreement. Indeed, the agency has not explained why it waited a year to bring the settlement agreement to the Board's attention, if the settlement agreement resolved the current indefinite suspension appeal. Further, it has not explained how the appellant's August 27, 2009 appeal of his indefinite suspension is a matter arising out of its July 23, 2010 proposal to remove him. Moreover, it has not submitted any actual evidence concerning the appellant's proposed removal. *See, e.g., Santos v. U.S. Postal Service*, [77 M.S.P.R. 573](#), 577 (1998) (stating that a party's representative's unsworn statements in a pleading are not evidence).

¶22 But even if we assume that the proposed removal was based on the alleged misconduct cited by the agency in its brief, such misconduct was not the basis for the appellant's indefinite suspension. The brief states that the appellant's proposed removal was based on conflict of interest and use of non-public information; lack of candor; failure to follow instructions; and misuse of government resources, second offense of misconduct. In contrast, the basis of the indefinite suspension, as stated above, was the suspension of the appellant's access to classified material pending a determination by DONCAF.

¶23 We thus decline to dismiss the petition for review based on the parties' September 10, 2010 settlement agreement. As discussed below, we have considered information concerning the July 9, 2010 settlement agreement only to the extent that it indicates the length of the appellant's indefinite suspension.

The appellant was entitled to constitutional due process when the agency indefinitely suspended him from federal employment based on a suspension of access to classified information.

¶24 The Board has recognized that, under certain circumstances, an agency may indefinitely suspend 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. *See, e.g., Gonzalez v. Department of Homeland Security*, [114 M.S.P.R. 318](#), ¶ 13 (2010); *Jones v. Department of the Navy*, [48 M.S.P.R. 680](#), 682, 689, *aff'd as modified on recons.*, [51 M.S.P.R. 607](#) (1991), *aff'd*, [978 F.2d 1223](#) (Fed. Cir. 1992). On appeal of such an action, the Board lacks the authority to review the merits of the agency's decision to suspend an employee's access to classified material. *Egan*, 484 U.S. at 527-32. The Board may review, however, whether the agency provided the employee with the procedural protections set forth in [5 U.S.C. § 7513](#) in taking an adverse action. *Id.* at 530; *see also Cheney v. Department of Justice*, [479 F.3d 1343](#), 1344-45 (Fed. Cir. 2007); *King v. Alston*, [75 F.3d 657](#), 661-63 (Fed. Cir. 1996). The Board may also determine whether the agency committed harmful error in failing to follow its applicable regulations. *See, e.g., Romero v. Department of Defense*, 527 F.3d 1324, 1329 (Fed. Cir. 2008).

¶25 In addition to reviewing whether an agency provided an employee with statutory and regulatory protections in indefinitely suspending him based on a security clearance matter, the Board may also determine whether the agency afforded him due process with respect to his constitutionally-protected property interest in his employment. *See, e.g., Johnson v. Department of the Navy*, [62 M.S.P.R. 487](#), 490-91 (1994); *Kriner v. Department of the Navy*, [61 M.S.P.R. 526](#), 531-35 (1994). In *Kriner*, the Board stated that when a suspension is based on restriction of the employee's security access, the agency is required to provide the employee a meaningful opportunity to respond to the reasons for the suspension by ensuring that, *either in the advance notice of that action or in the*

*earlier access determination*, the employee has been notified of the cause that led to the access determination. 61 M.S.P.R. at 533; *see also Byerline v. Department of the Navy*, [62 M.S.P.R. 279](#), 283 (1994). An indefinite suspension based upon a negative security clearance determination thus illustrates the tension between ensuring that an agency does not violate an employee's constitutional due process rights in effecting the indefinite suspension and following the *Egan* prescript against reviewing the substance of the underlying security clearance determination. Because some precedent appears inconsistent regarding the parameters and analytical framework of constitutional due process for indefinite suspensions based upon negative security clearance determinations, we now address what due process requires under those circumstances.

¶26 In *Cleveland Board of Education v. Loudermill*, [470 U.S. 532](#), 546 (1985), the Court held that an agency's failure to provide a tenured public employee with notice and an opportunity to present a response, either in person or in writing, *prior* to removing him or her is a violation of the employee's constitutional right to due process of law. The Board's decision in *Stephen v. Department of the Air Force*, [47 M.S.P.R. 672](#) (1991), applied *Loudermill* to cases arising under 5 U.S.C. chapter 75. The Board found that, under *Loudermill*, an agency's failure to provide a non-probationary federal employee with prior notice and an opportunity to respond to an adverse action that deprives the employee of his property right in his employment is a violation of constitutional due process of law. *Stephen*, 47 M.S.P.R. at 680. The Board stated that when the agency deprives the employee of a constitutionally-protected property interest, the right to due process is "absolute" in the sense that it does not depend on the merits of the employee's claim. *Id.* at 681.

¶27 In *Gilbert v. Homar*, [520 U.S. 924](#) (1997), the Supreme Court addressed the issue of whether a tenured public employee who was suspended from employment was entitled to constitutional due process. The Court assumed, without deciding, that the suspension infringed a protected property interest and

summarized *Loudermill's* procedural due process requirements as comprising notice and a meaningful opportunity to respond. *Id.* at 929. While acknowledging that a suspension does implicate the constitutional due process right to notice and opportunity to respond, the Court went on to explain that due process in this context may not necessarily encompass a right to have such notice and opportunity *prior* to the deprivation as required in a removal action under *Loudermill*. *Id.* It explained that 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.* at 930. In order to determine what process is due, the Court balanced 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. *Id.* at 931-32 (quoting *Mathews v. Eldridge*, [424 U.S. 319](#), 335 (1976)).

¶28 Pursuant to *Loudermill*, *Stephen*, *Kriner* and *Homar*, 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.

¶29 Concerning the first factor, the record indicates that the appellant was ultimately suspended for approximately 10 months, from July 29, 2009, until May 17, 2010. PFR File, Tab 12, Att. 2, ¶ 3; *see also id.*, Tab 17, Appellant's Resp. at 4. We recognize that such a deprivation of the appellant's property interest is significant. However, the appellant in this instance 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 ultimately 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 him constitutionally defective.

¶30 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.

¶31 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. *Id.* 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, on March 5, 2009, it received an IG hotline complaint that the appellant was involved in a private business owned by his spouse, NetAnalysis Consulting LLC, and had attempted to secure government contracts for the business using his government e-mail account and official time. The subsequent Report of Investigation concerning that IG complaint indicated that the investigation substantiated allegations of conflict of interest, misuse of government equipment, conflicting outside employment and activities, misuse of official time, and misuse of subordinate’s time. IAF, Tab 4, subtab 4P, Encl. 1 at 2. In a June 3, 2009 memorandum, Capt. Purnell of the agency’s Judge Advocate concluded that the IG’s investigation and report were legally sufficient and substantiated the appellant’s violation of

various laws and regulations. *Id.*, Encl. 2 at 3-4. Conversely, DONCAF had neither fully investigated, nor finally decided, whether it would permanently revoke the appellant's security clearance when the agency indefinitely suspended him. IAF, Tab 4, Subtabs 4c-d, 4g, 4i, 4n. In addition, DONCAF conditionally reinstated the appellant's security clearance,<sup>6</sup> thus suggesting, at least in retrospect, that the Command may not have had a strong interest in suspending his security clearance. Even so, overall, we conclude that the agency did have reasonable grounds to support the appellant's suspension.

¶32 Moreover, we reject the appellant's assertion that the agency failed to provide him with the specific reasons for the action before he responded to the proposal notice, thereby denying him a meaningful opportunity to respond. PFR File, Tab 1 at 2, 5-9. To the contrary, we find that the notice of proposed indefinite suspension, coupled with the notice of temporary suspension of the appellant's security clearance, gave the appellant sufficient information to enable him to respond to the agency's proposed indefinite suspension. Specifically, the proposal notice references the SAER and the appellant admits receiving that report before the time for responding to the indefinite suspension proposal notice had elapsed. PFR File, Tab 1 at 5-6. As previously noted, the SAER contained sufficient detail about the reasons the agency temporarily suspended the

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<sup>6</sup> However, the reinstatement was conditional. Specifically, the PSAB stated that the appellant must demonstrate a positive attitude towards security responsibilities by having no further security-related incidents, strictly adhere to command rules and regulations regarding use of IT systems, continue to meet his financial obligations, incur no further delinquent debt, and continue to demonstrate financial responsibility and good judgment regarding compliance with relevant rules and regulations. It also required the appellant to provide his command security manager with a financial statement at 6 months and again at 1 year. Further, it specifically stated that he was "strongly cautioned to avoid construing this decision to mean that the PSAB condones" the conduct that led to the revocation of his security clearance, eligibility for assignment to a sensitive position and eligibility for access to SCI, and that any future similar conduct would result in re-evaluation of his eligibility for a security clearance. PFR File, Tab 4, Encl. 1.



appellant's security clearance, i.e., his recent discipline for his inability to comply with directions and for overstating his employee status, and his involvement with his wife's company despite instructions prohibiting him from using government resources to further that business. IAF, Tab 4, Subtabs 4D, 4I.

¶33 Nonetheless, a significant question exists as to whether the appellant had a meaningful opportunity to respond to the proposed indefinite suspension such that the procedures that were used posed a risk of erroneous deprivation of the appellant's property interest. *See Homar*, 520 U.S. at 933-34; *Mathews*, 424 U.S. at 335. 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 reply or deciding official should have authority to take or recommend agency action based upon the reply. *See Swindell v. Veterans Administration*, [12 M.S.P.R. 148](#), 150-51 (1982). Although *Swindell* technically addressed rights under the applicable statutory, regulatory, and Federal Personnel Manual provisions, it stated as follows:

[The Office of Personnel Management's] guidance material summarizes the court cases on point. We have reviewed this guidance and the leading court cases and find that the [Office of Personnel Management's] guidance material generally comports with what the judicial decisions deem to be the requirements of due process in connection with an oral reply. Namely, a fair conference with an agency official who is authorized to decide or recommend a decision. *See, e.g., Ricucci v. United States*, [425 F.2d 1252](#), 192 Ct. Cl. 1 (1970).

12 M.S.P.R. at 150 n.1. 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. *See Mathews*, 424 U.S. at 333 (stating that the fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner"); *see also Noe v. U.S. Postal Service*, [28 M.S.P.R. 86](#), 88-89 (1985). Indeed, it is especially important in circumstances such as are present here that the deciding official have authority to change the outcome of a proposed indefinite suspension

where 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. 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 was taken.

¶34 Here, the record suggests that the deciding official lacked authority to change the Command's initial determination to suspend the appellant's security clearance or to reassign him. IAF, Tab 4, Subtab 4N at 2. Specifically, the deciding official stated that the agency regulations required a Command to report any questionable or unfavorable information concerning an individual to DONCAF, and that, once a Command suspends an individual's access to classified information, DONCAF removes eligibility, and the Command cannot reinstate access until DONCAF adjudicates the issue. IAF, Tab 4, Subtab 4N at 2. The deciding official further stated that the official policy of the agency was not to provide reassignment following the suspension of access to classified information. *Id.*; *see also* IAF, Tab 5, Subtab 4Q (Declaration from the agency's Office of Civilian Human Resources Director stating that the agency's official policy is that reassignment following the loss of clearance or the suspension of access to classified information is neither mandatory nor desirable and that the agency has never issued and has no plans to issue regulations that would require activities to consider reassignment following the loss of a security clearance or the suspension of access to classified information).<sup>7</sup>

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<sup>7</sup> The deciding official did refer to an Inspector General Report of Investigation, noting that it had been reviewed and supported the conclusion that the appellant was conducting work for his wife's firm on government time, using government resources. He indicated that, based in part on this review, he found that the appellant's indefinite suspension was appropriate. IAF, Tab 4N at 2.

¶35 Unfortunately, the record does not establish whether the deciding official in fact possessed the authority to reinstate the appellant's access to classified information, or reassign him to a position not requiring access to classified information, regardless of what the appellant said in his reply to the proposal to indefinitely suspend him. Moreover, although unclear, it appears that the deciding official also could not place the appellant on administrative leave.<sup>8</sup> 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) (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).

¶36 The administrative judge did not grant the appellant an evidentiary hearing, and the record in this case is incomplete as to the deciding official's authority vis-à-vis the appellant's indefinite suspension. We therefore find that further adjudication is warranted. If the deciding official lacked the authority to do anything but affirm the indefinite suspension, the procedures used in effecting the appellant's indefinite suspension sufficiently ran the risk of an erroneous

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<sup>8</sup> As previously noted, subsequent events indicate that PSAB directed DONCAF to reinstate the appellant's security clearance, but that the appellant's then Commander (Navy Cyber Forces) decided to place the appellant on administrative leave. Although that would suggest that the appellant's then Commander had authority to change the outcome of the security clearance determination, it could be that the deciding official on the appellant's indefinite suspension lacked similar authority, or that any commander lacked such authority until after the security clearance determination had been completed.

deprivation of his property interest in employment such as to find that the agency violated his right to constitutional due process.

The appellant is also entitled to a determination on whether the agency committed harmful error when it indefinitely suspended him from federal employment based on a suspension of access to classified information.

¶37 Under [5 U.S.C. § 7511\(c\)\(2\)\(A\)](#), the Board will not sustain an adverse action if the appellant shows harmful error in the application of the agency's procedures in arriving at the decision under appeal. Therefore, even when an appellant fails to establish a violation of constitutional due process, he may still show that the agency committed harmful error in failing to follow the required statutory procedures or the agency's own regulations. *See Romero*, 527 F.3d at 1329. In *Romero*, the court acknowledged that the Board may not review the substance of a security clearance revocation decision and found that the Board did not err in finding that the agency had complied with [5 U.S.C. § 7513](#) in removing Romero after it revoked his security clearance. *Id.* at 1329. It vacated the Board's decision and remanded, 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 1325-26, 1329-30. The court found that *Egan* did not preclude the Board from reviewing whether the agency complied with its own regulations and procedures.<sup>9</sup> *Id.* at 1329. In addition, the court found that the Supreme Court's decisions in *Service v. Dulles*, [354 U.S. 363](#) (1957) and *Vitarelli v. Seaton*, [359 U.S. 535](#) (1959) also make clear that federal employees may challenge an agency's compliance with its regulations governing revocation of security clearances. The

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<sup>9</sup> In its subsequent decision, the court found that Romero had not met his burden in establishing that the agency had failed to follow its own regulations for revoking his Secret security clearance. Therefore, the court did not reach the issue of whether any procedural deficiency resulted in harmful error. *See Romero v. Department of Defense*, [658 F.3d 1372](#), 1373, 1380 (Fed. Cir. 2011).

court further noted that nothing in *Egan* overruled these cases. *Romero*, 527 F.3d at 1329.

¶38 Accordingly, on remand, if the appellant fails to establish a violation of constitutional due process, he may also attempt to show that the agency failed to follow its procedures in suspending his security clearance and that any failure to do so resulted in harmful error.

#### ORDER

¶39 We remand the appeal to the Washington 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 the guidance provided above.

FOR THE BOARD:

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