UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 2021-1014

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

CORRECTED BRIEF FOR THE PETITIONER

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Counsel for Petitioner

December 30, 2020

CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rule 47.4(b), the undersigned certify the following:

1. The full name of the Petitioner is Rafael Cruz-Martin.

2. The names of the real parties in interest, if different from the parties named above, are: Not applicable.

3. There are no parent corporations or publicly held companies that own 10% or more of the stock of any entity represented by us.

4. The legal representatives, including all law firms, partners or associates, who (a) appeared for the entities in the originating court/tribunal [Merit Systems Protection Board (MSPB)] or Agency or (b) are expected to appear in this Court for the entities, not including attorneys who have already entered an appearance in this court, are:

- Steve Newman, Law Offices of Steve Newman (before Agency and MSPB only) and
- Aaron Baughman, Office of Chief Counsel, Transportation Security Administration (before MSPB only).

5. There are no related cases.

6. There is no information required under Fed. R. App. P. 26.1(b) regarding organizational victims in criminal cases and under Fed. R. App. P. 26.1(c) regarding bankruptcy case debtors and trustees. Fed. Cir. R. 47.4(a)(6).

The undersigned attorneys for Petitioner certify that the above information is accurate and complete to the best of our knowledge.

Dated: December 30, 2020

Respectfully submitted,

/s/ *Arthur B. Spitzer*
Arthur B. Spitzer

/s/ *Patrice M. Scully*
Patrice M. Scully
Counsel for Petitioner

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STATEMENT OF RELATED CASES

Pursuant to Federal Circuit Rule 47.5, Petitioner states:

1. No other appeal in or from the same civil action or proceeding in the lower body has previously been before this or any other appellate court.

2. Petitioner's counsel are not aware of any other case pending in this or any other court that will directly affect or be directly affected by this Court's decision in this appeal.

JURISDICTIONAL STATEMENT

The Agency, the Transportation Security Administration (TSA), placed Petitioner on indefinite suspension without pay on June 3, 2020. Appx040-042. On June 4, 2020, Petitioner timely appealed to the Merit Systems Protection Board (Board). Appx001. The Board had jurisdiction pursuant to 49 U.S.C. § 40122(g)(3).[1] The Board issued its Initial Decision, affirming the agency's action, on July 29, 2020. Appx001. Because Petitioner did not appeal to the full Board, which has no members, the Initial Decision became final on September 2, 2020. *See* Appx006. The petition for review was timely filed on October 2, 2020. This Court has jurisdiction to review the Board's final decision under 28 U.S.C. §1295(a)(9).

[1] The Administrative Judge stated that the Board had jurisdiction pursuant to 5 U.S.C. § 7511-7513 and § 7701(a). Appx003. That was incorrect. Because Petitioner was an employee of TSA, the Board had jurisdiction pursuant to 49 U.S.C. § 40122(g)(3).

STATEMENT OF ISSUE

In *King v. Alston*, 75 F.3d 657, 661 (Fed. Cir. 1996), this Court held that a tenured employee is entitled 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." In *Cheney v. Dep't of Justice*, 479 F.3d 1343, 1352 (Fed. Cir. 2007), the Court explained 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." Petitioner Rafael Cruz-Martin was suspended indefinitely, without pay, on the ground that his access to classified information had been suspended. He was informed only that the suspension of his access was "based on potentially disqualifying information regarding your Personal and Criminal Conduct." But Mr. Cruz-Martin has not been charged with any crime and does not know what alleged conduct is at issue.

The question presented is whether the Agency failed to provide Mr. Cruz-Martin with sufficient information to make an informed reply to his proposed suspension from employment before being placed on enforced leave, thereby denying him the procedural protections to which he was entitled.

STATEMENT OF THE CASE

This case is about the indefinite suspension, without pay, of a 25-year federal employee who was given such a vague and uninformative notice of the reasons for the underlying suspension of his security clearance that he was unable to respond to the proposed suspension in a meaningful manner. His suspension was upheld by the Merit Systems Protection Board on grounds that ignored the Agency's own regulations and the controlling law of this Court.

Petitioner Rafael Cruz-Martin is an Attorney-Advisor at the Transportation Security Administration (TSA). Appx043. TSA proposed to suspend him indefinitely from his employment, without pay, on the sole ground that his access to classified information had been suspended. The only reason he has ever been given for the suspension of his access to classified information—which has now continued for more than eight months—is that it was "based on potentially disqualifying information regarding your Personal and Criminal Conduct." Appx021.

The Board upheld the indefinite suspension on the ground that it was adequate to inform Petitioner "that the action was proposed because he had no security clearance." Appx005. That ruling ignored TSA's own procedural rules regarding suspensions, as well as this Court's uniform line of precedent holding that applicable law "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," and that "[m]erely 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." *King v. Alston*, 75 F.3d 657, 661-62 (Fed. Cir. 1996); *accord Cheney v. Dep't of Justice*, 479 F.3d 1343 (Fed. Cir. 2007); *Gargiulo v. Dep't of Homeland Security*, 727 F.3d 1181 (Fed. Cir. 2013); *Lucena v. Dep't of Justice*, 802 Fed. Appx. 585 (Fed. Cir. 2020) (nonprecedential); *Willingham v. Dep't of the Navy*, 809 Fed. Appx. 872 (Fed. Cir. 2020) (nonprecedential).[2]

The Board's decision should therefore be reversed, and Mr. Cruz-Martin should be reinstated with back pay.

Statement of Facts

Mr. Cruz-Martin has been a federal employee for over 25 years. Appx036. He began working for TSA in 2002 as a security screener. Attending night school, he obtained a master's degree in criminal justice, and then a law degree, *cum laude*. *Id*. In 2010, he became an Attorney-Advisor for TSA's Office of Chief Counsel. He has

[2] Except for *Gargiulo*, these cases involved employees covered by 5 U.S.C. § 7513(b). As a TSA employee, Mr. Cruz-Martin is covered by TSA regulations. But as TSA has conceded in this case, in *Gargiulo*, and elsewhere, and as both the Board and this Court have recognized, TSA regulations provide the same procedural protections as 5 U.S.C. § 7513(b). *See infra* at 15-16 & n.5.

had a stellar record of excellent performance evaluations, including numerous awards and bonuses, and no discipline. Appx036. His duty station is at the San Juan, Puerto Rico airport. Appx043.

On March 12, 2020, two investigative agents met Mr. Cruz-Martin at the San Juan airport as he was returning from a business trip. They accompanied him to his office, where they informed him that he was under investigation and seized his government property. Appx016, 017, 038. They then accompanied him to his home, where they seized a TSA hard drive and tablet that he used when he worked from home. Appx016, 037, 038, 060. When Mr. Cruz-Martin inquired as to the nature of the investigation, the agents provided no information. Appx038.

Later that day, Mr. Cruz-Martin's supervisor emailed him a letter stating: "The purpose of this letter is to inform you that a decision has been made to place you on administrative leave effective immediately. This action is being taken based on a Department of Homeland Security Office of Inspector General investigation." Appx018-019. Administrative leave is "a non-duty paid status." Appx018. The letter provided no information about why Mr. Cruz-Martin was being investigated. *See id*.

On April 8, 2020, the Chief of TSA's Personnel Security Section sent Mr. Cruz-Martin's second-line supervisor, Acting Deputy Chief Counsel Bryan Bonner, a memorandum stating:

> This memorandum is to advise you that, effective immediately the Personnel Security Section has made the

> determination to suspend Mr. Cruz-Martin's access to classified information granted on July 27, 2011.
>
> You are responsible for ensuring that Mr. Cruz-Martin does not have access to classified information or occupy a sensitive position during this process.

Appx020.

The same day (April 8), TSA's Personnel Security Section (the office responsible for issuing, suspending, denying and revoking security clearances) emailed Mr. Cruz-Martin a notice that his security clearance had been suspended "[e]ffective immediately." The notice provided only the vaguest of reasons, stating:

> The 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.
>
> The issue identified above raises serious security concerns and must be favorably resolved prior to regaining access to classified information.

Appx021. (Emphasis added.)

Three days later, on April 11, 2020, Mr. Cruz-Martin's first-line supervisor issued the Notice of Proposed Indefinite Suspension the adequacy of which is at issue in this case. Appx022-025. The notice informed Mr. Cruz-Martin that "[t]his proposed indefinite suspension is based on the following":

> Charge: Suspension of Security Clearance
>
> Specification: In a memorandum dated April 8, 2020, the TSA Personnel Security Section (PerSec) notified the Chief Counsel's office (CC) that your access to classified information is suspended and, therefore, you are unable to access classified information.

Appx022. The notice informed Mr. Cruz-Martin that he had the right to respond "orally and/or in writing," Appx023, and stated that "[t]he material relied on to support this proposal is attached," Appx024. But the only attachment was a copy of the April 8, 2020 memorandum from the TSA Personnel Security Section informing the Office of Chief Counsel that Appellant's security clearance had been suspended (Appx025), which gave no reason for the suspension.

Mr. Cruz-Martin attempted to obtain more information. In a letter dated April 15, 2020, to the Chief of the TSA Personnel Security Section, he stated:

> Your Notice gave me 10 days from receipt "to provide any information or documentation regarding this action." I very much would like to provide such information or documentation. However, I am unable to do so because the reasons stated in the Notice are so vague: "potentially disqualifying information regarding (my) Personal and Criminal Conduct" that appear to be related to "an investigation opened by the" DHS OIG. The Notice does not even give me a hint as to what the "Personal and Criminal Conduct" might be about.
>
> * * *
>
> Thus, I continue to remain completely clueless as to why the DHS OIG is investigating me. As a result, it is impossible for me to formulate any response. Because you have failed to inform me of the reason or reasons for the investigation and thus for the

> suspension of my security clearance, I request that you extend my 10 days to respond until after I am informed as to what this is about.

Appx026. He heard nothing back before his response to the proposed indefinite suspension was due.[3]

Mr. Cruz-Martin then responded to the Notice of Proposed Indefinite Suspension. Appx017-039. He pointed out that he had received "[n]o indictment or information of any sort informing [him] of the nature of his alleged 'Personal and Criminal Conduct' that is charged," leaving him unable to respond to the charge. Appx029. He also explained in detail how TSA's own regulations, as well as the rulings of this Court, required the agency to inform him of the factual basis for the suspension of his access to classified information before he could be suspended without pay. Appx028-033.

He asked the agency to allow him to remain on administrative leave (*i.e.*, leave with pay), or to telework from home, "so that [he] could perform legal research and additional legal work not requiring security clearance." Appx038-039.

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[3] More than a month later, on May 20, 2020, the Personnel Security Section responded by email:

> Suspension [sic] are an interim measure and no due process rights attach until a Notice of Determination is issued (if applicable). We will await completion of the investigation before proceeding with a final determination. It is at this time that the underlying Materials Relied Upon are provided.

Appx081.

The Agency's decision

On June 3, 2020, TSA's Acting Deputy Chief Counsel for Field Operations issued a Notice of Decision suspending Mr. Cruz-Martin indefinitely, without pay. Appx040-042. The only stated basis for that decision was "the current suspension of your required security clearance." Appx041. The Deputy Chief Counsel completely ignored the legal requirement that the agency was obliged to provide Mr. Cruz-Martin with sufficient information to make a meaningful response to the proposed suspension, although that requirement had been called to his attention in Mr. Cruz-Martin's written response to the proposed suspension. Appx027-033. Indeed, the Deputy Chief Counsel did not suggest that he himself was aware of the factual basis for Mr. Cruz-Martin's suspension; he apparently viewed it as irrelevant.

Having concluded that Mr. Cruz-Martin's indefinite suspension was justified simply because his access to classified information had been suspended, the Deputy Chief Counsel rejected Mr. Cruz-Martin's request to remain on leave with pay for the sole reason 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. He rejected Mr. Cruz-Martin's request to telework on matters not requiring access to classified information for the sole reason that "all TSA attorney positions require maintaining a security clearance and the ability to access classified

information." *Id*. He did not pause to consider whether there was, in fact, unclassified work Mr. Cruz-Martin could do while the investigation went forward.[4]

The Merit Systems Protection Board's decision

Following Mr. Cruz-Martin's timely appeal to the Merit Systems Protection Board, Administrative Judge Nicole DeCrescenzo issued the Initial Decision in this case on July 29, 2020, affirming the Agency's action. Appx001-013. She stated that she had "considered the appellant's [Petitioner's] argument that he was not provided sufficient information to respond to the investigation that caused his security clearance to be suspended." Appx005. But she rejected that argument on the ground that it "mistakes the appellant's due process rights in the suspension with his process rights in the security clearance determination." *Id*. She never cited *King v. Alston*, although it had been cited twenty-five times in Mr. Cruz-Martin's brief. *See* Appx058-088. She cited *Cheney v. Dep't of Justice*, but only for the proposition that "[t]he Board has no authority to review the underlying merits of a security

[4] It is common knowledge that many people who hold security clearances rarely, if ever, actually need to access classified information. As of October 2017, nearly 1.2 *million* individuals held security clearances but were "not in access." *See* Office of the Director of National Intelligence, *Fiscal Year 2017 Annual Report on Security Clearance Determinations* at 4, available at https:www.dni.gov/files/NCSC/documents/features/20180827-security-clearance-determinations.pdf (last visited December 14, 2020). By way of example, the second undersigned counsel on this brief is a retired supervisory attorney for TSA; in her almost 9 years as a TSA attorney with a security clearance, she had access to classified information exactly once.

clearance/access," Appx003, although *Cheney* had also been cited twenty-five times in Mr. Cruz-Martin's brief for the proposition that an employee whose indefinite suspension is proposed based on the suspension of the employee's security clearance is entitled to notice of the reasons for the suspension of the security clearance. *See* Appx058-088.

Based on her mistaken understanding that an employee in such a situation is entitled only to notice that his or her security clearance has been suspended, Judge DeCrescenzo "f[ou]nd the proposal gave the appellant specific notice that the action was proposed because he had no security clearance, and this was not vague." Appx005. Her decision became the Board's final decision on September 2, 2020. This appeal followed.

SUMMARY OF THE ARGUMENT

The Agency's Notice of Proposed Indefinite Suspension was deficient as a matter of law because it failed to provide Mr. Cruz-Martin with sufficient information to make an informed reply to the Agency before being placed on enforced leave. The Board's decision affirming the agency action was reversibly erroneous because its reasoning was directly contrary to the holdings of a consistent line of cases from this Court making clear that, before an employee can be suspended without pay, "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." *Cheney v. Dep't of Justice*, 479 F.3d 1343, 1352 (Fed. Cir. 2007). *See also King v. Alston*, 75 F.3d 657, 661 (Fed. Cir. 1996); *Gargiulo v. Dep't of Homeland Security*, 727 F.3d 1181 (Fed. Cir. 2013); *Lucena v. Dep't of Justice*, 802 Fed. Appx. 585 (Fed. Cir. 2020) (nonprecedential); *Willingham v. Dep't of the Navy*, 809 Fed. Appx. 872 (Fed. Cir. 2020) (nonprecedential).

Simply telling Mr. Cruz-Martin that his access to classified information had been suspended obviously did not provide him with sufficient information to make a meaningful response to the proposed suspension. Telling Mr. Cruz-Martin that his suspension was "based on potentially disqualifying information regarding your Personal and Criminal Conduct" was no better. "Personal conduct" could mean anything. "Criminal conduct" could mean anything from murder to disturbing the peace. Mr. Cruz-Martin has not been charged with any crime, and he has received no "information of any sort informing [him] of the nature of his alleged "Personal and Criminal Conduct." Appx029. Like Mr. Cheney, he could only "guess at the reason for his security clearance suspension." *Cheney*, 479 F.3d at 1353 (internal quotation marks omitted). His indefinite suspension without pay was therefore improper.

ARGUMENT

This case is about the indefinite suspension, without pay, of a tenured federal employee. 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. What he challenges is the sufficiency of the process his agency afforded him before suspending him from his employment. That process was insufficient, under TSA's own regulations and under the precedents of this Court.

Standard of Review

Pursuant to 5 U.S.C. §7703(c), this Court "shall review the record and hold unlawful and set aside" the Board's decision if it is: "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." *See also King v. Alston*, 75 F.3d at 660.

I. Petitioner Was Entitled to Sufficient Notice of the Reasons for the Suspension of his Security Clearance to Enable Him to Make a Meaningful Response to the Proposed Suspension of his Employment.

This Court has carefully considered the question of what process is due a tenured federal employee when an agency proposes to suspend him indefinitely, without pay, on the ground that his security clearance has been suspended. The Court concluded that the employee is entitled 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.

King v. Alston, 75 F.3d at 661-62. That conclusion was reaffirmed in *Cheney*, 479 F.3d at 1351-52, which held that "in a case involving a suspension resulting from the suspension of a security clearance,"

> 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. "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 suspended. [*Alston*, 75 F.3d] at 662.

The Court reiterated these holdings in *Gargiulo*, 727 F.3d at 1186 ("This court has held that 5 U.S.C. § 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." (internal quotation marks and citation omitted)). And it has applied them as recently as this year. *See Lucena*, 802 Fed. Appx. at 588 ("Such notice must "apprise[] the employee of the nature of the charges in sufficient detail to allow the employee to make an informed reply.") (quoting *King v. Alston*, 75 F.3d at 661) (alteration by the Court); *Willingham*, 809 Fed. Appx. at 875-76 ("As we stated in *Cheney*, '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.'") (quoting *Cheney*, 479 F.3d at 1352).

All of these cases were decided after *Dep't of the Navy v. Egan* and took full account of that decision. As this Court pointed out in *King v. Alston*, "*Egan* does not foreclose board review of the procedures used by the agency in placing Alston on enforced leave." 75 F.3d at 662. Indeed, *Egan* itself affirmed that "[a]n employee who is removed for 'cause' under § 7513, when his required clearance is denied, is entitled to the several procedural protections specified in that statute," *Egan*, 484 U.S. at 530, and pointed out that Mr. Egan had been informed of the specific reasons for the revocation of his security clearance. *Id.* at 521.

As noted, *supra* at 4 n.2, most of this Court's cases dealing with employees who were suspended or discharged because their security clearances had been suspended or revoked involved employees who were covered by 5 U.S.C. § 7513(b). As a TSA employee, Mr. Cruz-Martin is not covered by 5 U.S.C. chapter 75. But the applicable TSA regulation (Management Directive 1100.75-3), and its accompanying Handbook (Appx089-110), provide him with the same protections. As TSA conceded below, the "due process requirements in the Agency MD [Management Directive] *directly mimic the due process requirements established at 5 U.S.C. § 7513(b).*" Appx048 (emphasis added). The Board has previously recognized as much, *see Buelna v. Dep't of Homeland Security*, 121 M.S.P.R. 262,

271 (2014), as has this Court, *see Gargiulo*, 727 F.3d at 1185 n.3 ("the agency's personnel policies offer procedural safeguards similar to those provided by section 7513").[5]

Indeed, the TSA Handbook goes even further than section 7513 in assuring that an employee will have the ability to respond meaningfully to a proposed suspension. Section H(1)(a) of the Handbook requires not only that a notice of proposed indefinite suspension include the "charge(s) and specification(s)" alleged to support the suspension, but also, for each charge, "a description of the evidence that supports the charge." Appx105. And beyond that, it mandates that "the employee will be provided a copy of the material relied upon to support each charge and specification with the proposal letter. Alternatively, if the material is voluminous or contains SSI [Sensitive Security Information], the employee shall be given the opportunity to review the material at a designated TSA location." Appx106.

TSA's own procedural regulations are, of course, binding on TSA in its relations with its employees. *See United States ex rel. Accardi v. Shaughnessy*, 347

[5] The Board's decision in *Gargiulo v. Dep't of Homeland Security*, 118 M.S.P.R. 137, 142 (2012), sets out in detail the reasons why TSA regulations, rather than the statute, applies here.

Although both parties explained in their submissions to the Board that Petitioner was covered by TSA regulations rather than 5 U.S.C. § 7513, *see* Appx067 (Petitioner); Appx048 (Agency), the Administrative Judge incorrectly stated that "the process that was due here is defined by 5 U.S.C. §7513(b)." Appx005. However, given that the substance of the statute and the regulation are the same, and that the process due is therefore the same, that error was inconsequential.

U.S. 260 (1954); *Crediford v. Shulkin*, 877 F.3d 1040, 1047 (Fed. Cir. 2017) ("an agency is bound by its own regulations") (quoting *Wagner v. United States*, 365 F.3d 1358, 1361 (Fed. Cir. 2004)); *Romero v. Dep't of Defense*, 527 F.3d 1324, 1328 (Fed. Cir. 2008) ("agencies must also follow the procedures established by their own regulations") (citing *Drumheller v. Dep't of the Army*, 49 F.3d 1566, 1569-70 (Fed. Cir. 1995)).

It follows that, before being suspended indefinitely without pay, Mr. Cruz-Martin was entitled to "be given enough information to enable him . . . to make a meaningful response to the agency's proposed suspension of the security clearance," *Cheney*, 479 F.3d at 1352, including, per the TSA Handbook, a description of the evidence underlying the charge, and access to a copy of the material relied upon to support the charge.

II. Petitioner Did Not Receive the Notice to Which he was Entitled.

Petitioner received exactly *no* information that could enable him to make a meaningful response to the agency's proposed suspension of his security clearance. The *only* information he received was that his access to classified information had been suspended "based on potentially disqualifying information regarding your Personal and Criminal Conduct." Appx021. His request to the Chief of the Personnel Security Section for additional information was ignored until after the time for his response to the Notice of Proposed Indefinite Suspension had passed; it was later

rebuffed with the response that "Suspension [sic] are an interim measure and no due process rights attach until a Notice of Determination is issued (if applicable)." *See supra* at 8 n.3.

This Court's decision in *Cheney* controls the outcome here. It teaches that the information TSA provided to Mr. Cruz-Martin did not fulfill its obligations under its own regulations. In *Cheney*, as here, the employee was suspended indefinitely without pay because his access to classified information had been suspended pending an investigation. Mr. Cheney was informed that this was "based on allegations of potentially derogatory personal conduct and possible violations of law and DEA standards of conduct," and that he had "failed to comply with security regulations" and that he had "demonstrated a pattern of dishonesty and/or rule violations." 479 F.3d at 1345. Assessing that information, this Court "fail[ed] to see how Mr. Cheney could have made a meaningful response to such broad and unspecific allegations when there was no indication of when his alleged conduct took place or what it involved." *Id*. at 1352. Responding to Mr. Cheney's requests for additional information, his agency informed him 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." *Id*. This Court characterized this information as "akin to informing Mr. Cheney that his

security clearance was being suspended because he had robbed a bank, without telling him where the bank was and when he had robbed it," *id*., and concluded that, even with this additional information, it was not "possible for Mr. Cheney to make a meaningful response." *Id*. Accordingly, the Court reversed the Board's decision sustaining Mr. Cheney's indefinite suspension. *Id*. at 1353-54.

The same result follows here, *a fortiori*. The information Mr. Cruz-Martin was given, that "[t]he decision to suspend your access to classified information is based on potentially disqualifying information regarding your Personal and Criminal Conduct," was even less useful (if that is possible) than the information Mr. Cheney received. "Personal conduct" could mean—literally—anything. Suspected "criminal conduct" is a more limited universe, but it could mean anything from the murder of a federal official, *see* 18 U.S.C. § 1114, to affixing a poster to a public street or sidewalk, *see* Puerto Rico Laws tit. 33, § 4837 (Penal Code of 2004)).[6] Expecting Mr. Cruz-Martin to be able to make a meaningful response to the information that his clearance was suspended because of "potentially disqualifying information regarding your Personal and Criminal Conduct" was, therefore, about as helpful as telling him that the alleged misconduct occurred in North America. If Mr. Cheney

[6] There are at least 4,450 federal crimes, *See* John Baker, *Revisiting the Explosive Growth of Federal Crimes* (2008), available at https://www.heritage.org/report/revisiting-the-explosive-growth-federal-crimes (last visited December 10, 2020), and scores of additional crimes under Puerto Rico law.

was being asked to respond with his hands tied behind his back, Mr. Cruz-Martin is being asked to respond with his hands tied behind his back and blindfolded.

The cases in which this Court has concluded that *sufficient* information was provided illustrate the difference. Thus, for example, in *King v. Alston*, the agency informed Mr. Alston that the problem was a medical condition. Mr. Alston knew what his medical condition was—he conceded that he had "sufficient information to permit him to make an informed reply to the agency's proposed decision"—and he "offered medical evidence, which the agency considered." 75 F.3d at 662. In *Romero*, the agency informed Mr. Romero that the problem was that his wife was a foreign citizen who was employed at that country's embassy. 527 F.3d at 1326. The Court held that the Board "did not err in finding that the agency had complied with the requirements of section 7513 [because] the Department provided notice of the reasons for his removal and for the underlying revocation of his security clearance," *Id*. at 1329. In *Gargiulo v. Dep't of Homeland Security*, the agency (the TSA, the same agency involved in this case) provided Mr. Gargiulo "with the specific reasons for the security clearance suspension," and "provided [him] with an opportunity to review the material relied on to support the reason for the proposed action." 118 M.S.P.R. 137, 145 (2012), *aff'd*, 727 F.3d 1181 (Fed. Cir. 2013).[7] In *Lucena*, the

[7] In other words, TSA provided Mr. Gargiulo with exactly the information required by its own regulations, demonstrating that the agency knows how to do so when it wishes to.

notice of proposed suspension "explained, with specificity, why Mr. Lucena's security clearance had been suspended." 802 Fed. Appx at 589. It "provid[ed] the three 'matters . . . identified' in his OPR investigative file," *id*., including the "specific times and specific allegations of misconduct." *Id*. at 590. And in *Willingham*, while the reason provided in the initial notice of proposed indefinite suspension—"possible misuse[] of [his] position and protected information accessible to [him]" (alterations by the Court)—was "certainly vague," 809 Fed. Appx. at 876, Mr. Willingham was "provided a more detailed rationale for the suspension . . . before he made his response to the agency, and he made effective use of it." *Id*. Thus, "at the time Willingham responded to his proposed suspension, he was well-aware that his alleged offense consisted of misappropriating non-public information of other EEO complainants—whose information he had special access to, as an EEO specialist—and using it in his own EEO class complaint." *Id*.

These examples show that agencies, including TSA, are perfectly capable of providing sufficient information about the reasons for the suspension of a security clearance. Here, the information provided to Mr. Cruz-Martin, like the similar information initially provided to Mr. Willingham, was "certainly vague." 809 Fed. Appx. at 876. But unlike in *Willingham*, Mr. Cruz-Martin was provided no additional information. Here, as in *Cheney*, the Agency has provided only "broad and unspecific allegations [with] no indication of when his alleged conduct took place

or what it involved," leaving him unable to make "a meaningful response." *Cheney*, 479 F.3d at 1352. Like Mr. Cheney, Mr. Cruz-Martin was left to "guess at the reason" for his proposed suspension. *Cheney*, 479 F.3d at 1353.

Mr. Cruz-Martin therefore did not receive the procedural protections to which he was entitled.

III. The Agency and the Board Erred in Viewing Procedural Protections as Meaningless.

Reading both the Agency's decision and the Board's decision, one might think that indefinite suspension without pay is the ineluctable outcome of a security clearance suspension, and that protecting an employee's right to respond in a meaningful manner to a proposed suspension of employment in such a situation is a meaningless charade. Indeed, that is how both TSA and the Administrative Judge appear to have viewed the matter. As the Administrative Judge stated, "the proposal gave the appellant specific notice that the action was proposed because he had no security clearance, and this was not vague. Accordingly, the agency's action must be affirmed." Appx005.

That is not a correct view. TSA was not required to suspend Mr. Cruz-Martin without pay. The Personnel Security Section's memorandum to his supervisor stated only that the supervisor must ensure that Mr. Cruz-Martin did not have access to classified information during the investigation. Appx020. Other options were available, such as continuing him on administrative leave (*i.e.*, leave with pay), or

allowing him to telework on matters not requiring access to classified information. Indeed, the TSA Handbook specifically provides, "The mere fact of an employee being investigated does *not* automatically result in indefinite suspension." Appx108 (emphasis added).

Making such alternatives available serves the interests of the agency as well as of the employee. Mr. Cruz-Martin is an experienced, highly rated employee. Appx036. If he could continue to serve TSA as an Attorney-Advisor without having access to classified information during the temporary period of his investigation—and nothing in the record suggests that he could not—then in addition to remaining able to support himself and his family, TSA would have continued to receive full value for his service. And in the event the investigation ends favorably (which is presumably a potential outcome), Mr. Cruz-Martin's service to his agency would have continued without disruption. Yet TSA rejected that alternative simply because its attorneys are required to have security clearances. Appx041.[8]

[8] To be sure, the 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. *See Ryan v. Dep't of Homeland Security*, 793 F.3d 1368, 1373 (Fed. Cir. 2015). But Mr. Cruz-Martin was not seeking reassignment to a different position. He was simply seeking to perform his Attorney-Advisor duties by telework from home. That practice was already widespread in June 2020, when he was suspended; indeed, he had previously worked from home, as evidenced by the fact that the investigative agents seized a TSA hard drive and tablet from his home when they accosted him on March 12. *See supra* at 5 and Appx037. Needless to say, Mr. Cruz-Martin was not allowed to work with

[footnote continued on next page]

TSA rejected the option of administrative (paid) leave because "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." *Id*. There was no explanation of *why* this would not be in the best interest of the agency; presumably it was a simple matter of not spending money. But that rationale would apply with equal force to any employee whose access to classified information had been suspended; it is therefore flatly inconsistent with the TSA Handbook's promise that "[t]he mere fact of an employee being investigated does *not* automatically result in indefinite suspension." Appx108 (emphasis added). The agency therefore failed to give Mr. Cruz-Martin the consideration mandated by its own regulations, and the Board failed to review that dereliction.

More fundamentally—and what this case is really about—the agency might have been able to avoid the need to consider alternatives to putting Mr. Cruz-Martin on leave without pay if it had simply done what it was supposed to do: inform him of the reasons his access to classified information was suspended, thereby giving him an opportunity to respond in a meaningful way and perhaps clear up the

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classified information when he worked from home. *See*, *e.g.*, https://www.justice.gov/opa/pr/former-nga-employee-sentenced-taking-classified-information (Justice Department press release reporting sentencing of security-cleared employee for taking classified documents home). The deciding official did not suggest, and the Agency has not shown, that Mr. Cruz-Martin could not continue to work from home, without access to classified information, for the temporary period of the investigation.

problem. After all, the purpose of due process is to assure that officials will hear "both sides of the story" before making important decisions, because officials who have accurate and complete information are more likely to make decisions that are *correct*—correct for the government as well as correct for the employee. But an employee can't present his side of the story if he doesn't know what story is being told. Providing an employee with sufficient notice of reasons therefore serves the government's interest, as well as the employee's, in avoiding mistaken long-term suspensions. *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 543 (1985) (an "opportunity for the employee to present his side of the case is recurringly of obvious value in reaching an accurate decision"); *see also Stone v. Federal Deposit Insurance Corp.*, 179 F.3d 1368, 1376 (Fed. Cir. 1999) ("the employee's response is essential not only to the issue of whether the allegations are true, but also with regard to whether the level of penalty to be imposed is appropriate."). Conversely, permitting agencies to suspend employees indefinitely without pay, without meaningful notice of what the employee is alleged to have done wrong, will necessarily increase the number of suspensions based on erroneous or even illegitimate reasons—perhaps a baseless accusation by a fellow employee who felt mistreated, or by a non-employee who has a personal grudge. Permitting indefinite suspensions without pay and without meaningful notice can also encourage agencies to prolong suspensions for months or years until employees give up and resign. Mr.

Cruz-Martin has now been suspended without pay for more than six months, without being questioned or given even a hint about what TSA thinks he did wrong, resulting in great financial and emotional hardship for himself and his family. TSA's policy of providing the subjects of investigations with no information until after a decision has been reached—*see supra* at 8 n.3—ensures accuracy in the same manner as any "shoot first, ask questions later" policy does.

CONCLUSION

For the reasons stated above, this 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)).

December 18, 2020

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 7,213 words, including footnotes, as counted by Microsoft Word. Excluding the parts of the brief exempted by Rule 32(f), it contains 6,264 words. 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.

/s/ Patrice M. Scully
Patrice M. Scully

Counsel for Petitioner

ADDENDUM

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
NEW YORK FIELD OFFICE

RAFAEL CRUZ-MARTIN,
Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,
Agency.

DOCKET NUMBER
NY-0752-20-0166-I-1

DATE: July 29, 2020

Patrice Scully, Esquire, Killeen, Texas, and Steve Newman, New York, New York, for the appellant.

Aaron Baughman, Arlington, Virginia, for the agency.

BEFORE
Nicole DeCrescenzo
Administrative Judge

INITIAL DECISION

On June 4, 2020, the appellant filed an appeal of the agency's action indefinitely suspending him from the position of Attorney-Advisor, SV -905-K band, for an indefinite period of time required to resolve the suspension of his security clearance. (AF), Tab 1 at 9; Tab 10. The Board has jurisdiction over the indefinite suspension action pursuant to 5 U.S.C. §§ 7511-7513 and 7701(a). The appellant withdrew his request for a hearing AF, Tab 17. For the reasons set forth below, the agency's action is AFFIRMED.

ANALYSIS AND FINDINGS

Background

At the time of the suspension of his security clearance, the agency employed the appellant as an attorney, SV -905-K band, at its Field Operations, Chief Counsel's Office. AF, Tab 1 at 9; Tab 10 at 43.

The TSA suspended the appellant's "Secret" security clearance on April 8, 2020. AF, Tab 10 at 40.

On April 11, 2020, the agency proposed the appellant's indefinite suspension for failure to maintain the security access. AF, Tab 10 at 34. He filed a response. *Id.* at 19. Deciding official Bryan Bonner, Deputy Chief Counsel for Field Operations, effected the appellant's indefinite suspension by letter dated June 3, 2020. *Id.* at 4.

This appeal followed. The appellant clarified that he contests the indefinite suspension on the basis that he was denied due process AF, Tabs 10, 18. I informed the parties that the Board maintains limited jurisdiction over suspensions based on suspension of security clearance. AF, Tab 12. The appellant requested a decision on the written record. AF, Tab 17. The record closed on July 23, 2020.[1] AF, Tab 21.

Applicable Law and Findings

The agency bears the burden of proof on the merits of its action, by preponderant evidence. 5 C.F.R. § 1201.56(a). A preponderance of the evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.56(c)(2).

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[1] The agency's motion for extension and any other outstanding motion is DENIED. AF, Tab 23.

An agency may take an adverse action based on the withdrawal of security access, or pending investigation of a security clearance, if the agency believes an employee's retention in a duty status would be detrimental to government interests. *Jones v. Department of the Navy*, 48 M.S.P.R. 680, 689-90 (1991), *aff'd as modified on recons.*, 51 M.S.P.R. 607 (1991), *aff'd*, 978 F.2d 1223 (Fed. Cir. 1992). On appeal from such an action, the only issues the Board may consider are:

1) Whether an Executive Branch employer determined the employee's position required a security clearance;
2) Whether the clearance was denied, suspended, or revoked;
3) Whether the employee was provided with the procedural protections specified in 5 U.S.C. § 7513;
4) Whether transfer to a non-sensitive position was feasible.

Department of the Navy v. Egan, 484 U.S. 518, 530-31 (1988); *see also Kaplan v. Conyers*, 733 F.3d 1148, 1151 (Fed. Cir. 2013) (en banc). The Board has no authority to review the underlying merits of a security clearance/access determination. *See Cheney v. Department of Justice*, 479 F.3d 1343, 1349-50 (Fed. Cir. 2007) citing *Department of the Navy v. Egan*, 484 U.S. 518, 529 (1988).[2]

Pursuant to 5 U.S.C. § 7513(b), employees facing an adverse action must receive: (1) "at least 30 days' advance written notice;" (2) "a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and

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[2] Further, with respect to the issue regarding the possible transfer to a non-sensitive position, the Board and the Federal Circuit have held that, absent an existing agency policy manifested by regulation, the Board lacks authority to require an agency to reassign an employee to an alternative position which does not require a security clearance. *See Griffin v. Defense Mapping Agency*, 864 F.2d 1579, 1580 (Fed. Cir. 1989); *Bolden v. Department of the Navy*, 62 M.S.P.R. 151, 154 (1994). Absent such evidence, the Board is limited to reviewing whether the appellant was provided with the procedural protections specified in 5 U.S.C. § 7513(b).

other documentary evidence in support of the answer;" (3) a right to representation; and (4) "a written decision and the specific reasons therefor[e] at the earliest practicable date." *See Gargiulo v. Department of Homeland Security*, 727 F.3d 1181, 1184, n.3 (Fed. Cir. 2013). For the reasons discussed below, I find the agency met its burden here.

The agency proved by preponderant evidence that the appellant's position required a security clearance.

The agency's burden of proof to sustain this indefinite suspension based on a security clearance action requires the agency to identify preponderant record evidence to establish it determined the employee's position required a security clearance. *Conyers*, 733 F.3d at 1151. Here, the appellant's position description states the position required a security clearance. AF, Tab 10 at 120. The appellant did not rebut this evidence. I find the appellant's position required a security clearance.

It is undisputed the appellant's security clearance was suspended.

As discussed above, the record reflects the appellant's Secret level clearance was suspended on April 8, 2020. The appellant did not rebut this evidence. I find the appellant's access to Secret information was suspended.

The agency provided the appellant the required procedural protections.

The appellant asserted the "sole issue" here is he was not provided due process of law in connection with this suspension. AF, Tab 18 at fn. 1. Specifically, the appellant, an attorney, argues "the charge stated in the Notice of Proposed Indefinite Suspension was so vague that it was impossible for Appellant to respond meaningfully to the charge, thus denying him due process." *Id.* at 7.

As discussed above, the process that was due here is defined by 5 U.S.C. § 7513(b): (1) "at least 30 days' advance written notice;" (2) "a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;" (3) a right to representation; and (4) "a written decision and the specific reasons therefor[e] at the earliest practicable date." *Id.* Here, there is no dispute that more than 30 days elapsed between the notice of proposed indefinite suspension and the agency's decision letter. Further, the record reflects the agency granted him more than 7 days to respond to the proposal. AF, Tab 10 at 4. It is also undisputed the appellant was represented by counsel when he gave an oral and written reply. *See* AF, Tab 10 at 17. Lastly, the record contains a copy of a written decision containing the reason for the indefinite suspension: the position required a security clearance, and the appellant does not have one. *Id.* at 4.

Based on the above and after consideration of the complete record, I find the above evidence meets the agency's burden to establish it provided the appellant due process. I have considered the appellant's argument that he was not provided sufficient information to respond to the investigation that caused his security clearance to be suspended. AF, Tab 18 at 10. I find the argument mistakes the appellant's due process rights in the suspension with his process rights in the security clearance determination. However, as discussed above, the Board lacks jurisdiction to consider the merits of the security clearance determination. *Egan, 484 U.S. at 529.* I find the proposal gave the appellant specific notice that the action was proposed because he had no security clearance, and this was not vague. Accordingly, the agency's action must be affirmed.

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD:

Nicole DeCrescenzo
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **September 2, 2020**, unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with one of the authorities discussed in the "Notice of Appeal Rights" section, below. The paragraphs that follow tell you how and when to file with the Board or one of those authorities. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review.

If the other party has already filed a timely petition for review, you may file a cross petition for review. Your petition or cross petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file it with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.
Washington, DC 20419

A petition or cross petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

NOTICE OF LACK OF QUORUM

The Merit Systems Protection Board ordinarily is composed of three members, 5 U.S.C. § 1201, but currently there are no members in place. Because a majority vote of the Board is required to decide a case, *see* 5 C.F.R. § 1200.3(a), (e), the Board is unable to issue decisions on petitions for review filed with it at this time. *See* 5 U.S.C. § 1203. Thus, while parties may continue to file petitions for review during this period, no decisions will be issued until at least two members are appointed by the President and confirmed by the Senate. The lack of a quorum does not serve to extend the time limit for filing a petition or cross petition. Any party who files such a petition must comply with the time limits specified herein.

For alternative review options, please consult the section below titled "Notice of Appeal Rights," which sets forth other review options.

Criteria for Granting a Petition or Cross Petition for Review

Pursuant to 5 C.F.R. § 1201.115, the Board normally will consider only issues raised in a timely filed petition or cross petition for review. Situations in which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that:

(a) The initial decision contains erroneous findings of material fact. (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific

evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

(b) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The petitioner must explain how the error affected the outcome of the case.

(c) The judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case.

(d) New and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed.

As stated in 5 C.F.R. § 1201.114(h), a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to

submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

If you file a petition or cross petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. A petition for review must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

A cross petition for review must be filed within 25 days after the date of service of the petition for review.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

NOTICE OF APPEAL RIGHTS

You may obtain review of this initial decision only after it becomes final, as explained in the "Notice to Appellant" section above. 5 U.S.C. § 7703(a)(1). By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. 5 U.S.C. § 7703(b). Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this decision when it becomes final, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

Please read carefully each of the three main possible choices of review below to decide which one applies to your particular case. If you have questions about whether a particular forum is the appropriate one to review your case, you should contact that forum for more information.

(1) Judicial review in general. As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court within **60 calendar days** of the date this decision becomes final. 5 U.S.C. § 7703(b)(1)(A).

If you submit a petition for review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

(2) Judicial or EEOC review of cases involving a claim of discrimination. This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days** after this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. ____ , 137 S. Ct. 1975 (2017). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

Contact information for U.S. district courts can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. 5 U.S.C. § 7702(b)(1). You must file any such request with the EEOC's Office of Federal Operations within **30 calendar days** after this decision becomes final as explained above. 5 U.S.C. § 7702(b)(1).

If you submit a request for review to the EEOC by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit a request for review to the EEOC via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, N.E.
Suite 5SW12G
Washington, D.C. 20507

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012. This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and your judicial petition for review "raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8) or 2302(b)(9)(A)(i), (B), (C), or (D)," then you may file a petition for judicial review with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. The court of appeals must receive your petition for review within

60 days of the date this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(1)(B).

If you submit a petition for judicial review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

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Contact information for the courts of appeals can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx