No. 2021-1014

IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

RAFAEL CRUZ-MARTIN,

Petitioner,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Petition for Review of the decision of the Merit Systems Protection Board in Case No. NY-0752-20-0166-I-1

REPLY BRIEF FOR THE PETITIONER

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Reading the government's brief, one would think Rafael Cruz-Martin is seeking an order from this Court compelling the Department of Homeland Security (DHS) to provide him with classified information, or at least with information that would allow him to interfere with an ongoing criminal investigation. He is not, and that is not what this case is about.

This case is about applying the precedential decisions of this Court to a legal and factual situation that is fundamentally indistinguishable from the earlier cases. The issue is simply whether the Notice of Proposed Indefinite Suspension, Appx022, provided Mr. Cruz-Martin sufficient information to make a meaningful reply before he was placed on indefinite suspension without pay. DHS insists that the notice was sufficient because it informed Mr. Cruz-Martin that his access to classified information had been suspended. DHS Brief at 18.[1] The MSPB Administrative Judge affirmed on that ground. Appx005. But that precise argument was rejected in *Cheney v. Dep't of Justice,* 479 F.3d 1343 (Fed. Cir. 2007), and in its predecessor, *King v. Alston*, 75 F.3d 657 (Fed. Cir. 1996): "'Merely providing the employee with information that his access to classified information is being suspended, without more, does not provide the employee with sufficient information to make an

[1] Citations to the "DHS Brief" refer to the Corrected Brief for the Respondent, Document 28.

informed reply to the agency' before being suspended." *Cheney*, 479 F.3d at 1352 (quoting *Alston*, 75 F.3d at 662). And while those cases were decided under 5 U.S.C. § 7513 (a provision of the Civil Service Reform Act), DHS has conceded, both below and in this Court, that the TSA regulations applicable to Mr. Cruz-Martin "directly mimic," Appx048, or "parallel," DHS Brief at 22, the procedural requirements established by 5 U.S.C. § 7513, and that "the applicable standard here can nonetheless be inferred from *Cheney* and other cases analyzing Section 7513." DHS Brief at 23. Indeed, this Court has recognized as much in a case involving another TSA employee, *Gargiulo v. Dep't of Homeland Security,* 727 F.3d 1181 (Fed. Cir. 2013).

Despite conceding that *Cheney* provides the applicable standard, DHS argues that *Cheney* is inapplicable because Mr. Cruz-Martin was being investigated by its independent Office of Inspector General. But that is no distinction, because Mr. Cheney, an employee of the Drug Enforcement Administration, was the subject of an investigation by the independent Department of Justice Office of Professional Responsibility.

DHS next argues that *Cheney* cannot be "extend[ed]" to this case because this case involves an investigation into potentially criminal misconduct. But Mr. Cheney was also being investigated for potentially criminal misconduct, as the reported decision discloses.

DHS also argues that an agency cannot be required to provide information that could enable an employee to interfere with an investigation. But nothing in the record or in the agency's brief below suggests that any information was withheld from Mr. Cruz-Martin for that reason, or that he could not be provided with sufficient information to enable him to make a meaningful response without enabling him to undermine the investigation. This argument appears to have been pulled out of thin air for purposes of this appeal, and because it was not made below it was waived. Moreover, this argument could equally be made in *any* case in which an employee is suspended during an investigation; accepting it would therefore render the protections of 5 U.S.C. § 7513 toothless in a very wide swath of cases.

Finally, DHS argues that Mr. Cruz-Martin has not shown that any error was harmful. But the decisions of this Court and other courts—none of which DHS has cited—make clear that a procedural error of the sort involved here cannot be excused as harmless, because there is no way to know how the employee might have responded had he been provided with the information enabling him to make a meaningful response.

Ultimately, however, the question in this case is not whether DHS had a good reason for failing to tell Mr. Cruz-Martin anything about why his security clearance had been suspended. *Alston* and *Cheney* did not hold that an agency *must* provide such information. They held that if an agency fails to do so, it may not suspend an

employee without pay. If DHS was unwilling to provide Mr. Cruz-Martin with adequate notice, it could assign him to unclassified work, or it could suspend him with pay, until his clearance was restored or revoked. Because DHS chose not to provide adequate notice and nevertheless suspended Mr. Cruz-Martin without pay, he is entitled to back pay for the period of his (ongoing) unpaid suspension, just as Mr. Cheney was.

For these reasons, the decision below should be reversed.

I. This Court's Precedential Decisions Control This Case

A. TSA's regulations provide the same due process protections as 5 U.S.C. § 7513

This Court's decisions in *King v. Alston* and *Cheney v. Dep't of Justice* involved civil servants whose procedural rights regarding adverse actions were governed by 5 U.S.C. § 7513, a provision of the Civil Service Reform Act. As the Court noted in *Alston*, "The language of the statute is clear. Prior to an adverse action, the agency must provide an employee with 'written notice . . . stating the specific reasons for the proposed action.'" 75 F.3d. at 661. This Court has long held that a notice of proposed adverse action is sufficient under 5 U.S.C. § 7513 only "when it apprises the employee of the nature of the charges 'in sufficient detail to allow the employee to make an informed reply.'" *Brook v. Corrado*, 999 F.2d 523, 526 (Fed. Cir. 1993) (quoting *Brewer v. U.S. Postal Service*, 647 F.2d 1093, 1097 (Ct. Cl. 1981).

In *King v. Alston,* this Court considered how to apply that long-established interpretation to the case of an employee who, like Mr. Cruz-Martin, received a notice of proposed suspension from his job based on the suspension of his security clearance. The government argued there—just as it does here—that "before placing Alston on enforced leave, the agency was merely required to inform him that his placement on enforced leave was based on the agency's decision to suspend his access to classified information." *Alston*, 75 F.3d at 661. The Court rejected that argument, holding that:

> [S]ection 7513(b) entitles an employee to notice of the reasons for the suspension of his access to classified information when that is the reason for placing the employee on enforced leave pending a decision on the employee's security clearance. Such notice provides the employee with an adequate opportunity to make a meaningful reply to the agency before being placed on enforced leave. *Merely providing the employee with information that his access to classified information is being suspended, without more, does not provide the employee with sufficient information to make an informed reply to the agency before being placed on enforced leave.*

Alston, 75 F.3d at 661-62 (emphasis added). The government persisted in *Cheney*, where it again "argued that all section 7513 and due process require is proving that Mr. Cheney's position requires a security clearance, that he does not have a security clearance, and that he was given notice of the proposed employment suspension." *Cheney*, 479 F.3d at 1349. This Court again rejected that argument, holding that "the employee must be given enough information to enable him or her to make a

meaningful response to the agency's proposed suspension of the security clearance." *Id*. at 1352. Applying that standard, the Court held that Mr. Cheney had not been provided sufficient information to make a meaningful response, and that he was therefore "entitled to recover back pay for the period of the improper suspension." *Id*. at 1353.

In *Gargiulo v. Dep't of Homeland Security,* 727 F.3d 1181 (Fed. Cir. 2013), this Court reviewed the indefinite suspension of Joseph Gargiulo, who, like Mr. Cruz-Martin, was an employee of TSA. Recognizing that "TSA employees such as Mr. Gargiulo are subject to the Federal Aviation Administration's personnel management system, and not the statutory protections of 5 U.S.C. § 7513(b)," *id*. at 1185 n.3, the Court noted that TSA's regulations "offer procedural safeguards similar to those provided by section 7513," *id*., and proceeded to analyze the merits of Mr. Gargiulo's case relying on its earlier decisions in *Alston* and *Cheney* as setting out the applicable law. *See id*. at 1185-86.

In this case, DHS has conceded that the TSA regulations provide the same procedural protections as section 7513. Indeed, it called special attention to the point: "Notably, these due process requirements in the Agency MD [Management Directive] *directly mimic* the due process requirements established at 5 U.S.C. § 7513(b)." Appx048 (Agency Narrative Response) (emphasis added). And before this Court, DHS acknowledges that the two provisions are "parallel," DHS Brief at 22,

and that while section 7513 does not apply directly, "the applicable standard here can nonetheless be inferred from *Cheney* and other cases analyzing Section 7513." DHS Brief at 23.

In fact, the TSA regulations are even more specific and more demanding than the general language of section 7513. They instruct agency supervisors to inform employees of "[t]he charge(s) and specification(s) for each charge including a description of the evidence that supports the charge(s)," Appx105, and they mandate that the employee "be provided a copy of the material relied upon to support each charge and specification." Appx106.

The TSA regulations were adopted on January 2, 2009. *See* Appx089. *King v. Alston* had been decided thirteen years earlier. *Cheney v. Dep't of Justice* had been decided two years earlier. Federal personnel managers were perforce aware of those decisions. It is not plausible that TSA did not know what it was doing when it adopted regulations "parallel" (to use DHS's preferred word) to 5 U.S.C. § 7513.

The parties agreed below that the Administrative Judge should not have decided this case under Section 7513. *See* Appx046 (Agency Narrative Response); App067 (Mr. Cruz-Martin's Memorandum of Law). But DHS did not ask the Administrative Judge to reconsider her decision on the ground that it was based on an improper legal standard. Nor did it file a cross-appeal. The reason is plain: it recognized that the two provisions provide the same protection.

B. Mr. Cruz-Martin does not challenge the suspension of his security clearance

Mr. Cruz-Martin received two separate notices. First, he received a notification from TSA's Personnel Security Section informing him that his security clearance had been suspended. Appx021. He did not, and does not, challenge that suspension. The Department's suggestion that "Mr. Cruz-Martin is arguing that TSA erred by suspending his security clearance because he was under investigation," DHS Brief at 19-20, is a red herring, without foundation in Mr. Cruz-Martin's filings below or in this Court. Indeed, Mr. Cruz-Martin made it perfectly clear: "Mr. Cruz-Martin does not (and could not, under *Dep't of the Navy v. Egan*, 484 U.S. 518 (1988)), challenge the suspension of his security clearance." Cruz-Martin Brief at 12-13.[2]

C. Mr. Cruz-Martin did not receive sufficient information to enable him to make a meaningful response to his proposed suspension without pay

After Mr. Cruz-Martin's security clearance had been suspended, he received a second notice, from a line supervisor, proposing to suspend him indefinitely, without pay, from his job as an attorney-advisor for the TSA. Appx022. That is the only notice at issue here.

[2] Citations to the "Cruz-Martin Brief" refer to the Corrected Brief for the Petitioner, Document 17.

That second notice informed Mr. Cruz-Martin that the reason for his proposed employment suspension was "the suspension of your Security Clearance and access to classified information," and that "[t]he details of the basis for the suspension of your access to classified information are contained in the Notice of Access Suspension letter . . . dated April 8, 2020." *Id*. The letter of April 8 informed Mr. Cruz-Martin that "[t]he decision to suspend your access to classified information is based on potentially disqualifying information regarding your Personal and Criminal Conduct. Specifically, the Personnel Security Section was notified, on March 13, 2020, of an investigation opened by the Department of Homeland Security, Office of Inspector General (OIG) concerning you." Appx021.

That is the only information Mr. Cruz-Martin has received about the reason for his suspension.

This is less information, by an order of magnitude, than was provided to Mr. Cheney, which this Court held was insufficient to enable him to make a meaningful and informed response.[3] In *Cheney*, this Court stated that the information provided "was akin to informing Mr. Cheney that his security clearance was being suspended

[3] Mr. Cheney was informed that the decision to suspend his security clearance was based on allegations, which were being investigated, that he "had 'inappropriately queried or caused to be queried Law Enforcement Data Bases,' had 'abused the Administrative Subpoena process,' and had acted 'in violation' of the confidentiality agreement into which he had entered with OPR during its investigation." 479 F.3d at 1352.

because he had robbed a bank, without telling him where the bank was and when he robbed it." 479 F.3d at 1352. Here, the information provided was not even akin to telling Mr. Cruz-Martin that he had robbed a bank—it consisted of telling him that he might have committed some crime, somewhere, at some time.

DHS argues that the word "specifically," at the beginning of the second sentence quoted just above, somehow proves that Mr. Cruz-Martin was provided with adequate information ("The connecting word 'specifically' indicates that the second sentence is providing more information about the first." DHS Brief at 30 n.4.) But all the second sentence says is, "Specifically, the Personnel Security Section was notified, on March 13, 2020, of an investigation opened by the Department of Homeland Security, Office of Inspector General (OIG) concerning you." Our research has found no case, before this Court or the MSPB, in which a suspended employee had been given such completely uninformative "information" about the reasons for a proposed suspension.

Accordingly, accepting DHS's submission—that, when it told Mr. Cruz-Martin the suspension of his security clearance was based on the opening of an investigation involving "potentially disqualifying information regarding your Personal and Criminal Conduct," it provided him sufficient notice to make a meaningful and informed reply before being placed on enforced leave—would require overruling *Alston*, *Cheney*, and *Gargiulo*.

D. DHS's excuses for refusing to tell Mr. Cruz-Martin why he is being investigated do not withstand analysis

DHS attempts to justify its refusal to provide Mr. Cruz-Matin with the information he needed to make an informed reply to the agency in three ways. None is persuasive.

1. That the investigation here involved "Potentially . . . Criminal Conduct" does not distinguish it from the investigation in *Cheney*

First, DHS argues that because Mr. Cruz-Martin was under *criminal* investigation, the rules must be different. *See* DHS Brief at 33 ("*Cheney* . . . did not consider any of the unique issues posed by the disclosure of information related to an ongoing criminal investigation"); *id* at 26 ("Mr. Cruz-Martin is advocating for this Court to interpret TSA's procedures in a way that would require it to extend the holding in *Cheney* to encompass ongoing criminal investigations"). But that would be no extension because Mr. Cheney was also under criminal investigation. *See Cheney*, 479 F.3d at 1345 ("The decision to suspend your security clearance is based on allegations of potentially derogatory personal conduct and *possible violations of law* . . . ."). And DHS makes no effort to explain why the criminal vs. non-criminal nature of an investigation should make any difference to the process that an employee is due. A non-criminal problem (*e.g.,* heavy sports-gambling debt incurred in a state where sports gambling is legal, or a romantic association with a citizen of an unfriendly foreign nation) could certainly raise more serious questions regarding

a security clearance than a suspected minor criminal offense (*e.g.,* driving on a suspended license or hunting out of season).

2. DHS has provided no reason to believe that it withheld information because it feared Mr. Cruz-Martin would interfere with the investigation

Second, DHS argues that it was justified in not telling Mr. Cruz-Martin anything about its investigation because informing an employee about the topic of an investigation might enable the employee to interfere with the investigation. *See* DHS Brief at 25, 28-29. This purported concern was raised for the first time in DHS's brief to this Court. Because the argument was not made below, it was waived. *See MCM Portfolio LLC v. Hewlett-Packard Co*., 812 F.3d 1284, 1294 n.4 (Fed. Cir. 2015) ("This argument was not made below and was waived."); *Flowers v. Mississippi*, 139 S. Ct. 2228, 2257 (2019) (same).

Waiver aside, nothing in the record of this case remotely suggests that any concern about potential interference played any role in refusing to tell Mr. Cruz-Martin anything about the reasons for the suspension of his security clearance. The record reflects only that TSA's Personnel Security Section advised TSA management that Mr. Cruz-Martin should "not have access [to classified information] during the PerSec process." Appx025. Neither that document, nor any other, reflects any request to withhold from Mr. Cruz-Martin basic information about *why* he was being investigated. Nor does TSA management's subsequent letter to

Mr. Cruz-Martin, proposing to suspend him indefinitely without pay, Appx022-023, indicate that any information is being withheld because of a concern that he might interfere with the investigation. Notably, nothing in the record—or even in DHS's brief to this Court—even hints that any classified information is involved in the investigation.[4]

On April 15, 2020, Mr. Cruz-Martin wrote to the Chief of the TSA Personnel Security Section that he was "completely clueless as to why the DHS OIG is investigating me. As a result, it is impossible for me to formulate any response." Appx026. His May 11 formal response to the notice of proposed suspension again explained that he was unable to respond effectively "because specifics . . . ha[ve] not been provided." Appx027-028. The agency's June 3 Notice of Decision, Appx040-042, again did not indicate that any information had been withheld because of any concern about interference with the investigation.

[4] This is not surprising. Most suspensions and revocations of security clearances involve ordinary misconduct or mental illness, not breaches of security. *See, e.g.*, *Egan* (criminal convictions); *Lucena v. Dep't of Justice*, 802 F. App'x 585 (Fed. Cir. 2020) (threatening behavior, driving while intoxicated, etc.) (nonprecedential); *Ryan v. DHS*, 793 F.3d 1368 (Fed. Cir. 2015) (criminal indictment); *Salinas-Nix v. Army*, 527 F. App'x 956 (Fed. Cir. 2013) (tax fraud) (nonprecedential); *Zadzielski v. Navy*, 464 F. App'x 902 (Fed. Cir. 2012) (arrest for voyeurism) (nonprecedential); *Drumheller v. Army*, 49 F.3d 1566 (Fed. Cir. 1995) (mental illness); *Brockmann v. Air Force*, 27 F.3d 544 (Fed. Cir. 1994) (mental illness); *Jones v. Navy*, 978 F.2d 1223 (Fed. Cir. 1992) (drug use); *Lyles v. Army*, 864 F.2d 1581 (Fed. Cir. 1989) (sleeping on duty).

Mr. Cruz-Martin's subsequent brief to the Merit Systems Protection Board again explained how the agency's refusal to provide him with any information about why his clearance had been suspended (other than that he was under investigation) made it impossible for him to respond in a meaningful manner to his proposed employment suspension. Appx064-066. The agency's response to the Board contained no suggestion that the refusal was base0d in any way on a concern about potential interference with the investigation. Appx043-057. To the contrary, the agency's position before the Board, like its position here, was that Mr. Cruz-Martin had received all the information to which he was entitled when he was told that his security clearance had been suspended. Appx050-51 ("there is no dispute that the Agency suspended Appellant's security clearance or that Appellant occupies a position that requires a security clearance as a condition of his continued employment. . . . Therefore, the Administrative Judge should find that the Agency's charge of Suspension of Security Clearance is supported by a preponderance of the evidence."); Appx 56 ("Appellant had adequate knowledge and information to understand why PerSec suspended his secret clearance: he is under investigation by DHS OIG.").

Moreover, TSA's own regulations do not support DHS's argument. They instruct managers "not to disclose information or evidence that could undermine or jeopardize any ongoing investigation or potential criminal prosecution." Appx109.

Similarly, the DHS Instruction provides that "[i]f n0otification [of the reasons for the suspension of a security clearance] is *likely* to compromise an ongoing investigation, the individual specifics are not disclosed at the time of the suspension, but thereafter as soon as practicable." Appx134-135 (emphasis added). Neither of these provisions instructs management to disclose *no* information; rather, they instruct management to exercise judgment about whether *certain* "information," "evidence," or "individual specifics," should not be disclosed. Thus, for example, there will surely be cases in which interference is not a realistic concern because the relevant evidence is in the agency's possession or in the possession of third parties over whom the employee has no control. In other cases, certain information (*e.g.,* names of witnesses) may require protection, while other information (*e.g.,* the nature of the alleged misconduct) will not. Under the government's own regulations, then, a decision about what information can or cannot be released to an employee must be made on a case-by-case basis by persons with knowledge of the relevant facts. There is no other way to determine whether notification of particular facts is *likely* to compromise an ongoing investigation. It seems clear that no such judgment was made here.0

Nor do the cases cited by DHS support its argument. It relies particularly on *Miller v. Dep't of Justice*, 842 F.3d 1252, 1269 n.4 (Fed. Cir. 2016), for the proposition that "'[a] requirement that OIG disclose anything to the agency it is

investigating has the potential to damage an ongoing investigation.'" DHS Brief at 28. But OIG is not investigating "the agency" here, it is investigating Mr. Cruz-Martin; there is no logical reason to assume that a disclosure to the TSA Office of Personnel Security would damage that investigation.[5]

DHS also relies on *Alyeska Pipeline Service Co. v. EPA*, 856 F.2d 309 (D.C. Cir. 1988), a case involving FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A), which exempts from disclosure "records or information compiled for law enforcement purposes [th0at] . . . could reasonably be expected to interfere with enforcement proceedings." *See* DHS Brief at 28. That case provides a useful comparison, because under Exemption 7(A), speculative assertions about possible interference will not justify withholding. As the D.C. Circuit explained in the *Alyeska* case, "it is not enough for an agency to shore up its exemption claim merely with general and conclusory statements regarding the effect of disclosure." 856 F.2d at 312. In that case, withholding was upheld only because the agency's affidavit "d[id] not suffer from such deficiencies," *id*., but explained in detail how release of the requested materials would likely enable the company to identify the employees who had cooperated with the investigation and "could allow for the destruction or alteration

[5] In any event, the quoted passage occurs in a dissenting opinion, and the opinion of the Court rejected that concern, suggesting, to the contrary, that the Administrative Judge in that case should have looked into the OIG investigation: "it would seem important in this case to examine whether one could impute a retaliatory motive to OIG" when it directed the agency to reassign the employee. *Id*. at 1262.

of relevant ev0idence, and the fabrication of fraudulent alibis." *Id*. (internal quotation marks omitted). More recently, the same court rejected withholdings under Exemption 7(A) because "on the record before us it is impossible to determine whether disclosure would in fact impede such an investigation." *Sussman v. U.S. Marshals Service*, 494 F.3d 1106, 1114 (D.C. Cir. 2007). DHS's argument here can only be described as "general and conclusory," and on the record here there is no basis to conclude that a meaningful notice of the basis for the suspension of Mr. Cruz-Martin's security clearance "would in fact impede" any investigation.

DHS also cites (DHS Brief at 29) *Dellwood Farms, Inc. v. Cargill, Inc.,* 128 F.3d 1122 (7th Cir. 1997), a case in which the government's appropriate assertion of the law enforcement investigatory privilege prevailed over private antitrust plaintiffs' attempt to subpoena, for use in their own lawsuit, evidence that was being held by the government as part of a criminal price-fixing investigation. In quashing the subpoena, the Seventh Circuit observed that "no rights of the plaintiffs were invaded by the government's assertion of its law enforcement investigatory privilege." *Id*. at 1126. Here, of course, Mr. Cruz-Martin is not seeking to *compel* the government to turn over any evidence. He is simply asserting his right to be sufficiently informed about the basis for the suspension of his security clearance to be able to make a meaningful and informed response to the proposed suspension

without pay of his employment. The government can opt not to inform him; in that case it simply may not suspend him without pay.

Finally, DHS's argument should not be accepted because it proves far too much. The argument that disclosure might allow an employee to interfere with an investigation could be made in *every* case in which a security clearance is suspended during an investigation; accepting the argument would therefore be tantamount to overruling *Alston, Cheney*, and *Gargiulo.* Indeed, the argument could equally well be made in every case in which an employee is proposed to be suspended during an investigation even where no security clearance is involved; accepting it as a blanket excuse for non-disclosure would thus render Section 7513 toothless whenever an employee was being investigated for anything.[6]

Once again, *Cheney* provides the proper roadmap for the decision here. In that case, the MSPB Administrative Judge had accepted the agency's argument that "providing greater detail of the agency's reasons for its decision could jeopardize

[6] To be sure, Mr. Cruz-Martin does not assert that *no* information or evidence can ever be withheld from the subject of an investigation. An employee facing suspension is not entitled to know everything—but he is entitled to know enough to be able to make a "meaningful" and "informed" reply to the proposed suspension. *Alston*, 75 F.3d at 662. TSA's own regulations presume that an employee will receive, "for each charge . . . a description of the evidence that supports the charge(s)," Appx105, and "a copy of the material relied upon to support each charge and specification." Appx106. DHS's argument here would make denial of all information the presumption, rather than the rare exception.

the integrity of the investigation." 479 F.3d at 1348. This Court found that conclusory assertion no impediment to concluding that Mr. Cheney had not received adequate notice. The same result should follow here.

3. The Office of Inspector General's involvement does not relieve TSA of the obligation to follow its own regulations

Third, DHS argues that the fact that the investigation is being conducted by the DHS Office of Inspector General changes the rules entirely, because OIG "conduct[s] investigations independent of the agency." DHS Brief at 27. That is a non-sequitur.

The Office of Inspector General did not propose to put Mr. Cruz-Martin on indefinite unpaid leave without providing him enough information to enable him to make an informed and meaningful response to the proposal. TSA did that. The Office of Inspector General did not thereafter put Mr. Cruz-Martin on indefinite unpaid leave. TSA did that. Like 5 U.S.C. § 7513, TSA's procedural regulations contain no provision saying, "except when the Office of Inspector General is involved."

Nothing in the record suggests that OIG would not (or for that matter, did not) inform TSA of the nature of its investigation. Nothing in the record suggests that OIG objected, or would have objected, to Mr. Cruz-Martin being informed of the nature of its investigation. Nothing in the record suggests that TSA asked OIG what it might be able to tell Mr. Cruz-Martin about the nature of the investigation. DHS

does not suggest—nor is it plausible—that such a request (which OIG could reject) would somehow undermine OIG's independent investigatory authority.

The *Cheney* case is again analogous. Reginald Cheney was an employee of the Drug Enforcement Administration who was being investigated by the Department of Justice's Office of Professional Responsibility. *Cheney*, 479 F.3d at 1345. DOJ-OPR is outside of, and entirely independent from, the Drug Enforcement Administration. No one suggested—certainly this Court did not—that the procedural requirements of Section 7513 somehow became inoperative because the investigation into Mr. Cheney's conduct was being conducted by the Department of Justice's Office of Professional Responsibility rather than by the Drug Enforcement Administration itself. Surely DHS does not believe that maintaining the independence and effectiveness of the Department of Justice's Office of Professional Responsibility is unimportant.

DHS cites *Nat'l R.R. Passenger Corp. v. FOP Lodge 189 Labor Committee,* 855 F.3d 335 (D.C. Cir. 2017), for the proposition that "the Inspector General Act prevents the imposition of 'restrictions on the manner in which . . . Inspectors General conduct investigations." DHS Brief at 27. Mr. Cruz-Martin does not seek to restrict the manner in which OIG conducts its investigation. Informing him why his clearance was suspended, without disclosing classified information or information

that would enable him to sabotage the investigation, would not restrict the manner in which OIG conducts its investigation.

DHS also cites Justice Thomas's dissenting opinion in *NASA v. FLRA*, 527 U.S. 229, 253 (1999), for the proposition that Inspectors General should not be "involve[d] . . . in the process of disciplining agency employees." DHS Brief at 27. The Court, in that case, actually held the contrary: that when an OIG investigation may lead to discipline, OIG investigators *are* involved in the disciplinary process under the Federal Service Labor-Management Relations Statute, so that an employee under OIG investigation has a right to have his union representative participate in an OIG investigative interview. *See id*. at 231. Regardless, simply informing Mr. Cruz-Martin why his clearance was suspended hardly involves the Inspector General in any disciplinary process that may ultimately arise.

E. Because TSA failed to provide Mr. Cruz-Martin with meaningful information about the reason his clearance was suspended, its options were to assign him to unclassified work or to suspend him with pay

For the reasons already discussed, nothing in the record suggests that TSA had any good reason for failing to tell Mr. Cruz-Martin why he was being investigated, so that he could respond in a meaningful manner to his proposed suspension, and perhaps quickly clear up the matter. As the Supreme Court recognized in a case involving the due process rights of a civil servant whose termination was proposed, "some opportunity for the employee to present his side

of the case is recurringly of obvious value in reaching an accurate decision." *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 543 (1985). If, for example, Mr. Cruz-Martin had been informed that he was being investigated for some alleged misconduct at the San Juan airport on a given date, he might have been able to provide an innocent explanation for the conduct, or even show that he was in a distant location on work travel or vacation on that date.

Nevertheless, the rule announced in *Alston*, applied in *Cheney*, and reaffirmed in *Gargiulo,* is not that an agency *must* provide a civil servant with such "notice of the reasons for the suspension of his access to classified information" as will provide him "with an adequate opportunity to make a meaningful reply to the agency." *Alston*, 75 F.3d 661-662. The rule is that the employee must receive such notice "*before being placed on enforced leave*." *Id.* at 662 (emphasis added). Thus, an agency may choose to provide no meaningful information, as TSA has done here, so long as it does not place the employee on involuntary leave without pay.

When a federal employee's access to classified information has been suspended and the agency opts not to provide the employee with adequate information about the reason for the access suspension, the agency has two lawful choices: it can assign the employee to work that does not require access to classified information or it can suspend the employee with pay.

Mr. Cruz-Martin asked TSA for either alternative, *see* Appx038-039, and nothing prevented TSA from choosing either one. Mr. Cruz-Martin offered to work from home, without access to classified information. Appx039. TSA could have chosen that alternative. TSA's Personnel Security Section required only that he not have access to classified information during the investigation—not that he be placed on leave without pay. Appx023 ("PerSec advised CC [Chief Counsel] management . . . that management is responsible for ensuring that you do not have access during the PerSec process.").

Mr. Cruz-Martin had worked from home in the past—that is why he had a TSA hard drive and tablet at his home, Appx037-038. Many lawyers have been working from home during the past 13 months, including many lawyers who have security clearances but do not need to use those clearances in their daily work. The fact that all TSA attorneys are required to hold security clearances does not mean that every TSA attorney must regularly access classified information; while not in the record, Mr. Cruz-Martin has informed the undersigned that he has never once, in his whole career at TSA, actually accessed classified information. Analogously, an employee's job description may require him or her to be available for travel; that does not mean that an employee who has suffered an injury that makes him or her temporarily unable to travel must be placed on unpaid leave rather than being assigned, for a time, to do work that does not require travel. TSA's regulations

provide that an indefinite suspension "*may* be imposed" when "an employee's security clearance has been suspended," Appx108-109 (emphasis added), not that it must be imposed, and further provides that "[t]he mere fact of an employee being investigated does not automatically result in indefinite suspension." Appx108. TSA's refusal to allow Mr. Cruz-Martin to work temporarily without access to classified information was nothing but closed-minded bureaucratic bullheadedness.

Nevertheless, TSA was entitled to make that choice if it wished to.[7] That left it with the other option: Mr. Cruz-Martin could be placed on leave with pay, as he had been from March 12, 2020 until June 3, 2020. Appx018. In rejecting that option, TSA reasoned only "that it would not be in the best interest of the agency for you to be in a non-duty paid status pending the resolution of the security clearance process." Appx041. But the purpose of procedural protections for civil servants is not the minimization of agency expenditures, it is fairness to the employee, and few things are less fair than an unexplained indefinite leave without pay. As the Supreme Court noted in *Loudermill*, "[w]e have frequently recognized the severity of depriving a

[7] The parties agree that the Merit Systems Protection Board "cannot require an agency to reassign an employee whose security clearance has been suspended to a different position that does not require a security clearance unless the agency has such a policy," Cruz-Martin Brief at 23 n.8; DHS Brief at 20. That limitation on the Board's power does not mean that an agency cannot choose to reassign an employee if it wishes to. In any event, Mr. Cruz-Martin did not seek a reassignment to a different position; he asked to be allowed to continue to work as an attorney-advisor, on matters that did not require access to classified information, just as he had for the previous decade.

person of the means of livelihood." 470 U.S. at 543. Even if an agency has good reasons for failing to tell an employee why he or she is being investigated (which does not appear to have been the case here), "where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay." *Id*. at 544-45 (footnote omitted). That is what this Court recognized in *Cheney* when it ordered the agency to make him whole for the income he had lost while on leave without pay. 479 F.3d at 1353. Even the employee in *Dep't of the Navy v. Egan* was put on leave with pay; as the Supreme Court noted, "Until the time of his removal, he remained on full-pay status." 484 U.S. at 533.

TSA knows that it can do this; it has treated other employees this way. As Mr. Cruz-Martin reminded the agency in his written reply to the notice of proposed suspension, suspending him without pay would result in his "be[ing] treated differently when compared with TSA employees who have been permitted to remain on paid administrative leave while being investigated. [They] have been permitted to remain on paid administrative leave for extensive period[s] of time." Appx038-039.

II. The Agency's Error Here Was Not Harmless

DHS argues that any error was harmless because Mr. Cruz-Martin has not shown that the agency would have reached a different decision had he been provided sufficient information to make a meaningful response. DHS Brief at 35. But this

Court's cases make clear—in binding authority that DHS has failed even to mention, much less address—that an employee who receives inadequate notice does not bear such a burden.

In *Do v. Dep't of Housing and Urban Development,* 913 F.3d 1089 (Fed. Cir. 2019), Ms. Do had been suspended and demoted based on a violation different from the one with which she had been charged. *Id*. at 1092. This Court held that Ms. Do's due process rights were violated under the principle, "established by a long line of this court's cases," *id*. at 1095, that "[w]hen an agency relies on a charge not included in the notice, due process is violated because the notice does not fully inform the employee of the grounds for the proposed removal and deprives the employee of an opportunity to make an informed response before the agency takes disciplinary action." *Id*. at 1094. The Court then rejected the agency's argument that the error was harmless, because a serious defect in notice can never be harmless:

> [W]here a serious procedural curtailment mars an adverse personnel action which deprives the employee of pay, the court has regularly taken the position that the defect divests the removal (or demotion) of legality .... In that situation, the merits of the adverse action are wholly disregarded.

Id. at 1098 (quoting *Ryder v. United States*, 585 F.2d 482, 487-88 (Ct. Cl. 1978)). The Court reached the same conclusion regarding due process error in *Sullivan v. Department of Navy*, 720 F.2d 1266 (Fed. Cir. 1983).

The rationale for that rule is as obvious as the rule is clear: "the test for harmlessness is an objective one, not a subjective one." *Do*, 913 F.3d at 1098. Because there is no objective way to know what decision an agency would have reached had an employee been able to respond in a meaningful way, the procedural error of inadequate notice cannot be presumed harmless.[8]

That *Do* was about a constitutional due process right to notice and this case concerns a right to notice created by regulation does not diminish *Do*'s applicability here. The content of both rights is precisely the same: to be provided with meaningful notice before adverse action. Here, as there, where "a serious procedural curtailment mars an adverse personnel action which deprives the employee of pay," *Do*, 913 F.3d at 1098, the error cannot be presumed harmless.

[8] The same basic principle applies in a wide variety of contexts. For example, "the Secretary [of State]'s failure to provide the required notice and unclassified material in advance of her decision" about whether a group should be designated as a foreign terrorist organization could not be harmless because the court cannot "assume that nothing the [group] would have offered . . . could have changed her mind," *People's Mojahedin Org. of Iran v. Dep't of State*, 613 F.3d 220, 228 (D.C. Cir. 2010); depriving an applicant "of the opportunity to submit a timely request for a waiver" is not harmless because it cannot be known what his request would have shown. *Boniface v. Dep't of Homeland Security*, 613 F.3d 282, 290 (D.C. Cir. 2010). Similarly, a would-be applicant for public office does not have to show that he would have been appointed in order to seek relief from a rule disqualifying him from applying, *Turner v. Fouche,* 396 U.S. 346, 362 (1970); a would-be contractor does not have to show that it would have obtained a contract in order to seek relief from a rule disadvantaging it in bidding, *Northeast Florida Chapter of Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 666 (1993).

The proof of that pudding is, again, *Cheney*, where this Court did not even pause to discuss harmless error before ordering Mr. Cheney to be awarded back pay because he had been placed on unpaid leave without adequate notice of the reasons for the suspension of his security clearance. *See Cheney*, 479 F.3d at 1353.

In sum, practically every argument DHS makes in this case is, on its face, shot full of holes by *Cheney*.

CONCLUSION

For the reasons stated above and in Petitioner's opening brief, the Court should reverse the decision of the Board affirming Mr. Cruz-Martin's indefinite suspension and remand this case to the Board with instructions that Mr. Cruz-Martin "is entitled to recover back pay for the period of the improper suspension," including "'credit, for all purposes, for the period of his improper [suspension].'" *Cheney*, 479 F.3d at 1353 (quoting *Gose v. U.S. Postal Service,* 451 F.3d 831, 840 (Fed. Cir. 2006)).

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains a total of 6,989 words, including footnotes, and excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

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