

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RECEIVED MSPB
MAILROOM
2011 OCT 19 PM 3:51

**HAND
DELIVERED**

CORRY B. MCGRIFF,
Appellant,

DOCKET NUMBER
DC-0752-09-0816-I-1

v.
DEPARTMENT OF THE NAVY,
Agency, and

ALEXANDER BUELNA,
Appellant,

DOCKET NUMBER
DA-0752-09-0404-I-1

v.
DEPARTMENT OF HOMELAND
SECURITY,
Agency, and

JOSEPH GARGIULO,
Appellant,

DOCKET NUMBER
SF-0752-09-0370-I-1

v.
DEPARTMENT OF HOMELAND
SECURITY,
Agency, and

JOHN GAITAN,
Appellant,

DOCKET NUMBER
DA-0752-10-0202-I-1

v.
DEPARTMENT OF HOMELAND
SECURITY,
Agency.

**BRIEF ON BEHALF OF THE UNITED STATES OFFICE OF SPECIAL COUNSEL AS
AMICUS CURIAE**

IDENTITY OF THE AMICUS

Amicus, the United States Office of Special Counsel (OSC), is an independent federal agency charged with protecting federal employees, former federal employees and applicants for federal employment from “prohibited personnel practices,” as defined in 5 U.S.C. § 2302(b). In particular, OSC is responsible for protecting federal employees against retaliation when they disclose “any information” that they reasonably believe evidences a violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety, unless such disclosure is specifically prohibited by law. *See* 5 U.S.C. § 2302(b)(8). OSC also is responsible for protecting federal employees from personnel actions that violate “any law, rule, or regulation implementing, or directly concerning, the merit system principles.” *See* 5 U.S.C. § 2302(b)(12). When read along with the merit system principle articulated in 5 U.S.C. § 2301(b)(2), which requires federal employers to act with proper regard for the constitutional rights of their employees, Section 2302(b)(12) empowers OSC to protect federal employees from personnel actions that violate their constitutional rights.

STATEMENT OF THE ISSUES

1. Whether the Board should apply the balancing test set forth in *Gilbert v. Homar*, 520 U.S. 924 (1997), to determine whether an agency violates an employee’s constitutional right to due process by indefinitely suspending the employee pending a security clearance determination.
2. Whether due process requires that a deciding official have the authority to change the outcome of a proposed indefinite suspension.

3. When due process is not violated, whether the Board should apply its ordinary analysis to determine whether an agency's failure to follow statutory or agency procedural requirements constitutes harmful procedural error with regard to an indefinite suspension pending a security clearance determination.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Board's notice in the Federal Register, 76 Fed. Reg. 59,171 (September 23, 2011) ("Notice"), invited amicus briefs regarding the due process requirements involved in a decision to indefinitely suspend an employee pending a security clearance determination. This is an issue of importance to OSC because it implicates OSC's and the Board's ability to protect employees from a deprivation of their constitutional rights and from retaliation for whistleblowing or other protected activity.

With respect to the first issue in the Notice, no matter the case, the Board should employ the balancing test set forth in *Gilbert v. Homar*, 520 U.S. 924 (1997) to determine whether an agency afforded an employee adequate due process. Currently, in cases involving an indefinite suspension pending a security clearance review, the Board performs a perfunctory review to ascertain whether an employee received the procedural protections set forth in 5 U.S.C. § 7513.¹ Specifically, the Board only reviews whether an employee (1) received sufficient notice of the charges against him or her; (2) had an adequate opportunity to respond; (3) was entitled to be represented by counsel; and (4) received, in writing, the agency's specific reasons for a decision. The Board, however, should not confine its review to the minimal statutory requirements simply because the indefinite suspension stemmed from a security clearance suspension. Rather, the

¹ For the three cases at bar involving the Department of Homeland Security, Transportation Security Agency (TSA), the Board's current practice is to ascertain whether TSA complied with its own procedures relating to indefinite suspensions because TSA is exempt from Title 5, Chapter 75.

Board should apply the ordinary due process test, as articulated in *Homar*, to determine whether an employee is entitled to procedural protections beyond the letter of the statute. Thus, as required by *Homar*, the Board should balance the employee's interest, the government's interest, and the risk that the procedures used will lead to an erroneous deprivation in deciding whether the agency satisfied due process.

With respect to the first issue raised by the Board, the test to determine the process due to an employee faced with an indefinite suspension should be no different from that available in any other adverse action simply because the agency asserts that it is the consequence of an interim suspension of a security clearance. The Board should still employ the balancing test set forth in *Gilbert v. Homar*, 520 U.S. 924 (1997), to determine whether the agency afforded an employee adequate due process. This test requires balancing the employee's interest, the government's interest, and the risk that the procedures used will lead to an erroneous deprivation. This is in contrast to the current practice, whereby the Board performs only a perfunctory review to ascertain whether an agency complied with the procedures articulated in 5 U.S.C. § 7513.²

Nothing in *Dep't of the Navy v. Egan*, 484 U.S. 518 (1988), dictates a different result. Although the Supreme Court in *Egan* held that the Board may not review the merits of a decision to revoke a security clearance, the Court nonetheless acknowledged that employees retain their procedural rights with respect to adverse actions resulting from that revocation. Thus, *Egan* does

² For the three cases at bar involving the Department of Homeland Security, Transportation Security Agency (TSA), the Board's current practice is to ascertain whether TSA complied with its own procedures relating to indefinite suspensions because TSA is exempt from Title 5, Chapter 75.

not stand in the way of an employee receiving constitutional protections in addition to statutory procedural protections, if a balancing of the interests at stake so requires.³

With respect to the second issue, due process requires that a deciding official have sufficient authority to decide the merits of an indefinite suspension. Minimal due process requires that an employee have a meaningful opportunity to respond to the charges against him or her. An opportunity to respond, however, is futile and constitutionally deficient if an employee has no chance of success because the deciding official lacks discretion to find in his or her favor. Under the *Homar* balancing test, the risk of an erroneous deprivation is acute if the deciding official lacks the authority to weigh the evidence and decide between the two competing positions presented. This is not to say that the deciding official must also have the capacity to decide the merits of the security clearance suspension. Rather, the deciding official need only have the authority to determine whether an employee should remain in a paid status pending a security clearance determination.

OSC advocates going one step further. For the same reason that due process requires that an internal appeal be made to someone with discretion to decide the merits of an indefinite suspension, due process likewise mandates that the Board's review be meaningful. To that end, the Board should not restrict its review to the procedure afforded an employee, but rather evaluate the merits of an indefinite suspension, just as it does in other cases involving indefinite suspensions. *See Conyers v. Dep't of Defense*, 115 M.S.P.R. 572, 579 (2010) (remanding case to administrative judge to "conduct a hearing consistent with the Board's statutory authority to

³ Although *Homar* should apply to the cases presently before the Board, OSC has insufficient knowledge of the factual records in the four cases presently before the Board to advocate a particular result.

determine whether the appellant's indefinite suspension is supported by a preponderance of the evidence, promotes the efficiency of the service and constitutes a reasonable penalty."").

In advancing this position, OSC does not challenge the established law that the Board lacks jurisdiction to consider the merits of a suspension or revocation of a security clearance. OSC accepts that federal employees do not have a cognizable interest in retaining a clearance that triggers substantive appellate review whenever a security clearance is revoked or suspended. Rather, OSC challenges the denial of substantive appellate review, meaning a review of the merits of an agency's decision, when an employee has been placed on indefinite suspension regardless of the reason. By their nature, indefinite suspensions pose significant threats to employees' property interests. Indeed, employees may endure an indefinite suspension for well over one year. If, in the end, the employee retains his or her security clearance, there is no statutory provision to provide back pay for the loss of pay suffered in the interim. Thus, the risk of an improper indefinite suspension is borne entirely by the employee. This poses a particular threat to whistleblowers, if, in reprisal for a disclosure, management initiates a retaliatory investigation that results in the suspension of a clearance and an indefinite suspension of pay. Only a meaningful Board review can protect against this threat. Moreover, the Board may evaluate whether an agency should retain an employee on paid status pending a security clearance determination without overstepping its jurisdictional limits and intruding on the agency's prerogative to make security clearance decisions.

With respect to the third issue, if due process is not violated by an agency's failure to comply with the procedures outlined in Section 7513 or the agency's own procedures, the Board should apply its ordinary harmful procedural error review to determine whether to overturn an indefinite suspension. *Egan* does not require a different result. Such a review does not require

the Board to overturn a security clearance suspension. Rather, a finding of harmful procedural error simply entitles the employee to recoup back pay and remain in a paid status pending the agency's redetermination of the appropriate penalty through the proper procedures.

ARGUMENT

I. DUE PROCESS REQUIRES THE BOARD TO APPLY THE *HOMAR* BALANCING TEST

It is established that non-probationary federal employees have a property interest in continued employment. *King v. Alston*, 75 F.3d 657, 661 (Fed. Cir. 1996) (“[A]n employee . . . has a property right in his continued employment.”). The contours of this property interest are created by statute. *Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985) (finding public employees have a property interest in continued employment when a statute directs that they can only be separated for cause). By statute, federal employees have a property interest in remaining in a paid status, free from suspension, except “for such cause as will promote the efficiency of the service.” 5 U.S.C. §§ 7503, 7512(2) and 7513(a). Thus, the indefinite suspension of a federal employee effects a deprivation of property that triggers constitutional due process. This remains true even when the underlying basis for the indefinite suspension is the suspension of a security clearance pending a final security determination. *Kriner v. Dep’t of the Navy*, 61 M.S.P.R. 526, 531-32 (1994) (explaining that *Egan* did not abrogate an employee’s due process rights in connection with an adverse action that follows the suspension of a security clearance).

The Supreme Court has determined that a balancing test applies to determine what process is due in any given situation. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Specifically, the Court weighs three factors: (1) the private interest that will be affected by the suspension; (2) the risk of an erroneous deprivation of the private interest through the procedures

used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest. *Id.* In *Gilbert v. Homar*, 520 U.S. 924, 932 (1997), the Supreme Court determined that the *Mathews* balancing test applies to the suspension of public employees.

Homar involved a police officer employed by a state university who was arrested and charged with a felony, although the charges were later dismissed. *Id.* at 926-27. The university immediately suspended the employee without pay pending an investigation. *Id.* at 927.

Following the suspension, the university gave the employee an opportunity to respond to the charges against him. *Id.* The employee sued, claiming that the university denied him his right to constitutional due process because he did not receive notice and an opportunity to respond *before* the suspension took effect. *Id.* The Supreme Court applied the *Mathews* balancing test and determined that, in cases involving discipline less severe than termination, due process did not always require an opportunity to be heard before the discipline took effect. *Id.* at 930.

Nothing in *Egan* suggests that the balancing test should not apply to determine the process due for adverse actions even when an agency has also suspended a security clearance. In *Egan*, the Supreme Court decided a narrow issue: "whether the Merit Systems Protection Board (Board) has authority by statute to review the substance of an underlying decision to deny or revoke a security clearance in the course of reviewing an adverse action." 484 U.S. at 520. The Court concluded that the Board lacked such jurisdiction because security clearance determinations are uniquely vested in the discretion of the President and his delegates, who make predictive judgments regarding who meets the criteria to access national security information. *Id.* at 527. Consequently, employees do not have a property interest in access to national security information because the "grant of a clearance requires an affirmative act of discretion on

the part of the granting official.” *Id.* at 528. Thus, the revocation or suspension of the security clearance does not implicate due process considerations.

At the same time, however, *Egan* acknowledged that an employee retains his or her procedural protections for any attendant adverse action that results from the suspension or revocation of a security clearance. 484 U.S. at 533. Thus, an adverse action, even one arising from the suspension of a security clearance, presents a discrete issue. The Board can rule on the propriety of the indefinite suspension, i.e., the placement of an employee in an unpaid status, without assuming jurisdiction over the suspension of the security clearance itself. Thus, the ordinary balancing test, as articulated in *Homar*, should apply to determine what process is due for the proposed adverse action.

II. MEANINGFUL DUE PROCESS REQUIRES AN APPEAL RIGHT TO A DECISIONMAKER WITH THE AUTHORITY TO CHANGE THE OUTCOME OF A PROPOSED INDEFINITE SUSPENSION

A. Due Process Requires a Meaningful Opportunity to Respond to a Deciding Official Who Has the Ability to Weigh the Evidence and Adjudicate an Appeal.

Minimum due process requires that an employee receive specific notice of the grounds for a deprivation of property and an opportunity to be heard. *Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (finding due process required prior notice and a pretermination hearing) (internal citation omitted); *In re Bailey*, 182 F.3d 860, 871 (Fed. Cir. 1999) (“Due process . . . requires specific notice and an adequate opportunity to be heard.”). In *Loudermill*, the Supreme Court applied the *Mathews* balancing test and held that meaningful due process required an opportunity for an employee to present his or her case prior to termination. 470 U.S. at 542-45. In cases involving discipline short of termination, the circumstances of the individual case inform whether the opportunity to be heard precedes or follows the adverse

action. *Homar*, 520 U.S. at 931. Regardless of whether the right to respond precedes or follows the adverse action, however, due process requires that an employee be afforded some opportunity to be heard. *Id.* at 930-31 (noting that postponing the opportunity to be heard is warranted in limited cases demanding prompt action); *see also Edwards v. U.S. Postal Svc.*, 112 M.S.P.R. 196, 201 (2009) (explaining minimum due process includes notice of the charges, an explanation of the agency's evidence and an opportunity to respond).

Furthermore, *Loudermill* and *Homar* make clear that the opportunity to respond must be meaningful, such that the response contributes to the agency reaching the correct result. *Loudermill*, 470 U.S. at 543 (“[S]ome opportunity for the employee to present his side of the case is recurringly of obvious value in reaching an accurate decision.”); *Homar*, 520 U.S. at 934 (noting a post-suspension hearing was adequate because, unlike in the case of a termination, there would be ample opportunity to invoke the discretion of the deciding official after the suspension takes effect). In other words, a meaningful opportunity to respond enables the deciding official to weigh the employee's argument against the agency's position in determining the appropriate course. As the Court stated, “[a]t least the [employer] will be alerted to the existence of disputes of facts and arguments about cause and effect. . . . [His] discretion will be more informed and we think the risk of error substantially reduced.” *Loudermill*, 470 U.S. at 543, n.8, *citing Goss v. Lopez*, 419 U.S. 565, 583-84 (1975).

The opportunity to respond would be meaningless, however, if the deciding official lacked the discretion to weigh the employee's response in the overall decision. In effect, the official's decision would be predetermined in favor of the agency, no matter how compelling the employee's case. Consideration of the three factors in the *Homar* balancing test exposes the constitutional deficiency of such a negligible “opportunity to respond.” As the Court held in

Loudermill, the employee has a substantial interest in retaining his or her livelihood. *See Loudermill*, 470 U.S. at 543 (“[T]he significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood.”) (citations omitted). To advance that interest, the employee requires an opportunity to make his or her case to a deciding official who has the discretion to weigh the evidence and potentially find in the employee’s favor. And the risk of an erroneous deprivation is acute if the deciding official has no ability to consider an employee’s arguments and to prevent an indefinite suspension when the facts warrant intervention.

Moreover, the government also has an interest in providing a meaningful opportunity to respond (appointing a deciding official with the authority to weigh the evidence and make a decision) in that the government has a general interest in fairness and ensuring that the correct result is reached. *Id.* at 544 (“[T]he employer shares the employee’s interest in avoiding . . . erroneous decisions.”). While the government also has an interest in placing an employee whose clearance has been suspended on an unpaid status pending the security clearance review, the government’s interest is outstripped by the employee’s substantial interest in his or her livelihood coupled with the genuine risk of an erroneous deprivation. For these reasons, due process requires a meaningful review by an official with the actual capacity to decide between the employee’s and the agency’s positions.

B. Due Process Requires That the Board Conduct a Review of the Merits of an Indefinite Suspension.

For the same reasons that an agency’s deciding official has the authority to rule against an indefinite suspension, the Board also has authority to rule on the merits of an indefinite suspension. Namely, the *Homar* factors – the employee’s interest in remaining in a paid status, the risk of an erroneous deprivation absent an independent review, and the government’s

interest in reaching a correct result – weigh heavily in favor of the Board examining the merits of an indefinite suspension. These interests exceed the government’s limited interest in evading an independent Board review of the agency’s decision to deny payment to an employee pending a final security clearance determination. To be clear, OSC does not suggest that the Board has the authority to overrule an agency’s suspension of a security clearance. Rather, the discrete issue is whether the Board can review the merits of a decision to place an employee in an unpaid status, pending the security clearance review.

The Board’s current practice is to apply only a technical review of indefinite suspensions that result from a security clearance suspension. The Board reviews only whether (1) the security clearance was suspended; (2) the employee required the clearance to perform his or her job duties; and (3) whether the agency gave the employee notice of the reasons for the suspension and an opportunity to respond. *Norrup v. Dep’t of the Navy*, 87 M.S.P.R. 444, 446 (2001), *citing Hesse v. Dep’t of State*, 217 F.3d 1372 (Fed. Cir. 2000) and *Dep’t of the Navy v. Egan*, 484 U.S. 518, 530-31 (1988).

The conventional wisdom is that such a limited review is dictated by *Egan* and *Hesse*.⁴ *See, e.g., Norrup*, 87 M.S.P.R. at 446 (explaining that *Egan* and *Hesse* preclude the Board from reviewing the merits of a security clearance suspension in deciding on an adverse action within the Board’s jurisdiction). *Egan* and *Hesse*, however, do not preclude the Board from reviewing

⁴ As discussed *supra*, *Egan* held that the Board lacked jurisdiction over the merits of a decision to revoke a security clearance. The Court reasoned that only an explicit statutory grant could afford the Board jurisdiction over security clearance revocations. *Egan*, 484 U.S. at 529-530. In *Hesse*, the Federal Circuit expanded the reach of *Egan*, finding that the Whistleblower Protection Act (WPA) did not provide the Board with such an explicit statutory grant to review the merits of a security clearance determination in cases where an employee alleged that the revocation of the clearance was an act of reprisal. *Hesse v. Dep’t of State*, 217 F.3d 1372 (Fed. Cir. 2000); *see also Roach v. Dep’t of the Army*, 82 M.S.P.R. 464, 481-82 (1999) (finding that security clearances determinations are not personnel actions under the WPA).

the merits of an indefinite suspension pending a final agency security review. *Egan* dealt with the Board's jurisdiction over a termination following the final revocation of a security clearance; it did not address the scope of the Board's jurisdiction over an indefinite suspension. In *Egan*, the federal employee remained in a paid status until the agency rendered the final decision on his security clearance. 484 U.S. at 533. Indeed, in listing the procedural protections that the employee received, the Court specifically identified that Egan "remained on full-pay status" pending the security clearance review. *Id.* Similarly, *Hesse* is akin to a revocation case, even though the case technically involved an indefinite suspension. There the agency made a final decision to suspend the employee's clearance for two years. 217 F.3d at 1374. This suspension followed the completion of the security investigation. *Id.* at 1381. In fact, the employee "was not suspended from his position until *after* the conclusion of the investigation in his case." *Id.* at 1381 (emphasis added).

Thus, the termination in *Egan* and the suspension in *Hesse* followed the agency's *final* decision on the security clearance. By contrast, the usual indefinite suspension precedes the completion of an agency's security clearance investigation. This distinction is important because, with a typical indefinite suspension, there remains a chance that the agency's review will correct an unwarranted suspension of a security clearance. Thus, the window for the Board to conduct a substantive review is before the agency makes a final, unreviewable decision because it is during this period that the Board can prevent a deprivation of property where the evidence suggests it is likely to be unjustified.

As the Board recently acknowledged, "[w]e believe that the *Egan* Court's limitation of the Board's statutory review authority must be viewed narrowly, most obviously because the Court itself so characterized its holding in that case." *Conyers*, 115 M.S.P.R. at 579. The

narrow decision in *Egan* was that the Board could not review the substance of an underlying decision to deny or revoke a security clearance in the termination of an employee because “the President, as Commander in Chief under the Constitution, had authority to classify and control access to information.” *Id.* Board review of the merits of an indefinite suspension would in no way undermine this exclusive authority to control access to classified information because the Board would not overturn the suspension of a security clearance; rather, the Board would only make a decision as to an employee’s pay status. As discussed *supra*, the pay status issue was not presented in *Egan* or *Hesse*.

A number of Federal Circuit cases, in *dicta*, have assumed that the Board cannot review the merits of an indefinite suspension because such a review would require the Board to consider the merits of the underlying suspension of the security clearance and weigh those against the other evidence. *See, e.g., Cheney v. Dep’t of Justice*, 479 F.3d 1343, 1351-52 (Fed. Cir. 2007) (noting that the “teaching we glean from *Egan*, *Alston*, and *Hesse*” is that the Board may not review the underlying merits of an agency’s decision to suspend a security clearance when deciding on an indefinite suspension); *King v. Alston*, 75 F.3d 657, 663 (Fed. Cir. 1996) (explaining, in *dicta*, that the Board “may not review the substantive reasons for a suspension of access to classified information when an employee is placed on enforced leave”); *Drumheller v. Dep’t of the Army*, 49 F.3d 1566, 1571 (Fed. Cir. 1995) (reasoning that, to the extent an employee’s defense against an adverse action goes to the sufficiency of the evidence supporting the revocation of her security clearance, the Board cannot review the merits of that revocation).

In none of these cases, however, was the issue whether the Board could review the merits of an indefinite suspension.⁵ In *Cheney* and *Alston*, the Federal Circuit confronted the narrow issue whether the employee had received his statutory procedural protections; thus, any language implying that *Egan* precluded the Board from reviewing the merits of an indefinite suspension in those decisions was *dicta*. *Cheney*, 479 F.3d at 1348 (explaining the issue on appeal was whether the employee had received adequate notice of the reasons for suspending his clearance so that he could meaningfully respond); *Alston*, 75 F.3d at 660-61 (explaining that the issue on appeal was whether the Board had authority to determine the adequacy of notice provided to an employee of the grounds for suspending the clearance). Similarly, in *Drumheller*, like *Egan*, the Federal Circuit reviewed the termination of an employee following the revocation of a clearance, not an indefinite suspension following the suspension of a clearance. 49 F.3d at 1567.

Although the suspension of a security clearance is one of the areas where an indefinite suspension is permitted (*Gonzales v. Department of Homeland Security*, 114 M.S.P.R. 318 (2010)), that does not mean it is always appropriate. One can imagine a scenario where the Board's review of the merits could overturn an indefinite suspension that is motivated by reprisal for whistleblowing: A manager, upset over an employee's whistleblowing, admits that he instigated a security review by providing false information concerning the whistleblower to the Personnel Security Office (PSO). In receipt of the derogatory information, and with no facial reason to suspect the manager had a bad motive, the PSO makes the reasonable decision to investigate the employee's eligibility for a security clearance and suspends the whistleblower's

⁵ Nonetheless, relying on *Hesse*, the Federal Circuit has ruled in non-precedential decisions that the Board cannot review the merits of an indefinite suspension because such a review would require the Board to consider the merits of the underlying suspension of the security clearance. See, e.g., *Stoyanov v. Dep't of the Navy*, 348 Fed. Appx. 558, 2009 U.S. App. LEXIS 20407 (Fed. Cir. Sept. 15, 2009). For the reasons explained above, i.e., that *Egan* and *Hesse* do not require this result, we believe the Board should not follow these non-binding decisions.

access pending that investigation. In tandem with the PSO's investigation, the agency proposes an indefinite suspension of the troublesome employee ostensibly because the PSO suspended the security clearance, and the retaliatory manager serves as the deciding official. Consequently, the whistleblower remains in an unpaid status for the duration of the security investigation. This can be a lengthy deprivation; it is not unheard of for such investigations to take more than a year.

See, e.g., Jones v. Dep't of the Navy, 978 F.2d 1223, 1224 (1992) (indefinite suspension lasted 14 months while the security review took place).

In the end, the PSO will hopefully determine that revocation of the clearance was unwarranted and, thereby, the whistleblower retains the clearance and avoids termination.⁶ While the PSO review provides a potential check against retaliatory actions, it only prevents the permanent deprivation of a termination. *See Hesse*, 217 F.3d at 1380 (noting that "because individual supervisors are typically not involved in the security clearance adjudication process, the risk of retaliation for protected disclosures may be less in this context than in others."). Under existing law, however, even if the employee prevails, he or she is not entitled to receive back pay, unless the Board overturns the indefinite suspension.⁷ *Jones*, 978 F.2d at 1227

⁶ Alternatively, the PSO may uncover sufficient grounds to warrant revocation of the clearance. Even so, the inception of the investigation was motivated by reprisal. Thus, even in a case where PSO ultimately revokes the clearance and the agency terminates the employee, the indefinite suspension is no less retaliatory and will have a chilling effect on other potential whistleblowers. Thus, although the Board could not second-guess the decision to revoke the clearance and terminate the employee, the Board should intercede to ensure that the employee remained on a paid status for the duration of the security review, so as to deter, not embolden, future reprisals.

⁷ Interestingly, in *Jones*, the court did not have the opportunity to decide the merits of the indefinite suspensions because "[t]he [employees] apparently do not question that the Navy's termination of access to classified information justified the agency indefinitely suspending them pending its determination whether to cancel their security clearances." 978 F.2d at 1226. This at least implies that the court would have entertained a challenge to the indefinite suspension, had the employees mounted one.

(explaining that “[a]s the law now stands . . . since we have upheld the [indefinite] suspensions, there is no basis upon which we could award them back pay for that period.”).

Thus, only a substantive Board review can prevent retaliatory indefinite suspensions.⁸ Under current practice, though, the Board would be helpless to prevent such a deprivation even in this most extreme example of reprisal for whistleblowing. In short, the employee bears the entire risk of an improper indefinite suspension. This practice need not continue. It is indisputable that the Board has jurisdiction over indefinite suspensions. Furthermore, the Board’s review of an indefinite suspension would not implicate *Egan* or *Hesse* because any Board decision would leave the suspension of the security clearance untouched – the sole issue for review would be the employee’s pay status during the security investigation.

It is likely that a review of the merits by the Board would require some examination of the reasons underlying the suspension of the clearance. Thus, in the above whistleblower example, the Board might consider whether the supervisor’s knowledge of the protected disclosure and the timing of the indefinite suspension raised the presumption that it was retaliatory. *Horton v. Dep’t of the Navy*, 66 F.3d 279, 284 (Fed. Cir. 1995); 5 C.F.R. § 1221(e)(2). Furthermore, the Board would likely consider any evidence of retaliatory animus. *Hathaway v. M.S.P.B.*, 981 F.2d 1237, 1242 (Fed. Cir. 1992) (when supervisor disciplined

⁸ On October, 13, 2011, the Board granted an OSC stay request in another matter, which presents an actual scenario where the Board can intercede to prevent an indefinite suspension, while not overstepping the jurisdictional limits set forth in *Egan*. *Office of Special Counsel, ex. rel Franz J. Gayl v. Marine Corps.*, M.S.P.B. Doc. No. CB-1208-12-0001-U-1. In that case, the agency suspended the employee’s security clearance and placed him on administrative leave, with pay, pending the outcome of the security review. In the meantime, the employee made protected disclosures to the press and to Congress. After learning of these disclosures, and after leaving the employee on administrative leave for one year, the agency reconsidered his pay status and indefinitely suspended him. That case presents a situation where the Board can evaluate the discrete issue of the decision to change the employee’s pay status, without treading into the merits of the security clearance decision.

whistleblower following whistleblower's protected disclosures to the Inspector General, the MSPB properly inferred retaliatory motive); *Powers v. Dept. of Navy*, 69 M.S.P.R. 150, 156 (1995) (finding in absence of knowledge-timing that contributing factor may be shown by consideration of whether whistleblowing directed at proposing or deciding officials and whether officials had motive to retaliate). And the agency would have an opportunity to present clear and convincing evidence that it would have suspended the employee in the absence of the employee engaging in protected conduct. We can foresee that an agency's defense would likely include evidence of the reasons for the suspension of the clearance. Simply because the Board weighs this evidence in reviewing the indefinite suspension, however, does not mean that the Board assumes jurisdiction to rule on the security clearance.

In sum, *Egan* does not preclude the Board's substantive review of indefinite suspensions. The Board's decision would be limited to determining the employee's pay status, pending a final security clearance decision. This in no way conflicts with the narrow decision in *Egan* that the Board lacked jurisdiction to review the revocation of a clearance.

III. *EGAN* DOES NOT CHANGE THE BOARD'S ORDINARY HARMFUL PROCEDURAL ERROR ANALYSIS

In the event that an agency's decision to indefinitely suspend an employee does not violate due process, but the agency nonetheless commits a statutory or other procedural violation, the Board applies a harmful error analysis. *See, e.g., Ward v. U.S. Postal Service*, 634 F.3d 1274, 1281 (Fed. Cir. 2011) (explaining that the Board must apply a harmless error analysis when reviewing an agency's procedural error). A "harmful error" is a failure to follow statutory or agency procedural requirements that makes it "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." *Ward*, 634 F.3d at 1281 (citations omitted). The focus of the analysis is on whether the agency

is likely to have reached a different conclusion in the absence of the procedural error. *Id.* at 1282. The remedy for the error is to remand the case to the agency “for redetermination of the appropriate penalty in the first instance.” *Id.* at 1282 (internal quotation omitted).

Egan is not implicated by the Board’s application of the harmful error analysis. As we have discussed, with respect to an indefinite suspension that results from a security clearance investigation, the Board’s review would not intrude on the suspension of the clearance. Rather, the Board would simply analyze whether, absent the procedural error, the agency would have placed the employee in an unpaid status during the suspension of the clearance. If the Board found procedural error in the indefinite suspension and remanded the case to the agency, the suspension of the clearance would be unaffected. The employee would only be entitled to recoup the pay lost during the period when his indefinite suspension was procedurally defective. Thus, nothing in a harmful error analysis would prompt the Board to overstep the limits on its jurisdiction outlined in *Egan*.

CONCLUSION

Based on the foregoing, OSC requests that the Board find that the *Homar* balancing test applies to determine the process due to employees who are indefinitely suspended following the suspension of their security clearances; that due process requires a meaningful opportunity to respond to a deciding official with authority to decide on the merits of an indefinite suspension; that due process also requires the Board to substantively review the merits of an indefinite suspension; and that the Board apply its ordinary harmful procedural analysis to these cases in the absence of a due process violation.

Respectfully submitted,

Carolyn N. Lerner
Special Counsel

Bruce D. Fong*
Acting Associate Special Counsel



Elisabeth R. Brown*
Attorney

U.S. Office of Special Counsel
1730 M Street, N.W., Suite 300
Washington, D.C. 20036
Fax: (202) 653-5151

U.S. Office of Special Counsel*
S.F. Bay Area Field Office
1301 Clay Street, Suite 1220N
Oakland, CA 94612
(510) 637-3464
Fax: (510) 637-3474
Lbrown@osc.gov