OPM file

United States of America
Office of Personnel Management

Office of the General Counsel
Washington, D.C. 20415

In Reply Refer To:

Your Reference:

August 12, 1985

MEMORANDUM FOR THE GENERAL COUNSELS OF ALL EXECUTIVE BRANCH AGENCIES AND DEPARTMENTS

FROM: JOSEPH A. MORRIS
GENERAL COUNSEL
OFFICE OF PERSONNEL MANAGEMENT

Joseph A Morris

SUBJECT: DECISION OF THE MERIT SYSTEMS PROTECTION BOARD IN SECURITY CLEARANCE CASES

On August 8, 1985, the Merit Systems Protection Board (MSPB or Board) held that it lacked the authority to review the security clearance determinations underlying an agency decision to remove or to take other adverse action against an employee under 5 U.S.C. § 7512 for failure to meet a condition of employment (i.e., maintenance of a security clearance). In five unanimous decisions, the Board ruled that the decision to deny or revoke a security clearance is a decision reserved exclusively to Executive Branch agencies under the terms of Executive Order No. 10450. The Board held further that it lacked statutory authority to do any more than review the removal to determine whether minimum due process had been afforded to the employee during the security clearance denial or revocation process.

The MSPB requested all interested parties to submit briefs on several issues before it in a series of appeals involving adverse actions taken against Federal employees for failure to obtain or keep a security clearance. That request for amicus curiae briefs was set out in two Federal Register notices. See 50 Fed. Reg. 2355 (January 16, 1985); 49 Fed. Reg. 48623 (December 13, 1984).

In the lead case, Egan v. Department of the Navy, MSPB Docket No. SE07528310257 (August 8, 1985), the Board set the limits on its review authority in adverse actions based on security clearance determinations. Board review is restricted to determining whether the agency has established "(1) the requirement of a security clearance for the position in question; (2) the loss or denial of the security clearance; (3) and the granting of minimal due process protections to the employee." With regard to due process protections, the Board held that the employee must be afforded "notice of the denial or revocation; a statement of the reason(s) upon which the negative decision was based; and an opportunity to respond." It will not inquire into the reasons relied upon by the agency to support its determination to revoke or deny the clearance.

Even in those rare cases where the Board may find a lack of due process in the security clearance determination process, the Board has limited its remedial action to reversal of the adverse action and ordering the agency to restore the employee to a pay status. However, the Board has expressly ruled that it lacks authority to order reinstatement of the security clearance. Further, an agency may elect to "re-initiate the adverse action based upon the negative security

clearance determination" and afford the minimal due process protections.

In four companion decisions issued simultaneously with Egan, the Board has strictly applied the holdings in the lead case to appeals involving several different positions and several different agencies. Copies of all five decisions are enclosed for your convenience.

Importantly, the MSPB has clearly rejected the holding of the United States Court of Appeals for the District of Columbia Circuit in Hoska v. Department of the Army, 677 F.2d 131 (D.C. Cir. 1982). In Hoska, the Court of Appeals reviewed the issues already decided by the Board's presiding official without specifically determining the propriety of Board review of the underlying security clearance determination. The Board holds here that Hoska does not stand for the specific proposition that the Board has that review authority. Even if it did, the Board notes that Hoska is persuasive authority only because the Court of Appeals for the Federal Circuit now has exclusive judicial review authority over Board decisions.

The Board's decision in Egan is bold and will have an important and salutary effect upon America's ability to protect the national security. It will improve our counterintelligence capabilities and significantly enhance ourcapability to guarantee the security of vital classified information. In this era of increased security awareness, the Board has wisely deferred to the expertise of security professionals in the area of security clearance determinations. I applaud the Board's decisions in the Security Clearance Appeals and look forward to their application in the future.

Enclosures

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

SHELBY DRAKE, appellant, v. DEPARTMENT OF THE ARMY, agency.	DOCKET NUMBER AT07528310851
	DATE: AUG 8 1985

BEFORE

Herbert E. Ellingwood, Chairman
Maria L. Johnson, Vice Chair
Dennis M. Devaney, Member

OPINION AND ORDER

The agency has petitioned for review of the presiding official's initial decision which, relying on Schwartz v. Department of the Army, MSPB Docket No. NY07528110226 (September 27, 1983), reversed on its merits appellant's demotion for failure to obtain a security clearance.*/ The petition for review is GRANTED.

In Egan v. Department of the Navy, MSPB Docket No. SE07528310257 at 12 (August 8, 1985), the Board held that it had no authority to review the merits of an agency's denial or revocation of a security clearance and overruled those Board cases, including Schwartz, supra, which relied on Hoska v. Department of the Army, 677 F.2d 131 (D.C. Cir. 1982), to support a contrary holding.

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*/ The agency had initially proposed appellant's removal but, prior to the effective date of the removal, established a File Clerk position which did not require a security clearance.

The Board further stated in Egan, supra, at 12-13, that it will limit its review of security clearance determinations to ascertaining that the agency has established the following: (1) the requirement of a security clearance for the position in question; (2) the loss or denial of the security clearance; and (3) the granting of minimal due process protections to the employee. Those minimal due process rights to which the employee is entitled are: notice of the denial or revocation; a statement of the reason(s) upon which the negative determination was based; and an opportunity to respond. Id.

A review of the record in the instant case reveals an agency Disposition Form, which indicates that appellant was denied a security clearance "after a thorough evaluation of [his] response to CCF's Letter of Intent to Deny Security Clearance" and that appellant was notified of the right to an agency appeal of the denial. See Agency File, Tab I-5. However, it does not appear from the record that the agency submitted a copy of either the notice of intent or appellant's response thereto. Further, it does not appear that the agency stated a basis for its denial.

Nevertheless, because this case was decided by the presiding official prior to the issuance of the Board's decision in Egan, id., the agency could not have known that it would be required to show that the appellant had been afforded his procedural due process rights in the denial of the security clearance.

Accordingly, the initial decision is VACATED, and the case is REMANDED to the Atlanta Regional Office to allow the parties to introduce further evidence and argument on the issue of whether appellant had been afforded his due process rights in accordance with Egan, id, and for issuance of a new initial decision consistent with this opinion.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

RALPH B. BOGDANOWICZ, appellant,	)	DOCKET NUMBER PH07528110587REM
v.	)	
DEPARTMENT OF THE ARMY, agency,	)	DATE: AUG 8 1985

BEFORE

Herbert E. Ellingwood, Chairman
Maria L. Johnson, Vice Chair
Dennis M. Devaney, Member

OPINION AND ORDER

Appellant has petitioned for review of the remand initial decision of January 18, 1984, which sustained his demotion from the position of Electronic Equipment Worker, Installer, Repairer, WB-6, to Warehouse Worker, WG-5.

For the reasons set forth below, the petition for review is hereby DENIED.

Appellant was demoted for failure to meet the requirements of his position because his security clearance had been revoked. On appeal, the presiding official sustained the agency action. In response to appellant's petition for review, the Board remanded the case for consideration of the propriety of the clearance revocation. On remand, the presiding official again sustained the agency action. Appellant has petitioned for review of the remand decision, raising several issues concerning the relationship between his alleged handicap, alcoholism, and the revocation.

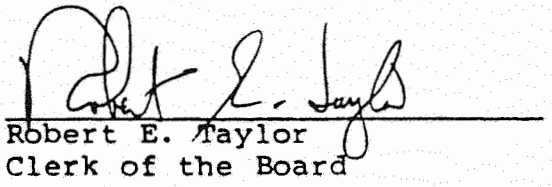
The Board has recently held that in an adverse action over which the Board has jurisdiction, and which is based substantially on the agency's revocation of a security clearance, the Board has no authority to review the agency's security clearance determination. See Egan v. Department of the Navy, MSPB Docket No. SE07528310257 (August 08, 1985). Thus, the security clearance being required for appellant's position, and it having been revoked, we find that the agency proved by preponderant evidence that appellant failed to meet established standards for continued employment in his position.1/

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. § 1201.113(b).

1/ In Egan, supra the Board held that it will review the procedures utilized by the agency in revoking the security clearance to ensure minimum due process rights of notice of the denial or revocation; a statement of the reasons upon which the negative decision was based; and an opportunity to respond. In the instant case, the record shows that these due process rights were afforded appellant.

The appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review, if the court has jurisdiction, of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:



Robert E. Taylor
Clerk of the Board

Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing ORDER was sent by certified mail this date to:

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(Date)

_____
Robert E. Taylor
Clerk of the Board

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

DAVID W. GRIFFIN, appellant,	)	DOCKET NUMBER SL0752841015O
v.	)	
DEFENSE MAPPING AGENCY, agency.	)	DATE: AUG 8 1985

BEFORE

Herbert E. Ellingwood, Chairman
Maria L. Johnson, Vice Chair
Dennis M. Devaney, Member

OPINION AND ORDER

Appellant was removed from his position of Cartographer, GS-7, on the basis that he was unable to obtain a top secret security clearance upon which his continued employment was conditioned. Appellant's position allowed him access to sensitive compartmented information relating to the gathering of intelligence, and appellant's work involved the production of maps and charts and the "positioning" of data for use in military operations. See Hearing Transcript at 13, 91-92. The security clearance denial was based on allegations that appellant intentionally falsified security documents by failing to indicate a September 2, 1971 disorderly conduct charge and a July 16, 1979 simple battery charge on a Personnel Security Questionnaire and a Personal History Questionnaire, and that appellant initially denied both

charges in an agency investigative interview.[1] Appellant appealed his removal to the St. Louis Regional Office of the Board, denying that he intentionally falsified the documents as alleged and asserting the defense of disparate treatment.[2] Relying on Schwartz v. Department of the Army, 16 M.S.P.R. 642 (1983), as well as Hoska v. Department of the Army, 677 F.2d 131 (D.C. Cir. 1982), the presiding official reviewed the merits of the security clearance denial, finding that the agency failed to prove its charges by preponderant evidence. He therefore reversed the agency action.

The agency petitions for review, challenging the Board's authority to review security clearance determinations and alleging various errors by the presiding official. The agency's petition for review is GRANTED.

In Egan v. Department of the Navy, MSPB Docket No. SE07528310257 at 12 (August 8 , 1985), the Board found that it had no authority to review the merits of an agency's denial or revocation of a security clearance and overruled those Board cases, including Schwartz, supra, which relied on Hoska, supra, to support a contrary holding.

The Board further stated in Egan, supra, at 12-13, that it will limit its review of security clearance determinations to ascertaining that the agency has established the following: (1) the requirement of a security clearance for the position in question; (2) the loss or denial of the security clearance; and (3) the granting of minimal due process protections to the employee. Those minimal due process rights to which the employee is entitled are: notice

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1/ It is undisputed that the agency's investigation discovered that appellant had been arrested and convicted of both charges.

2/ Appellant had initially asserted the defense of reverse race discrimination but withdrew that defense at the hearing. See Hearing Transcript at 391.

of the denial or revocation; a statement of the reason(s) upon which the negative determination was based; and an opportunity to respond. Id.

Consistent with our holding in Egan, supra, that the Board is without authority to review the merits of security clearance determinations, we find that the presiding official erred in reviewing the merits of the agency's denial of appellant's security clearance.[3/]

Upon consideration of the relevant issues, we find that the agency established that appellant's appointment was clearly conditional upon obtaining a top secret security clearance. See Agency File, Tab 8. Also, there is no dispute that appellant was denied a security clearance and that his removal was based on that denial. See Agency File, Tab 32.

Further, the agency afforded appellant due process rights in denying him the security clearance. The July 18, 1983 memorandum apprising appellant of the initial security clearance denial stated that appellant was being afforded procedural rights pursuant to Department of Defense Directive 5200.2-R, "DOD Personnel Security Program" (December 20, 1979). The memorandum set forth the specific charges of appellant's falsification and his initial denial when confronted in the course of an agency investigation into the matter. The memorandum notified appellant that he would be allowed fifteen days to submit a written reply and that a fifteen day extension could be granted for good reason. It further notified appellant that a written response would be made to his submission and that, if dissatisfied with the response, he had the right to appeal to the director of the agency. Additionally, the memorandum informed

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3/ Because of this finding, we deem it unnecessary to address the agency's remaining allegations of error by the presiding official.

appellant of the location of the information upon which the agency relied in denying his security clearance and advised him of how to obtain release of that information. See Appeal File, Tab 2.

On October 12, 1983, appellant submitted a written response to the charges. Id. On October 31, 1983, the Director of Security affirmed the denial. Id. Appellant then appealed on November 17, 1983, to the agency director, who reaffirmed the denial on December 29, 1983. Id.

We conclude, therefore, that the agency's charge is sustained.

Accordingly, the initial decision of the presiding official is hereby REVERSED, and the agency's removal action is SUSTAINED.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

The appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review, if the Court has jurisdiction, of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing OPINION and ORDER was sent by certified mail this date to the following:

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(Date)

_____
Robert E. Taylor
Clerk of the Board

Washington, D.C.

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

J. DUDLEY REESE, appellant,	)	DOCKET NUMBER AT07528510163
v.	)	
DEPARTMENT OF THE ARMY, agency.	)	DATE AUG 8 1985

BEFORE

Herbert E. Ellingwood, Chairman
Maria L. Johnson, Vice Chair
Dennis M. Devaney, Member

OPINION AND ORDER

Appellant petitioned for appeal from an agency action removing him from the position of General Engineer, GS-12, at the United States Army Missile Command, Redstone Arsenal, Alabama. The removal was effective November 9, 1984, and was based on the revocation of appellant's security clearance.

In an initial decision dated March 18, 1985, a presiding official from the Board's Atlanta Regional Office upheld the agency action. The presiding official determined that the agency had valid reasons for revoking appellant's security clearance,*/ and that such a clearance was necessary for appellant's position. See Initial Decision (I.D.) at 3-5.

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*/ The presiding official noted that the agency revoked appellant's security clearance due to appellant's use of intoxicating beverages to excess, and due to his medical condition which could cause a defect in judgment. Initial Decision (I.D.) at 3.

Appellant has petitioned for review of the initial decision.

Subsequent to the issuance of the initial decision, the Board issued its decision in Egan v. Department of the Navy, MSPB Docket No. SE07528310257 (August 08 , 1985), in which we considered the extent of Board jurisdiction in cases involving the revocation of security clearances. In Egan, supra, the Board determined that it had limited authority to review adverse actions based on the revocation or denial of a security clearance. We held that the Board has no authority to review the agency's security clearance determination. Egan, supra, at 12. The Board further stated that it will limit its review of security clearance determinations to ascertaining that the agency has established the following: (1) the requirement of a security clearance for the position in question; (2) the loss or denial of the security clearance; and (3) the granting of minimal due process rights to the employee. The Board will review the procedures utilized by an agency to ensure that the agency afforded an appellant the following minimum due process rights: notice of the denial or revocation; the reason(s) upon which the negative decision was based; and an opportunity to respond. Id. at 12-13.

In the instant case, the appellant stipulated that a security clearance was required for his position. I.D. at 2. It is clear from the record that appellant's security clearance was revoked, and appellant's removal resulted from this revocation. Appeal File, tab 3, attachments G, J-7, J-14. Further, the agency afforded appellant his due process rights in revoking his security clearance. The agency clearly provided appellant with notice of the revocation, the reasons underlying the revocation, and an opportunity to respond. See Appeal File, tab 3, attachments E, F, G, J-2, J-4, J-5, J-6, J-7. Therefore, we find that the agency charge is supported by the preponderance of the evidence and that the agency removal action will promote the efficiency of the service.

Accordingly, the petition for review is DENIED. This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final within five (5) days from the date of this order. 5 C.F.R. § 1201.113(b).

The appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review, if the Court has jurisdiction, of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing OPINION and ORDER was sent by certified mail this date to the following:

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Atlanta Regional Office

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(Date)

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Robert E. Taylor
Clerk of the Board

Washington, D.C.

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

THOMAS M. EGAN, appellant, v. DEPARTMENT OF THE NAVY, agency.	DOCKET NUMBER SE0752831025 7
	DATE: AUG 8 1985

BEFORE

Herbert E. Ellingwood, Chairman
Maria L. Johnson, Vice Chair
Dennis M. Devaney, Member

OPINION AND ORDER

Appellant was removed from his position as Laborer Leader with the Trident Naval Refit Facility on the basis that he was unable to obtain a security clearance, which was a requirement of his position.[1/] The agency specified

1/ The position description for Laborer Leader specifically stated that the "TRIDENT Refit Facility Bangor, (TRIREFAC) Bremerton, Washington . . . is an immediate maintenance activity (IMA) developed to support quick turnaround repair, replenishment and systems checkout of the TRIDENT submarine over its extended operating cycle." See Agency Exhibit, Tab 4. The responsibilities of appellant's position, which fell under the auspices of the Repair Department of the facility, included the inspection of work, the change of "work plans, work assignments, and methods as necessary to reduce or control costs and maintain schedule." Id. The position description further stated that appellant's working conditions included "work[ing] in shop and waterfront areas and aboard ships/submarines." Id.

that maintenance of a security clearance was a mandatory condition of employment and that the Naval Civilian Personnel Command denied appellant's clearance based on the results of a background investigation concerning appellant's reliability, trustworthiness, and judgment. Appellant appealed his removal to the Board's Seattle Regional Office. Following the parties' submission of evidence in lieu of a hearing, the presiding official found that the Board had authority to review the propriety of the denial of the security clearance under Hoska v. Department of the Army, 677 F.2d 131 (D.C. Cir. 1982), and Bogdanowicz v. Department of the Army, MSPB Docket No. PH07528110587 (September 27, 1983). The presiding official then found that the agency failed to establish that its denial of appellant's security clearance was reasonable and therefore reversed the agency action.

In its petition for review, the agency: (1) challenged the Board's jurisdiction and authority to review the merits of the security clearance denial and the removal actions; (2) alleged error by the presiding official in her assessment of the evidence submitted; and (3) contended that, even assuming arguendo that the Board had jurisdiction over the merits of the case and determined that the agency failed to support its action, the appropriate remedy was not to reverse the removal but to remand the case to the agency to correct any errors. In response to the agency's petition for review, appellant asserts the correctness of the initial decision.

The agency's petition for review is GRANTED.

ISSUES

This case and a number of others pending before the Board raise significant issues of law relating to appeals of actions taken under 5 U.S.C. § 7511 et seq. and based

on the agency's revocation or denial of the employee's security clearance. Consequently, by notices published in the Federal Register, the Board solicited amicus briefs on those issues. See 50 Fed. Reg. 2355 (January 16, 1985); 49 Fed. Reg. 48623 (December 13, 1984). In response to the Federal Register notices, some twelve briefs were submitted for the Board's consideration. Requests for oral argument by the Office of Personnel Management (OPM) and the National Security Agency are hereby DENIED.[2/]

The issues on which amicus briefs were solicited were:

I. Scope of the Board's Authority in Security Clearance cases:

A. Whether, in an adverse action case over which the Board has jurisdiction, and which is based substantially on the agency's revocation or denial of a security clearance, the Board has the authority to review the agency's stated reasons for revoking or denying the security clearance. Specifically address whether any law, rule, or regulation concerning national security expressly or impliedly restricts the Board from reviewing the agency's stated reasons for revoking or denying the security clearance.

B. Whether, if the Board has such authority, the Board's scope of authority extends to ordering the agency to reinstate the security clearance.

C. When an agency wishes to base an action listed in 5 U.S.C. § 7512 on the revocation of a security clearance, may it do so pursuant to 5 U.S.C. § 7513, or is 5 U.S.C. § 7532 the exclusive basis for such an action?

II. Alternative Remedies

A. If the Board's authority does not extend to ordering reinstatement of the security clearance, what alternative remedies may the Board order?

2/ However, the Board has accepted and considered the June 25, 1985 supplemental amicus brief submitted by OPM.

DISCUSSION

I.

A. Whether, in an Adverse Action Case Over Which the Board has Jurisdiction, and Which is Based Substantially on the Agency's Revocation or Denial of a Security Clearance, the Board has the Authority to Review the Agency's Stated Reasons for Revoking or Denying the Security Clearance

The Washington Legal Foundation and all federal agencies which responded to the Federal Register notices contend that the Board has no authority to review the underlying reasons upon which a negative security clearance determination is based. They contend that while the Board has jurisdiction over adverse actions which are taken under 5 U.S.C. § 7512[3/] and which are based upon negative security clearance determinations, the Board has no express or implied legal authority to review security clearance determinations. They further assert that review by the Board in those cases should be limited to procedural due process concerns.

The American Civil Liberties Union (ACLU) of Washington and the ACLU of Washington Foundation, as well as the federal employee unions which responded, assert that the Board has the authority to review security clearance determinations. They urge that the Board review the underlying reasons for the security clearance determination in order to ascertain whether the agency has shown the necessary nexus between the employee's conduct upon which the security clearance determination was based and the employee's ability to safeguard confidential information. They contend that if Congress had intended to exclude security clearance determina-

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3/ Section 7512 contains a list of those adverse actions within the scope of Chapter 75: removal, suspension for more than 14 days, reduction in grade, reduction in pay, and furlough of 30 days or less.

tions from review under 5 U.S.C. § 7512, it would have so stated. They assert that the Board must address the underlying reasons for the determination in order to afford the employee meaningful due process.

Statutory Background

The Board has statutory jurisdiction over removal actions taken pursuant to 5 U.S.C. Chapter 75, and regulatory jurisdiction under 5 C.F.R. Part 752. Moreover, by 5 U.S.C. § 1205, the Board is mandated to adjudicate all matters within its jurisdiction. Employees are given the right to invoke the Board's jurisdiction over any appealable action by virtue of 5 U.S.C. § 7701.

In addition, 5 U.S.C. § 7532 creates an expedited procedure for termination of employees by an agency head on national security grounds. While section 7512(A) specifically excludes from Board review actions taken pursuant to section 7532, it does not define the scope of the Board's authority, if any, in adverse actions based on security clearance considerations and not taken under that section.

The provisions of 5 U.S.C. §§ 7512 and 7513 involve, inter alia, the Board's jurisdiction over the ultimate adverse action taken by an agency. They do not specifically address the extent of the Board's review of the underlying determinations upon which the adverse action is based. Thus, these statutory provisions do not provide a sufficient basis for the Board to determine the extent of its review of the underlying security clearance determination over which it is not plainly given jurisdiction.

The legislative history of the Civil Service Reform Act of 1978 (hereinafter referred to as the "Reform Act"), Pub. L. No. 95-454, 92 Stat. 1111 (codified in various sections of title 5, United States Code), also

does not address the extent of the authority Congress intended the Board to exercise in reviewing revocations or denials of security clearances which result in Chapter 75 actions.

The legislative history of section 7512 states that "[a]dditional exceptions conforming this section [7512] to other provisions of title V cover employees subject to section 7532 (national security)" as well as other categories of employees. See S. Rep. No. 969, 95th Cong., 2nd Sess. 4, reprinted in 1979 U.S. Code Cong. & Ad. News 2723, 2772. The legislative history does not include an identification of "other categories of employees" not covered by section 7512, and there is no mention of the coverage of security clearance denials under that section. The legislative history also makes it clear that certain agencies, positions, and formerly appealable actions are excluded from the coverage of various sections of the Reform Act, including section 7512. See H.R. Rep. No. 1717, 95th Cong., 2d Sess. 4, reprinted in U.S. Code Cong. & Ad. News 2860, 2861 and H.R. Rep. No. 1403, 95th Cong., 2d. Sess. (1978). It contains no further exceptions or statements, however, which address the security clearance issue, either directly or indirectly. Thus, it cannot be determined from the legislative history of the pertinent statutory provisions to what extent Congress intended the Board to exercise authority in section 7512 adverse actions based on security clearance determinations.

Case Law

The only federal appellate court which has reviewed a Board decision in an adverse action based on a security clearance determination is the Court of Appeals for the District of Columbia, in Hoska v. Department of the Army, supra.

In Hoska, the employee was removed from his position subsequent to the agency's revocation of his security clearance. The presiding official reviewed the merits of the revocation and sustained the agency action. The initial decision became a final decision of the Board when the employee failed to file a petition for review with the Board within the 35-day time limit. On the employee's appeal, the court found that the agency action was based on unsubstantiated hearsay, which did not amount to substantial evidence, and that the agency failed to show a rational nexus between the employee's conduct and his ability to safeguard classified information. Accordingly, the court reversed the removal action and remanded the case to the Board "to order appropriate relief, including reissuance of [the employee's] security clearance, reinstatement, back pay, and such other relief as may be warranted." Hoska, supra, at 145.

It is significant to note that, at no point in the Hoska decision did the court expressly address the Board's authority to review the underlying reasons for the agency's security clearance determination. The court merely reviewed those issues already decided by the presiding official, without specifically determining the propriety of that degree of Board review, and decided the case under the standard of review applicable to the court. Thus, to the extent that appellant relies upon Bogdanowicz and other Board cases which cite to Hoska 4/ for the proposition that the Board has the authority to review the propriety

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4/ Moreover, as a decision issued by the U.S. Court of Appeals for the District of Columbia Circuit, Hoska is persuasive authority only and not precedential for Board decisions. See 5 U.S.C. § 7703, granting a right of appeal from final Board decisions to the U.S. Court of Appeals for the Federal Circuit.

of the agency's revocation or denial of a security clearance, we find this reliance misplaced and, in light of our findings, infra, now overrule that holding.

In sum, we find that neither the statutory framework, nor previous case law resolves the issues raised in this case. We turn now to a discussion of additional authorities.

Foremost among other considerations is the authority to grant or deny a security clearance, which is committed by law exclusively to the employing agencies within the executive branch of government. Executive Order 10450, reprinted in 5 U.S.C. § 7311 note, provides inter alia, that "[t]he head of each department . . . shall be responsible for establishing and maintaining . . . an effective program to insure that the employment and retention in employment of any civilian officer or employee within the department or agency is clearly consistent with the interests of national security."

The commitment of security clearance matters to agency discretion is analogous to the deference with which courts have treated matters traditionally within military purview. When faced with requests for review of such matters, courts have deferred to the military's primary authority and have refused review absent an allegation of the deprivation of a constitutional right. In Mindes v. Seaman, 453 F.2d 197 (1971), the Court of Appeals for the Fifth Circuit reviewed those internal military affairs which would normally not be subjected to judicial review. In doing so, the court pointed to a number of considerations militating against judicial review: peculiar military expertise; concern over stultifying the vital missions of the military; and judicial inclination to commit the matter in question to the military. Id. at 200-201.

These considerations were weighed against the nature and strength of the appellant's claim, and the potential of injury if review were denied. On balance, the

court found that there was a "judicial policy akin to comity". Id. at 199.

Other courts have adopted this same approach to military matters. See, e.g., Oestereich v. Selective Service Systems, 393 U.S. 233 (1968) (exemption from selective service); Burns v. Wilson, 346 U.S. 137 (1953) (court martial conviction); Orloff v. Willoughby, 345 U.S. 83, 93-94 (1953) (review of military assignments). See also Zimmerman v. Department of the Army, 755 F.2d 156 (Fed. Cir. 1985) (loss of reserve membership); Thornton v. Coffey, 618 F.2d 686, 691 (10th Cir. 1980)(promotions); Yee v. United States, 512 F.2d 1383 (Ct. Cl. 1975) (promotions).

Despite the broad jurisdictional grants to the Board in 5 U.S.C. Chapter 75, the Board has recognized restraints in the extent of the exercise of this jurisdiction in appropriate circumstances.5/ For example, the Board has declined to consider the merits of military personnel decisions resulting in an employee's loss of membership in the active reserve. See Buriani v. Department of the Air Force, MSPB Docket No. SF07528410637 at 2 n.2 (December 6, 1984), appeal pending, No. 85-1890 (Federal Circuit); Schaffer v. Department of the Air Force, 8 MSPB 631 (1981), aff'd, 694 F.2d 281 (D.C. Cir. 1982). See

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5/ Generally in adverse action cases, the Board, in determining whether the agency has proved its case by preponderant evidence as required by 5 U.S.C. § 7701(c)(1)(B), has the authority to review the merits of the case, including the merits of the underlying reasons upon which the adverse action is based. See Ketterer v. U.S. Department of Agriculture, 2 MSPB 459, 462 (1980) (where the employee's refusal to accept reassignment results in removal, the Board will review the merits of the agency's stated basis for the reassignment upon the employee's challenge of the agency's basis); Cf. Losure v. Interstate Commerce Commission, 2 MSPB 361, 366 (1980) (Board will review the merits of the agency's stated reasons for a reduction-in-force action upon the employee's presentation of evidence challenging the agency's reasons).

also Zimmerman, supra, ("the Board does not have the jurisdiction to examine military assignments and transfers").

Similarly, in adverse actions based on criminal conviction, the Board does not re-examine the reasons behind the conviction to determine the appellant's innocence or guilt. See Crofoot v. United States Government Printing Office, 21 M.S.P.R. 248, 252 (1984), rev'd on other grounds, 761 F.2d 661, 665 (Fed. Cir. 1985). Neither does the Board examine the reasons for bar decertification where an employee is removed for failure to maintain bar membership. See McGean v. National Labor Relations Board, 15 M.S.P.R. 49 (1983). These Board decisions are based upon similar considerations to those outlined in Mindes. We find that those considerations are relevant in the security clearance context. In all these contexts, the underlying actions, i.e., termination of reserve status, conviction of a crime, and bar decertification, are committed to appropriate procedures within the respective entities and, additionally, involve determinations wherein the Board lacks a specific grant of jurisdiction. Moreover, Zimmerman Buriani, and Schaffer manifest a proper Board concern against treading into areas which are sensitive by virtue of their national security implications.

Present also in these contexts is a mechanism by which the employee could obtain review of the underlying actions. In Rolles v. Civil Service Commission, 512 F.2d 1319 (1975), for example, the Court of Appeals for the District of Columbia remanded to the Civil Service Commission an appeal by an employee who had been terminated after loss of military reserve status. Stressing that the only issue before it was the legality of the dismissal, and not the employee's reserve status, the court nevertheless held that what it found repugnant to due process was that "nowhere in the military or civilian proceeding was Rolles afforded the chance to refute the charges set forth in reputation-damaging detail . . . ." Id. at 1321.

The application of these considerations to the Board's review of security clearance issues leads us to conclude that a similar approach is proper here. We begin with the fact that an adverse action based on the loss of a security clearance is a bifurcated proceeding in which the Board's explicit authority extends only to the ultimate adverse action. If the Board were to exercise complete review over the underlying security clearance determination, it would inevitably be faced with agency exposition of highly sensitive materials and Board determinations on matters of national security. We find that the underlying national security considerations inherent in a security clearance determination involve such a degree of sensitivity that we should not infer jurisdiction over that determination, particularly in light of Executive Order 10450, which commits such actions to agency discretion.6/

Further, in those determinations concerned with reserve status, criminal culpability, and bar decertification, due process procedures and related expertise are reposed in the particular entity rather than the Board. In this regard, the court in Greene v. McElroy, 254 F.2d 944, 949 (D.C. Cir.), rev'd on other grounds, 360 U.S. 479 (1958), pointed out:

> [T]he Secretary of the Navy has, and of necessity must have, wide latitude in designating persons qualified for access to classified defense information in situations like the present--namely, where the problem relates to the selection of persons to be given that information for the purpose of designing or producing for the Government weapons or other defense materials. Authority of that sort is a necessary adjunct to the power and duty to defend the security of the nation . . . .

6/ The employee, of course, is not precluded from pursuing any available right to judicial review of the agency's negative security clearance determination.

Moreover, as set out in Mindes, supra, the countervailing factors relating to the nature of the claim and potential for injury to the appellant are addressed to the extent that there is present within the agency or the applicable entity a procedure for affording at least minimal due process protections, i.e., notice of the agency's determination, a statement of its reasons in support of the determination, and an opportunity for the affected individual to be heard. See DeSarno v. Department of Commerce, 761 F.2d 657, 660 (Fed. Cir. 1985); Doe v. Casey, 36 F.E.P. 1265, 1269 (D.D.C. 1985); Rolles, supra, at 1321. See also Greene v. McElroy, 360 U.S. 474, 502 (1958). Cf. Cleveland Board of Education v. Loudermill, 105 S.Ct. 1487, 1495 (1985), citing Arnett v. Kennedy, 416 U.S. 134, 170-71 (1974) (minimal due process protections held applicable to termination of tenured state employees).

Finally, we must recognize, in construing the breadth of the Board's jurisdiction under Chapter 75, that we are not a court of general jurisdiction. The Board has no Article III status and is purely a creation of statute. See Douglas v. Veterans Administration, 5 MSPB 313, 316 (1981).

In sum, we hold that, in an adverse action over which the Board has jurisdiction and which is based substantially on the agency's revocation or denial of a security clearance, the Board has no authority to review the agency's stated reasons for the security clearance determination. However, the Board will review the procedures utilized by the agency to ensure that the agency afforded the appellant procedural due process. We further hold that the minimal due process rights that must be afforded the employee upon the agency's denial or revocation of a security clearance are: notice of the denial or revocation; a statement of the reason(s)

upon which the negative decision was based; and an opportunity to respond.

The nature of Board review in such cases, therefore, will be limited to determining that the agency has established the following: (1) the requirement of a security clearance for the position in question; (2) the loss or denial of the security clearance; (3) and the granting of minimal due process protections to the employee.

B. Whether the Board's Scope of Authority Extends to Ordering the Agency to Reinstate the Security Clearance

Based on the premise that the Board lacks authority to review security clearance determinations, the federal agencies assert in their amicus briefs that the Board also lacks authority to order reinstatement of a security clearance. On the other hand, the federal employee unions contend that if the Board can review security clearance decisions, it necessarily follows that the Board may order reinstatement where appropriate.

For the reasons which led the Board to find that it has no authority to review the merits of security clearance determinations, the Board likewise finds that it has no authority to order reinstatement of a security clearance. Ordering reinstatement of a security clearance presumes the trustworthiness of the employee to hold a security clearance. Since the Board has specifically held herein that it lacks the authority to review the agency's security clearance determinations, ordering reinstatement of the security clearance would be clearly inconsistent with that holding.

We therefore hold that the Board's scope of authority does not extend to ordering the agency to reinstate an employee's security clearance.

C. When an Agency Wishes to Base an Action Listed in 5 U.S.C. § 7512 on the Revocation of a Security Clearance, may it do so Pursuant to 5 U.S.C. § 7513, or is 5 U.S.C. § 7532 the Exclusive Basis for Such Action?

The amici basically agree that an action described in 5 U.S.C. § 7512 and taken pursuant to 5 U.S.C. § 7513 procedures is distinguishable from an action taken under 5 U.S.C. § 7532. They contend that a section 7512 adverse action based on a security clearance determination may not be appropriate for disposition under section 7532.

Under section 7532(a), the head of an agency is empowered to suspend an employee without pay whenever the agency head determines that such action is necessary in the interests of national security. The suspended employee is entitled merely to notification of the reasons for the suspension. In Cole v. Young, 351 U.S. 536, 546 (1956), the Court held that, absent "an immediate threat of harm to the 'National Security,'" normal removal procedures are adequate, and the summary powers of section 7532 need not be invoked. The Court interpreted the term "national security" to apply "only to those activities of the Government that are directly concerned with the protection of the Nation from internal subversion or foreign aggression, and not those which contribute to the strength of the Nation only through their impact on the general welfare." Id. at 544.

The clear implication of the Court's holding in Cole is that removals under both sections 7512 and 7532 can be appropriate. The Board's conclusion above, that it will not review the merits of the security clearance determination when reviewing a removal under section 7513 also assumes the existence of such action. We conclude, therefore, that section 7532 is not the exclusive basis for removals based upon security clearance revocations.

II.

A. If the Board's Authority Does Not Extend to Ordering Reinstatement of the Security Clearance, What Alternative Remedies May the Board Order?

In the event the Board finds that a security clearance revocation occurred without the minimal procedural due process protections set out above, it must determine the nature of the relief to be afforded. Those amici who argue that the Board has no authority to order reinstatement of a security clearance propose that the Board order alternative remedies including: directing the agency to reconsider its decision in accordance with proper procedures; requiring the agency to search for alternative non-sensitive positions at the same or a lower grade level occupied by the appellant; and compelling the agency to place the appellant in a position which requires no security clearance. The amici who contend that the Board has the authority to order reinstatement argue that alternative remedies are inadequate to restore the appellant to the status quo and seriously compromise the Board's remedial authority.

However, consistent with our finding that our jurisdiction is limited to the removal per se, and does not extend to the security clearance determination, we hold that where the agency has failed to afford an appellant procedural due process rights in a negative security clearance determination, its action is not in accordance with law, and the appropriate remedy is to reverse the adverse action and to order the agency to restore the appellant to pay status.7/ See 5 U.S.C. § 7701(c)(2)(C). If the agency

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7/ Cf. Karpoff v. United States, 142 Ct. Cl. 93, 98 (1958) (upon reversal of its earlier determination that the

[Footnote continued on next page.]

elects to re-initiate the adverse action based upon the negative security clearance determination, the agency must demonstrate that the position in question required a security clearance, that the security clearance was denied or revoked and that it afforded the employee the minimal due process protections consistent with this Opinion and Order. See Doe v. Casey, supra, at 1272 (employee removed in violation of agency's procedures ordered returned to administrative leave status, which he occupied prior to removal, until granted procedural due process).

APPLICATION

In the instant case, the agency challenged the presiding official's authority to determine the merits of its denial of the security clearance. Consistent with our holding that the Board is without authority to review the merits of security clearance determinations, we find that the presiding official erred in reviewing the merits of the agency's denial of the security clearance.[8/] We further find that the agency

[Footnote continued from previous page.]

the employee was unsuitable for government service, the Civil Service Commission (the predecessor of the Merit Systems Protection Board) should have either reinstated the employee or restored him to duty). However, Karpoff is distinguishable from a security clearance case in two important respects: (1) the Commission in Karpoff was acting pursuant to the delegated authority of the employing agency in determining the employee's suitability; and (2) Karpoff did not involve the denial or revocation of a security clearance, merely a determination of suitability for federal employment.

8/ Because of this finding, we deem it unnecessary to address the agency's remaining allegations of error by the presiding official.

satisfied its burden of proof consistent with this Opinion and Order.

In this regard, we find that the agency designated appellant's position as non-critical sensitive and thus that the agency established the requirement of a security clearance for the position in question. See Affidavit of Richard J. Noreika, Appeal File, Tab 12.

Second, there is no dispute that appellant's security clearance was denied by the agency and that his removal was based on that denial. See Agency Exhibits, Tabs 7, 8. The agency's notice of proposed removal dated June 17, 1983, stated in part that "maintenance of a security clearance is a mandatory condition of employment" and that appellant had "not been able to perform the full scope of [his] . . . duties, including not being able to go aboard the submarines," because of his lack of a security clearance. Agency Exhibit, Tab 7. The notice further stated that reassignment was not possible because there were no other positions in the facility which did not require access to classified materials and that, based on the nature of the facility's mission, "it would not be possible to restructure or sanitize the job environment to eliminate the requirement for a security clearance." Id. The agency's decision letter reiterated these reasons for appellant's removal based on his failure to meet the requirements of his position and further stated that there was "no viable appropriate remedy other than removal." See Agency Exhibits, Tabs 8, 12.

Third, the record establishes that appellant was given due process protections consisting of notice of the denial of the security clearance, a statement of reasons for the denial, and an opportunity to be heard. By notice dated February 16, 1983, the agency informed appellant that it intended to deny his security clearance. See Agency Exhibit, Tab 5. In the notice, the agency stated as the

bases for its action, court and police records,[9] which indicated that appellant had a lengthy history of problems with the law, and appellant's signed, sworn statement, which he furnished during an interview with a special agent of the Defense Investigative Service. Id. Also, in the notice the agency provided appellant with an opportunity to reply to the proposed denial of his security clearance. Id. Appellant availed himself of that opportunity and submitted evidence in support of his explanation of the incidents cited in the agency notice, character references, and certificates indicating his participation in alcoholic recovery programs.[10] See attachments to petition for appeal, Tab 1. The agency letter of May 27, 1983, notified appellant of its determination that he was not eligible to occupy a sensitive position and of its decision to deny the security clearance. Id. It further notified appellant of his right to appeal that decision to higher level agency authority. Id.

We therefore find that the agency has sustained the reasons for its action by a preponderance of the evidence and that the removal action would promote the efficiency of the service.

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[9] Those records showed that for the period extending from 1966 to 1982, appellant was charged with a series of offenses including: driving with a suspended or revoked license; possession of stolen property; carrying a concealed weapon; carrying a loaded firearm; disturbing the peace, resisting arrest; assault; battery; disorderly conduct; failure to comply with a court order; and failure to appear at a court proceeding. Appellant was convicted of several of those offenses and served terms of imprisonment.

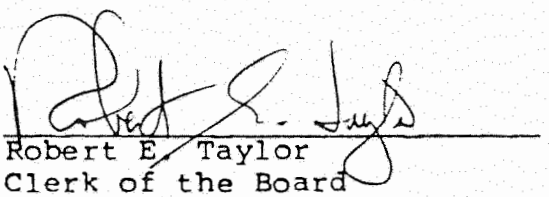
[10] Although appellant submitted evidence indicating that he was a recovered alcoholic, appellant did not assert the affirmative defense of handicap discrimination based on alcoholism, and the agency based neither the security clearance denial nor the removal action on that condition. Therefore, we are not presented with the issue of handicap discrimination.

Accordingly, the initial decision is REVERSED, and the agency's removal action is SUSTAINED.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

The appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review, if the court has jurisdiction, of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than (30) days after the appellant's receipt of this order.

FOR THE BOARD:



Robert E. Taylor
Clerk of the Board

Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing OPINION and ORDER was sent by certified mail this date to the following:

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(Date)

/Dick Chung for
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