No. 2007-3322

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

WILFREDO ROMERO,

Petitioner,

v.

DEPARTMENT OF DEFENSE,

Respondent.

On Petition for Review of the
Merit Systems Protection Board
in DC0752-07-0328-I-1

BRIEF OF *AMICUS CURIAE* THE AMERICAN CIVIL LIBERTIES UNION OF THE NATIONAL CAPITAL AREA

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November 9, 2007

FORM 9. Certificate of Interest

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Wilfredo Romero v. Department of Defense

No. 2007-3322

CERTIFICATE OF INTEREST

Counsel for the (petitioner) (appellant) (respondent) (appellee) (amicus) (name of party)

ACLU of the National Capital Area certifies the following (use "None" if applicable; use extra sheets if necessary):

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The American Civil Liberties Union of the National Capital Area

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

The American Civil Liberties Union of the National Capital Area, as amicus curiae in support of Petitioner Wilfredo Romero

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

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Arthur B. Spitzer, ACLU of the National Capital Area

11/9/2007
Date


Signature of counsel

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF THE NATIONAL CAPITAL AREA, AS *AMICUS CURIAE*

STATEMENT OF ISSUE ADDRESSED BY *AMICUS*

Whether the revocation of an existing security clearance violates the holder's right to due process when the only basis for that revocation is the "reciprocal acceptance" of another body's decision that denied an upgrade to the security clearance, but that *did not* revoke the existing clearance.

STATEMENT OF THE INTEREST OF *AMICUS*

The American Civil Liberties Union of the National Capital Area is the Washington-area affiliate of the American Civil Liberties Union, a nationwide, non-profit membership organization with more than 500,000

members that has been dedicated since 1920 to protecting the civil liberties of all Americans. Among those liberties are the First Amendment right of access to the courts, and the Fifth (and Fourteenth) Amendment right of due process, or procedural fairness. The ACLU often has represented parties, and filed *amicus* briefs, in the federal courts in support of these interests. *See, e.g., Cheney v. Dep't of Justice*, 479 F.3d 1343 (Fed. Cir. 2007) (agency failed to give employee sufficient information to make meaningful response to charges against him).

This case presents issues involving these important rights, including the removal of the Petitioner from his job based only on a clear procedural error – the "reciprocal acceptance" by one administrative body of a decision regarding his security clearance that a second administrative body had never made. Because the Petitioner is proceeding *pro se*, the ACLU filed along with this brief an unopposed motion seeking leave of the Court to address why this Court's general reluctance to examine security-clearance decisions should not preclude it from granting the Petitioner the relief that he seeks.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

The Department of Defense issues security clearances to its employees through a set of Central Adjudication Facilities, or CAFs. *See*

T3-8[1] (Department of Defense Personnel Security Regulations, DoD Reg. 5200.2-R § C6.1.2.1). There are nine CAFs, each housed within a different component of the Department. Two play a role in this case: the CAF for the Washington Headquarters Service (WHS-CAF) and the CAF for the Defense Intelligence Agency (DIA-CAF). When a component's CAF denies an employee's request for a clearance or revokes an existing clearance, the employee can appeal the decision to the component's Security Appeals Board, or SAB. T3-13 (DoD Reg. 5200.2-R § C8.2.2.3). Once a clearance is granted, it can be revoked only by the component that granted it, not by another component. *See* T10-5 (Director of Central Intelligence Directive 6/4, Annex F, Part 1(e) ("[T]he agency *that made the oiginal eligibility determination* may use new information obtained by another organization to eadjudicate the person's continued eligibility . . . .") (emphasis added)).

Wilfredo Romero is a non-probationary career employee who worked as an auditor at the Department's Office of the Inspector General starting in 1999. That job requires a Secret security clearance, T1-5, which Mr. Romero obtained through the WHS-CAF.

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[1] Mr. Romero attached copies of relevant documents to the informal brief that he filed with this Court. Some of those documents are organized by tab number; others, by appendix number. For efficiency, we cite the record documents as either Tx-y (for tab documents) or Ax-y (for appendix documents), where x is the tab or appendix number and y is the page number within the document.

In 2000, Mr. Romero married a citizen of Honduras employed in the United States by the Honduran embassy. T9-2. He advised the Department's security office when he and his future wife began dating and again when they were married, *id.*, but this did not result in the revocation of his clearance. That result is consistent with the applicable security guidelines, which indicate that marriage to a foreign citizen does not preclude a person from holding a Secret clearance, even though it might justify the denial of a Secret clearance absent mitigating factors. *See* T9-3 (citing DoD Reg. 5200.2-R and Director of Central Intelligence Directive 6/4).

In 2004, Mr. Romero's supervisor asked the DIA-CAF to grant Mr. Romero eligibility to access Sensitive Compartmented Information (SCI) so that Mr. Romero could assist with auditing work at the National Security Agency. T3A-1. (The request apparently was made to the DIA-CAF rather than to the WHS-CAF because it pertained to work at the NSA rather than in the Office of the Inspector General.) Permission to access SCI is far more difficult to obtain than a Secret clearance. *See, e.g., Guillot v. Garrett*, 970 F.2d 1320, 1322 & n.1 (4th Cir. 1992).[2] The only question before the DIA-

[2] "Access to Sensitive Compartmented Information requires clearance beyond the 'Top Secret' level. SCI is classified information that is required

CAF was whether Mr. Romero met the very high standard for SCI access; it was not asked to determine whether Mr. Romero still satisfied the much lower standard for a Secret clearance.

Nevertheless, on September 24, 2004, the DIA-CAF issued a Letter of Intent – akin to a preliminary decision – to deny Mr. Romero's request for access to SCI *and* to revoke his Secret clearance. T5-1.[3] It issued a Letter of Denial, converting its preliminary decision into a final one, on March 8, 2005. T6-1.

Mr. Romero could have appealed that decision to the DIA-SAB in either of two ways: by presenting a written argument to the DIA-SAB directly or by appearing before an administrative judge who would then make a written recommendation to the DIA-SAB. *See* T3-13 (DoD Reg. 5200.2-R §§ C8.2.2.4.1 (written argument), C8.2.2.4.2 (personal appearance)). He chose the latter option. On August 26, 2005, the administrative judge recommended that the DIA-SAB affirm the DIA-

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to be handled exclusively within formal access control systems established by the Director of Central Intelligence." *Id.* at 1322 n.1 (citation omitted).

[3] The DIA-CAF's decision stated that Mr. Romero "will not be eligible for access to SCI or collateral classified information." T5-1. "Collateral classified information" is any information restricted to those with a need to know. All involved treated revoking eligibility for access to collateral classified information as equivalent to revoking a security clearance, and we assume that this understanding is correct.

CAF's decision both with respect to eligibility for access to SCI and the Secret clearance. T9-1.

The DIA-SAB, however, did not follow this recommendation. Instead, on December 7, 2005, it issued a decision stating only that Mr. Romero "do[es] not currently meet the minimum personnel security standards *for SCI*" and that his "eligibility for access *to SCI* is denied effective this date." T7-1 (emphasis added). It never mentioned Mr. Romero's Secret clearance (or, equivalently, his eligibility to access collateral classified information).

Next, something strange happened. On December 16, 2005, the WHS-CAF issued a memorandum to Mr. Romero entitled "Reciprocal Acceptance of Denial of Eligibility for Access to Sensitive Compartmented Information (SCI), dated 7 December 2005." T8-1. It stated:

> This is to advise you that this office has been notified of the Defense Intelligence Agency's final decision to deny your eligibility for *access to SCI.*
>
> In accordance with [applicable regulations and rules], this office reciprocally accepts the Defense Intelligence Agency's final decision. Therefore, the eligibility granted to you by the Washington Headquarters Services Consolidated Adjudications Facility for *access to classified information and to occupy a sensitive position* has been revoked.

Id. (emphasis added). It said nothing regarding why the reciprocal acceptance of a denial of eligibility to access SCI should require the

revocation of a Secret clearance. Nor did it – or any other communication sent to Mr. Romero – say that the WHS-CAF's decision could be appealed to the WHS-SAB or any other body.

Because Mr. Romero's auditor position required a Secret clearance, *see* T1-5, the revocation of his clearance ultimately led to his removal from the Department on December 29, 2006. T16-1 (final decision on proposed removal); *see also* T11-1 (July 26, 2006, notice of proposed removal).

Mr. Romero appealed his removal to the Merit Systems Protection Board. On March 28, 2007, an Administrative Judge issued an initial decision affirming the agency's action. A1-1. The full Board denied his petition for review on July 20, 2007. A2-2. Mr. Romero filed a timely notice of appeal to this Court.

Separately, Mr. Romero also challenged the procedural validity of the indefinite suspension that preceded his removal. After an Administrative Judge upheld the agency's action in her initial decision, the Merit Systems Protection Board reversed the indefinite suspension. *See* A3-1. Further proceedings regarding the indefinite suspension are ongoing before the Board. Nothing in that proceeding should impact this Court's decision in this case regarding the validity of Mr. Romero's removal.

SUMMARY OF THE ARGUMENT

The Merit Systems Protection Board rejected Wilfredo Romero's appeal on the ground that it could not review the revocation of a security clearance. It is correct that the Board cannot review the revocation of a security clearance, but Mr. Romero's clearance was never actually revoked. One component of the Department of Defense simply assumed, *erroneously*, that another component of the Department had revoked it. The Board, and this Court, are authorized – indeed, required – to reverse that error, as the Supreme Court's relevant decision makes clear.

ARGUMENT

Mr. Romero lost his job in a manner seemingly lifted from *Alice's Adventures in Wonderland*: one administrative body denies him access to Sensitive Compartmented Information, but says nothing about his easier-to-obtain Secret security clearance; relying only on the first body's decision, a second body says that he must lose his Secret security clearance; and based entirely on the second body's through-the-looking-glass decision, the Defense Department fires him. This procedure belongs in the courtroom of the King of Hearts, not in a system committed to the value of due process.

This Court should hold that Mr. Romero's clearance was not validly revoked, that as a result his removal was improper, and that he should be

reinstated to his position unless and until his clearance is validly revoked or he is otherwise justifiably removed. The Court can do so without running afoul of *Department of the Navy v. Egan*, 484 U.S. 518, 520 (1988).

When reviewing decisions by the Merit Systems Protection Board, this Court must "set aside any agency action, findings, or conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 7703(c)(1); *see Kewley v. Dep't of Health & Human Servs.*, 153 F.3d 1357, 1361 (Fed. Cir. 1998) (describing the applicable standard of review). If ever a decision was arbitrary and capricious, this one was, and it therefore ought to be reversed.

Nevertheless, the Board concluded that it could not consider Mr. Romero's challenge to his removal "because such review would entail examining the underlying merits of the agency's security clearance revocation determination." A1-5 (AJ's Initial Decision). That decision rested on a mistake of law.

It is true that review by both the Board and this Court is limited in cases involving a removal based on the revocation of a security clearance. The Supreme Court has held that the Board has no authority "to review the substance of an underlying decision to deny or revoke a security clearance in the course of reviewing an adverse action," *Egan*, 484 U.S. at 520 (1988),

and this Court is likewise constrained, *see Cheney v. Dep't of Justice*, 479 F.3d 1343, 1352 (Fed. Cir. 2007). What the Board and this Court must do, however, is "determine whether a security clearance was denied, whether the security clearance was a requirement of the appellant's position, and whether the procedures set forth in [5 U.S.C. § 7513] were followed." *Hesse v. Dep't of State*, 217 F.3d 1372, 1376 (Fed. Cir. 2000) (citing *Egan*). In this case, the Board was too quick to conclude that Mr. Romero's Secret security clearance had actually been revoked.

It is undisputed that, at the beginning of 2004, Mr. Romero held a valid Secret clearance. Since then, no Executive Branch body has made a decision on the merits that this clearance should be revoked. The proceedings before the Defense Intelligence Agency resulted in a decision that denied Mr. Romero eligibility for access to SCI, but said nothing about his Secret clearance. *See* T7-1 (DIA-SAB letter). The Washington Headquarters Service then issued a "reciprocal acceptance" of a purported decision by the DIA's appeals board revoking the Secret clearance; *but in fact there had been no such decision*, and the WHS never made its own substantive determination that the Secret clearance should be revoked. *See* T8-1 (WHS-CAF letter). Since there was no decision on the merits revoking

Mr. Romero's clearance, the Board erred in assuming that it validly had been revoked.[4]

Reviewing the procedural validity of a purported reciprocal acceptance is not an impermissible incursion into the substance of a security clearance decision. The sole purpose of the review is to determine whether there was, in fact, a decision on the merits denying or revoking an employee's clearance. This does not require an assessment of the "underlying reasons for the agency's clearance determination." *Egan*, 484 U.S. at 524. It does not require the Board or this Court to second-guess the agency's "[p]redictive judgment" regarding an individual's likely future

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[4] The Department cannot seriously argue that the decision reciprocally accepted by WHS was the initial decision of the DIA-CAF, which did address Mr. Romero's Secret clearance, rather than the appellate decision of the DIA-SAB, which did not. The WHS's reciprocal acceptance explicitly cites the DIA decision "dated 7 December 2005," the date of the DIA-SAB's decision. T8-1. Moreover, if one Department of Defense component (*e.g.*, WHS) could reciprocally accept the decision of the CAF of another component (*e.g.*, DIA), even when the second component's SAB does not affirm the decision of its CAF on appeal, that would circumvent an employee's right to appeal adverse security clearance determinations. *See* T3-13 (DoD Reg. 5200.2-R § C8.2.2.4) (An employee shall be "[a]fforded an opportunity to appeal [a CAF's final decision] to the DoD Component Personnel Security Appeals Board."). An employee does not have the right to appeal the reciprocal acceptance of an adverse clearance determination, presumably under the theory that the determination itself already had been (or could have been) subjected to appellate review. Thus, to permit the reciprocal acceptance of a CAF's adverse determination even when it is appealed and not affirmed by the SAB on appeal would effectively nullify the regulations guaranteeing appellate review within the Executive Branch.

conduct, which "must be made by those with the necessary expertise in protecting classified information." *Id.* at 529. It involves only the determination of the existence or non-existence of a specific procedural fact, a determination falling squarely within the institutional competence of an adjudicative body rather than of the Executive Branch. This is precisely the sort of review that the Supreme Court must have had in mind when it said the Board (and the courts) *could* review the question whether a security clearance had, in fact, been denied or revoked. *See Egan*, 484 U.S. at 530-31.

Because this Court has limited authority to review adverse personnel actions based on security clearance decisions, it is tempting for an agency to use the clearance process to rid itself of troublesome employees without meaningful review. It is possible that this is what happened here: before the WHS issued its "reciprocal acceptance," Mr. Romero had contacted the EEOC, alleging that the Department denied him promotions on the basis of age and then retaliated against him for complaining about it. T1A-3 (EEOC counselor's report). While it is generally beyond the Board's or this Court's power to pass judgment on whether a clearance was denied based on a

legitimate security concern or an illegitimate retaliatory motive,[5] the Court should not cabin its review of clearance-based dismissals any more than is required by *Egan* or necessary to protect core executive functions.

It is clear that this Court has the authority to determine whether an employee's security clearance was, in fact, denied or revoked. *See Egan*, 484 U.S. at 530; *Cheney*, 479 F.3d at 1352; *Hesse*, 217 F.3d at 1376. Exercising that authority, it should hold that an agency cannot dismiss an employee for failure to maintain a required clearance when there has, in fact, been no decision on the merits that his clearance should be revoked.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Merit Systems Protection Board and order that Mr. Romero be reinstated.

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[5] A revocation based on *unconstitutional* retaliation would not, however, be subject to the limitations of *Egan*. *See Webster v. Doe*, 486 U.S. 592 (1988).

Respectfully submitted,

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November 9, 2007

CERTIFICATE OF COMPLIANCE
WITH RULES 29(d) AND 32(a)(5), (6) AND (7)

1. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) in that it contains 9,208 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) in that it has been prepared in 14-point Times New Roman type using Microsoft Word 2000 for Windows.

Arthur B. Spitzer

[*] Counsel wishes to acknowledge the assistance of Mr. James Cox, a recent law school graduate now awaiting admission to the bar, whose efforts contributed very materially to the preparation of this brief.

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of the American Civil Liberties Union of the National Capital Area, as *Amicus Curiae* were served upon:

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by first-class mail, postage prepaid (and a courtesy copy by e-mail), this ninth day of November, 2007.

Arthur B. Spitzer