IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 2010-3137

WILFREDO ROMERO,
Petitioner,

v.

DEPARTMENT OF DEFENSE,
Respondent,

On Petition for Review of the Merit Systems Protection Board in Nos. DC-0752-07-0328-M-3 and DC-0752-06-0136-M-2

REPLY BRIEF OF PETITIONER

ARTHUR B. SPITZER
ACLU OF THE NATION'S CAPITAL
1400 20th Street, N.W.
Suite 119
Washington, D.C. 20036
(202) 457-0800

JAMES C. COX
JENNER & BLOCK LLP
1099 New York Ave., N.W.
Suite 900
Washington, D.C. 20001
(202) 639-6000

Counsel for Petitioner

February 18, 2011

TABLE OF CONTENTS

TABLE OF AUTHORITIES*

CASES

STATUTES

* Authorities upon which we chiefly rely are marked with asterisk.

OTHER AUTHORITIES

SUMMARY OF THE ARGUMENT

The Department of Defense argues that it validly revoked Wilfredo Romero's Secret security clearance even though it is undisputed that no adjudicative body ever made a final decision on the merits that his Secret clearance should be revoked. Unsurprisingly, the Department points to no statute or regulation requiring or justifying that quixotic result. Instead, it asserts that Mr. Romero necessarily lost his Secret clearance when he was denied a *higher* clearance, obfuscating relevant differences in the eligibility requirements for the two clearance types. Notwithstanding the morass of internal procedures related to security clearance adjudication on which the Department relies, that assertion is simply wrong.

The core facts relevant to Mr. Romero's appeal are clear. The first body to consider Mr. Romero's case, the Defense Intelligence Agency ("DIA"), issued a final decision concluding only that Mr. Romero was ineligible for access to Sensitive Compartmented Information ("SCI"), a level of classified information above Top Secret. It never mentioned Mr. Romero's existing Secret clearance. The second body to consider the case, the Washington Headquarters Service ("WHS"), issued a decision that "reciprocally accept[ed]" the first body's decision, with no further discussion of the merits. Nevertheless, the second body stated that its decision covered not only the denial of SCI access but also the revocation of

Mr. Romero's Secret clearance – an "accept[ance]" of a revocation that did not exist.

The Department defends its process by arguing that the adjudicative standards for Secret clearances and access to SCI are the same, such that the denial of one requires the denial of the other. But the regulations establishing common adjudicative guidelines and investigative standards simply indicate that the same considerations are relevant at different clearance levels, not that the eligibility requirements are the same. Indeed, at the time of the proceedings regarding Mr. Romero's security clearance, spouses of foreign nationals (like Mr. Romero) were barred by directive from receiving SCI access eligibility but routinely obtained Secret security clearances. Thus, there is no basis to conclude that the Department's final decision denying eligibility to access SCI was an adequate substitute for a final decision on the merits regarding the Secret clearance.

Nor is there any basis to dispute that the lack of a final decision on the merits harmed Mr. Romero. The Department concedes that the Merit Systems Protection Board and this Court cannot attempt to divine whether the Department would have revoked Mr. Romero's Secret clearance had it actually made such a final decision. And because the eligibility requirements for SCI access are more stringent than those for a Secret clearance, the Department's adverse SCI determination does not establish what determination it would have made regarding

the Secret clearance. The lack of a final decision plainly harmed Mr. Romero in fact, and furthermore is the kind of fundamental error for which harm can be presumed. This Court should reverse the MSPB's decision and remand this matter again for the MSPB to award Mr. Romero appropriate relief, including back pay.

ARGUMENT

I. MR. ROMERO'S APPEAL RAISES THE SAME ISSUES THIS COURT REMANDED TO THE MSPB AND IS NOT LIMITED BY THE LAW OF THE CASE.

In *Romero v. Department of Defense*, 527 F.3d 1324 (Fed. Cir. 2008) ("*Romero I*"), this Court vacated an earlier decision by the MSPB affirming the revocation of Mr. Romero's security clearance. *Id.* at 1330. Because the MSPB had failed to "address Mr. Romero's arguments that the Department failed to follow its own regulations in revoking his Secret security clearance," *id.* at 1329, this Court remanded so that the issues could be "addressed by the Board in the first instance," *id.* at 1330. The two arguments identified by this Court as subject to its remand order are the same arguments that, after remand, Mr. Romero has raised again in the instant appeal:

> First, he argues that the DIA-SAB was authorized to review the denial of his eligibility for access to SCI, but not to revoke his Secret security clearance.
>
> Second, he argues that the DIA-SAB did not actually revoke his Secret security clearance, even if it had authority to do so. As a result, he asserts that the WHS-CAF's "reciprocal revocation" of his Secret security clearance was invalid.

Id. at 1329-30. This Court was "not in a position to decide" these issues during the prior appeal "[b]ecause the answer . . . may turn on the way that the Defense Department's procedures are interpreted and have been applied, matters that are not fleshed out in the record before us." *Id.* at 1330.

Nevertheless, the Department argues that Mr. Romero's appeal is partially barred by the law of the case. According to the Department, Mr. Romero cannot claim that the absence of a final decision by DIA-SAB revoking his Secret clearance violated his right under 5 U.S.C. § 7513 to a "written decision" giving "specific reasons" for the clearance revocation, because the *Romero I* Court "expressly held that the agency complied with section 7513" and "limited the inquiry [on remand] to whether internal agency procedures were followed." Resp. Br. at 21-22.

The problem with the Department's position is that Mr. Romero's current Section 7513 claim *is based on the Department's failure to follow its internal procedures*. As noted above, one of the issues on remand was whether, because the DIA did not issue a final decision on the merits revoking Mr. Romero's Secret clearance, "the WHS-CAF was required to provide him with a statement of reasons, an opportunity to respond, and an opportunity to seek review of the revocation at the Personnel Security Appeals Board." *Romero I*, 527 F.3d at 1330. These procedural rights are established by Section 7513. If the Department denied

those rights by failing to follow its own procedures, then it necessarily violated Section 7513 as well. And because the Court believed it was "not in a position to decide whether Mr. Romero's procedural objections have merit" without further factual development before the MSPB, it reserved the entire issue for consideration after remand. *Id.*

The Department relies on the Court's statement that "[t]he Board also did not err in finding that the agency had complied with the requirements of section 7513," *id.* at 1329, but divorces that statement from its context. In addition to the arguments described above, Mr. Romero in his initial appeal argued that the Department violated his rights under Section 7513 regardless of whether it complied with its internal procedures. In the statement quoted by the Department, this Court rejected that argument, and it is not at issue in this second appeal. But as its remand order makes clear, the Court did not foreclose the possibility that the Department's violation of its internal policies could have amounted to a violation of Section 7513.

Moreover, the Department's "law of the case" claim has no bearing on whether the arguments Mr. Romero has raised are properly before the Court. *Romero I* recognized that "Section 7513 is not the only source of procedural protections for employees subject to adverse actions based on security clearance decisions; agencies must also follow the procedures established by their own

regulations." *Romero I*, 527 F.3d at 1328; *accord Drumheller v. Dep't of the Army*, 49 F.3d 1566, 1569-73 (Fed. Cir. 1995). The errors that form the basis for this appeal involve the Department's failure to follow its own procedures; some implicate violations of Section 7513 as well. Under *Drumheller*, however, the internal procedural violation alone is a sufficient basis for reversal. Because both statutory and regulatory procedural violations leading to an adverse personnel action are reviewed under 5 U.S.C. § 7701, this Court can resolve Mr. Romero's appeal without addressing the Department's argument.

II. THE REVOCATION OF MR. ROMERO'S SECRET CLEARANCE WAS PROCEDURALLY INVALID.

Although this Court remanded to the MSPB to develop a factual record about how the Department's regulations and directives have been interpreted and applied, the ultimate question here is a legal one: whether Section 7513 and the Department's procedures permit the revocation of a Secret clearance based solely on "reciprocal acceptance" of a decision that did not address the Secret clearance but rather denied an upgrade to a higher clearance. The MSPB held that the answer is yes. That decision rests on a legal error. The MSPB also relied on improper speculation about what the Department would have done, but did not do. As a result, it necessarily was arbitrary and capricious and therefore must be reversed. *See Germano v. United States*, 26 Cl. Ct. 1446 (1992) (legal error is necessarily arbitrary and capricious); *Malave v. Holder*, 610 F.3d 483, 487 (7th

Cir. 2010) ("administrative decisions must stand on better footing than speculation"); 5 U.S.C. § 7703(c) (defining standard of review).

The Department asks for deference to its contrary view of the law. *See* Resp. Br. at 37 (citing *Smith v. Nicholson*, 451 F.3d 1344, 1349-50 (Fed. Cir. 2006)). But there are three barriers to deference in this case. *First*, as this Court recognized in *Smith*, deference is appropriate only "if the meaning of the words used [in the regulation] is in doubt" and the agency's interpretation is not "plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). Here, as discussed in Subsection B, below, the Department's core position – that the same substantive standards govern clearance determinations at different levels – is flatly inconsistent with the plain language of the controlling regulations and directives.

Second, even if an agency offers a plausible interpretation of an ambiguous regulation, its interpretation must "reflect the agency's fair and considered judgment on the matter in question." *Auer v. Robbins*, 519 U.S. 452, 462 (1997). Prior decisions have distinguished interpretations that explain "longstanding agency practice" from "'post hoc rationalizations' to which courts will not defer." *Azko Nobel Salt, Inc. v. Federal Mine Safety & Health Rev. Comm'n*, 212 F.3d 1301, 1305 (D.C. Cir. 2000). Here, the Department's litigation position that the same substantive standard governs all clearance determinations contradicts its

established practice of allowing the spouses of foreign citizens to obtain Secret clearances but not eligibility to access SCI. Furthermore, the Department's interpretative documents are often ambiguous, and its characterizations of those documents to this Court exemplify the "post hoc rationalizations" disapproved in *Azko Nobel*.

Third, and perhaps most obviously, an agency may only rely on an interpretation that actually purports to interpret the regulations and directives in question. Here, as discussed in Subsection C, below, the three interpretive documents the Department cites predate or ignore a key controlling directive that on its face compels a different result.

Faced with unambiguous regulations and directives establishing different eligibility criteria for Secret clearances and SCI access eligibility, and with a collection of agency interpretations that are confusing at best and irrelevant at worst, this Court should reverse the MSPB's erroneous legal judgment.

A. No Adjudicative Body Made a Final Decision on the Merits that Mr. Romero's Secret Clearance Should Be Revoked.

As detailed in Mr. Romero's opening brief, this case involves administrative proceedings seemingly drawn from the court of Lewis Carroll's Queen of Hearts: Mr. Romero lost his Secret security clearance, and therefore his job, even though no adjudicative body ever made a final decision on the merits that the clearance should be revoked. *See* Op. Br. at 18-21.

The historical facts are not in dispute. The DIA's Central Adjudication Facility ("DIA-CAF") issued notifications expressing intent to revoke the Secret clearance, *see* JA 44, 47, but those actions were not final determinations revoking the clearance. Mr. Romero had the right to appeal to the DIA's Security Appeals Board ("DIA-SAB"), *see* JA 282 (DoD Reg. 5200.2-R § C8.2.2.3), and he exercised that right. A DOHA administrative judge hearing his appeal recommended that DIA-SAB affirm DIA-CAF's decision regarding the Secret clearance, JA 49, but that recommendation does not have the force of law, *see* JA 282-83 (DoD Reg. 5200.2-R § C8.2.2.4). DIA-SAB's actual decision resolving the appeal – which was DIA's final decision – never mentioned the Secret clearance at all, dealing exclusively with Mr. Romero's eligibility for access to SCI. JA 53. And WHS-CAF simply "reciprocally accept[ed]" that decision without performing any independent evaluation. JA 54.

The Department fundamentally accepts the conclusion that there was no final merits decision addressing the Secret clearance. *See* Resp. Br. at 4-8. It does not argue that any of the DIA's preliminary actions preceding the DIA-SAB's decision were final decisions revoking Mr. Romero's Secret clearance. It does not assert that WHS-CAF made any determination about the merits. And it does not seriously defend the MSPB's assertion that, "although the SAB decision never specifically refers" to Mr. Romero's Secret clearance, DIA-SAB "likely" intended

to revoke that clearance. JA 31-32. As noted in Mr. Romero's opening brief, that conclusion rests on pure speculation and therefore is inconsistent with Section 7513 and the Department's internal regulations, which require a reasoned decision. *See* Op. Br. at 20-21.

B. The Denial of Mr. Romero's SCI Access Eligibility Did Not Require Revocation of his Secret Clearance Because More Stringent Substantive Requirements Applied.

Instead, the Department bases its position that Mr. Romero's Secret clearance validly was revoked on the claim that, as a matter of law, a person ineligible for SCI access necessarily is ineligible for a Secret clearance as well. Resp. Br. at 24-25. ("In determining eligibility under the common adjudicative guidelines, secret clearances and SCI access are treated differently in only one respect: the depth of the investigation undertaken."). If that proposition were true, then it might make sense for WHS-CAF to revoke a Secret clearance based on the "reciprocal acceptance" of a decision to deny eligibility for SCI access. But that legal claim is incorrect.

Contrary to the Department's core theory, different substantive standards apply to different clearance levels. The Department conflates procedural rules and adjudicative guidelines, which are shared among all security clearance adjudications, with eligibility requirements, which vary depending on the clearance sought. In doing so, it fundamentally misconstrues the governing regulations.

The issue raised with respect to Mr. Romero's clearance – potential foreign influence due to a familial relationship – provides a clear example. At the time of DIA-SAB's decision, Mr. Romero's marriage to a Honduran national was an absolute bar to eligibility for SCI access. The directive governing SCI eligibility determinations stated:

> 5. Personnel Security Standards.
>
> Criteria for security approval of an individual on a need-to-know basis for access to SCI are as follows:
>
> a. The individual requiring access to SCI must be a US citizen.
>
> b. *The individual's immediate family must also be US citizens.*
>
> . . .

JA 400 (DCID 6/4) (emphasis added).[1]

No parallel prohibition regarding the citizenship of family members existed for Secret and other lower-level clearances. The regulation governing eligibility for such clearances imposed several absolute requirements – for example, that "[o]nly United States citizens shall be granted a personnel security clearance" absent a formal waiver – but none pertaining to family members. *See* JA 221 (DoD Reg. 5200.2-R § C2.1.1). It listed several "security standards" subject to "an overall common sense determination based upon all available facts," one of

[1] That bar was abrogated in 2008, three years after the decision in Mr. Romero's case. *See* Intelligence Community Directive No. 704 at 3 (§ E).

which deals with family members living abroad, but none of which deals with family members' citizenship. JA 221, 223 (DoD Reg. 5200.2-R §§ C2.2.1, C.2.2.1.11.1). Finally, it listed 13 adjudicative guidelines, including "[f]oreign influence," that "should be evaluated in the context of the whole person," considering "[a]ll available, reliable information about the person, past and present, favorable and unfavorable." JA 338-39 (DoD Reg. 5200-R, App. 8, at 132-33). Among the factors potentially indicating foreign influence are "an immediate family member" who "is a citizen of, or resident or present in, a foreign country" and "relatives, cohabitants, or associates who are connected with any foreign government" (as Mr. Romero's spouse, an employee at her nation's embassy, was). JA 343 (DoD Reg. 5200.2-R, App. 8, at 137). While those conditions "*could* raise a security concern and *may* be disqualifying," they are not necessarily so. *Id.* (emphasis added).

The distinct treatment of applicants with non-U.S. citizen family members is just one of several substantive differences in eligibility standards. For example, an applicant cannot be approved for SCI access eligibility absent a waiver if a family member is "subject to physical, mental, or other forms of duress by a foreign power"; is subject to duress "by persons who may be or have been engaged in criminal activity"; or has "advocate[d] the use of force or violence to overthrow the Government of the United States." JA 400 (DCID 4/6, § 5.c). No parallel

mandatory requirements exist for collateral clearances.[2] As the Department's own directive recognizes, the failure to meet such "additional but not duplicative requirement[s] may not necessarily adversely affect a person's continued eligibility" for existing clearances and access. JA 445 (DCID 6/4, Annex F, § 1(e)).[3]

The evidence presented to the MSPB regarding the Department's actual practices confirms the distinction between DCID 6/4's substantive requirements for SCI access eligibility and DoD Regulation 5200.2-R's substantive requirements

---

[2] The Department asserts that these additional prohibitions "appl[y] to applicants for SCI access at the nomination stage," but do not apply to the actual clearance adjudication process once a person is nominated. Resp. Br. at 56 n.17; *accord* Resp. Br. at 32 n.10, 45. The Department's interpretation would have the bizarre consequence that some people could not be nominated for SCI access eligibility but, if inadvertently nominated, could actually be approved. It is not surprising, then, that this interpretation is inconsistent with the plain language of the controlling directive: DCID 4/6 states that the familial citizenship requirement and other additional SCI-specific requirements are "[c]riteria for *security approval* of an individual on a need-to-know basis for access to SCI," not criteria for *nomination* for security approval. JA 400 (DCID 4/6, § 5).

[3] The Department argues that this provision actually supports its position, because the failure to meet a requirement for SCI access eligibility "*may* adversely affect his continued eligibility for the secret clearance." Resp. Br. at 47. But the Department's argument requires more. The Department could not validly revoke Mr. Romero's Secret clearance solely based on the SCI denial unless failure to meet an SCI requirement *necessarily would* affect his continued eligibility for the secret clearance. DCID 6/4 makes clear that is not the case: revoking a lower clearance requires a separate substantive evaluation. *See* JA 445 (DCID 6/4, Annex F, § 1(e)) ("[T]he agency that made the original eligibility determinations [granting a different type of clearance or access] may use new information obtained by another organization *to readjudicate the person's continued eligibility*." (emphasis added)).

for collateral clearances. J. William Leonard, former Director of Security Programs for the Secretary of Defense and chair of an OMB working group on security clearance reciprocity, testified that "there is a per se requirement or per se prohibition to grant someone access eligibility to SCI if they have an immediate family member who's a non-U.S. citizen," but "[t]hat is not a per se condition for collateral or Top Secret, Secret, or Confidential information." JA 95 (12/15/2009 Hearing Tr. at 159:19-24). He explained that "the whole idea behind a special access program" like SCI "is to establish additional eligibility criteria over and above the normal criteria, again because of the sensitivity or the level of the threat." JA 95 (*id.* at 158:10-13). On cross-examination, he confirmed that the same person could maintain a Secret or Top Secret clearance while having his application for SCI access eligibility rejected: "I'm married to a Canadian. I'll get a TS [Top Secret] clearance any day of the week, all things being equal. I'm ineligible for SCI." JA 108 (*id.* at 213:8-10).

As noted in Mr. Romero's opening brief, the Department's Office of Hearings and Appeals has recognized that the denial or revocation of SCI access eligibility does not control a person's eligibility for other clearances. Op. Br. at 29 n.9. In *In the matter of [Redacted]*, No. 08-03707 (Dep't of Defense Office of Hearings & Appeals Nov. 25, 2008), included in the Appendix at JA 459, the Office determined that an employee already had lost SCI access eligibility for

smoking marijuana, but proceeded to conduct a separate analysis of whether the employee also should lose his Top Secret clearance. *See* JA 463. That entire adjudication would have been pointless had the same eligibility requirements applied to those two clearance levels.

Indeed, contrary to the Department's assertion, *see* Resp. Br. at 43-44, the MSPB's decision in this case also acknowledged this difference in substantive standards. In describing the DOHA Administrative Judge's non-binding recommendations to DIA-SAB, the MSPB stated that "the Administrative Judge's primary focus was the Secret clearance, rather than SCI eligibility, *due to the prohibition in DCID 6/4 against SCI eligibility for any individual with foreign immediate family members.*" JA 31 (emphasis added). The MSPB reasoned that, when the Administrative Judge discussed factors that could mitigate concerns about potential foreign influence over Mr. Romero, it could only have been addressing the Secret clearance; those factors were irrelevant to the SCI access eligibility determination because of DCID 6/4's *per se* rule. *Id.*; *cf.* Resp. Br. at 56 (asserting otherwise). Although the MSPB later concluded that Mr. Romero "has failed to show . . . that the DIA-CAF's denial of his SCI eligibility did not automatically revoke his collateral access," JA 32, it did not explain how automatic revocation could be justified given the difference between the substantive eligibility standards that it had itself recognized.

Thus, in numerous ways, including familial citizenship, the regulatory requirements for SCI are stricter than those for a Secret clearance. The Department's contrary argument, which is at the heart of its defense of the MSPB's decision on remand, flies in the face of the plain language of the regulations and directives that the Department concedes are controlling. Because those regulations and directives have created a class of people eligible for a Secret clearance but ineligible for access to SCI, it would be illogical to say that denial of the higher clearance also requires denial of the lower.[4] As discussed below, nothing in the Department's internal procedures sanctions such a bizarre result.

C. The Regulations, Directives, and Memoranda Cited by the Department Do Not Compel a Contrary Result.

The Department further claims that denial of SCI access eligibility requires the revocation of a preexisting Secret clearance because "the adjudicative standards for SCI access and collateral clearances are basically the same." Resp. Br. at 24. That claim conflates the procedural standards governing how clearance adjudications are conducted with the substantive standards governing whether access should be granted. The Department is right that there are "common adjudicative guidelines for determining eligibility for access to classified

[4] Respondent's position is akin to arguing that a physician who unsuccessfully seeks to become Board Certified in a specialty must automatically lose her license to practice medicine, or that a teacher who unsuccessfully seeks to become a principal must automatically lose his license to teach.

information" and a "common set of investigative standards for background investigations." JA 513 (Exec. Order 12968). But nothing in the controlling regulations and directives says that, in applying those common guidelines, the Department is compelled – notwithstanding the different eligibility requirements discussed above – to reach the same substantive outcome regarding clearances at different levels.

To the contrary, the regulations and directives make clear that granting a higher clearance implies eligibility for a lower clearance, but not vice versa, and that denying a lower clearance implies ineligibility for a higher clearance, but not vice versa. The contrary theory, espoused by the Department for the purpose of winning this case, would be irrational.

Section C4.1.1 of DoD Regulation 5200.2-R states:

> Adjudicative determinations for . . . access to classified information (including those pertaining to SCI) made by designated DoD authorities will be mutually and reciprocally accepted by all DoD Components without requiring additional investigation . . . .
>
> Whenever a valid DoD security clearance or access eligibility is on record, Components shall not request DIS or other DoD investigative organizations to forward prior investigative files for review *unless . . . [t]he individual concerned is being considered for a higher level clearance* (e.g., Secret or Top Secret) or the individual does not have an access authorization and is being considered for one.

JA 265-66 (emphasis added); *accord* JA 265 (DoD Reg. 5200.2-R § C.4.1.1). Thus, if one Department component had granted a person a Secret clearance, the application of common adjudicative guidelines would require another component to grant the same person a Secret clearance without conducting a duplicative adjudication. But the common guidelines embodied in DoD Regulation 5200.2-R would not require the second component to grant that applicant SCI access eligibility – "a higher level clearance" – without "request[ing] . . . prior investigative files for review" and, if necessary, conducting further investigation and adjudication.

Section C3.5.2.3 supports the same conclusion. That provision states:

> [A] TOP SECRET security clearance shall not be a prerequisite for access to SCI. Determination of eligibility for access to SCI . . . shall include eligibility for access to TOP SECRET and below.

JA 253. The Department asserts that "this provision applies to all determinations of eligibility, whether favorable or unfavorable." Resp. Br. at 39. Thus, in the Department's view, a denial of eligibility for SCI access would also "include [in]eligibility for access to TOP SECRET and below." But that reading is inconsistent with the plain language of the regulation. DoD Regulation 5200.2-R consistently uses the terms "eligible" or "eligibility" to refer only to positive

determinations of eligibility, not negative determinations of ineligibility.[5] Indeed, an interpretive memorandum relied on by the Department explicitly distinguishes between "security clearance and SCI access eligibility determinations" (positive determinations) and "[c]learance and SCI access denials or revocations" (negative determinations). *See* JA 458 (Money Memorandum). Section C3.5.2.3 addresses whether a Top Secret clearance is a prerequisite to SCI access eligibility; in that context, the function of the second sentence is to explain that it is not, because a decision granting SCI access eligibility also functions as a determination of eligibility for that easier-to-obtain Top Secret clearance. Moreover, reading "eligibility" to include "ineligibility" would lead to the nonsensical result that a person eligible for a Secret clearance could have that clearance revoked simply because he does not meet a more stringent requirement applicable only to SCI access. The only fair reading of Section C3.5.2.3 is as an acknowledgement that eligibility for a higher clearance implies eligibility for a lower clearance.

The Department insists that it has adopted a different interpretation of the regulations, citing three memoranda it issued between 1996 and 1998 – the Munson Memorandum, the Winneberger Memorandum, and the Money Memorandum. *See* Resp. Br. at 26-29. If those memoranda purport to require automatic revocation of a Secret clearance following a denial of SCI access

[5] *See, e.g.*, JA 266 (DoD Reg. 5200.2-R § C4.1.3.2); JA 270 (*id.* § C5.1.6.2); JA 275 (*id.* § C7.1.1.1); JA 276 (*id.* § 7.1.2.3).

eligibility (which, as discussed below, they do not), no deference is due to that interpretation. As an initial matter, any interpretation requiring the application of identical eligibility requirements for the two clearance types would be "plainly erroneous or inconsistent with" DCID 6/4 and DoD Regulation 5200.2-R. *Bowles*, 325 U.S. at 414. Furthermore, such an interpretation would depart from the Department's longstanding practice of allowing applicants with non-citizen spouses to obtain Secret clearances but not SCI access eligibility – *see, e.g.*, JA 108 (12/15/2009 Hearing Tr. at 213:8-10) (Leonard) – and therefore would represent a "'post hoc rationalization[]' to which courts will not defer." *Azko Nobel*, 212 F.3d at 1305. Finally, none of the memoranda claimed to interpret – or even mentioned – DCID 6/4, which set forth the more stringent eligibility requirements for SCI. Indeed, DCID 6/4 was not even in effect when two of the memoranda were issued: the Munson Memorandum was issued on February 2, 1996 and the Winneberger Memorandum on October 23, 1996; DCID 6/4 was issued on July 2, 1998;[6] and the Money Memorandum was issued shortly

[6] DCID 6/4 initially was enacted in July 1998 as an amendment to existing SCI access eligibility standards in DCID 1/14. It was renumbered DCID 6/4 in October 1999. *See* www.fas.org/irp/offdocs/dcid6-4/annexf.htm. At the same time, the Director of Central Intelligence added Annex F, "Reciprocity of SCI Eligibility Determinations." *Id.* Annex F makes clear that an applicant should not lose all access simply because he fails to satisfy an additional requirement specific to a different type of access or access granted by a different organization. JA 445 (DCID 6/4, Annex F, Item 1(e) ("Failure to meet an additional but not duplicative requirement may not necessarily adversely affect a person's continued eligibility

thereafter, on July 16, 2008. JA 397, 449, 458, 500. Because DCID 6/4 is plainly relevant, any interpretation made before its enactment or without recognition of its existence cannot command the deference of this Court.

Furthermore, even if the memoranda are entitled to deference, they do not actually support the Department's litigating position that denial of SCI access eligibility requires automatic revocation of a Secret clearance. The Money Memorandum, JA 455, mandates that "security clearance and SCI access eligibility determinations" will be "mutually and reciprocally accepted without further review or adjudication," and "[c]learance and SCI access denials or revocations" will be "mutually and reciprocally recognized," JA 458, but that mandate refers only to *determinations at the same clearance level*: "Reciprocity within SAPs *at the same level* is mandated by E.O. 12968." *Id*. (emphasis added). Otherwise, because it applies essentially the same reciprocity rules to positive eligibility determinations and negative ineligibility determinations, the Money Memorandum absurdly would require that one Department component must grant a person SCI access eligibility because another component granted him a Confidential clearance. The Money Memorandum's bottom line is that one component's denial of SCI access eligibility would require another component to deny SCI access eligibility too, but would have no effect on an existing lower-level Secret clearance.

---

for reciprocal access with other organizations and agencies."). Respondent's position in this case cannot be reconciled with the DCI's authoritative guidance.

The Munson and Winneberger Memoranda predated the Money Memorandum by two years and, where they offer conflicting guidance, have been superseded. The Munson Memorandum, JA 500-03, had said that, if a single adjudicative process results in findings supporting both the denial or revocation of SCI access and the revocation of a security clearance, both actions could be accomplished in a single proceeding. JA 500 ("there is no need for the WHS CAF to replicate due process procedures for a security clearance, so long as the procedures . . . are administered for denial or revocation of SCI access"). But it did not say that every adverse SCI determination should necessarily lead to the revocation of a lower clearance, if the relevant eligibility requirements were different.[7] Likewise, the Winneberger Memorandum, JA 449-54, had stated that, as a matter of procedure, DIA "will direct the *suspension* of the collateral classified access concomitant with delivery of the SCI access ineligibility notification to the named individual" (emphasis added) rather than requiring a separate action to suspend the collateral clearance, but it does not say that the *revocation* of a lower clearance always will follow from the denial of SCI access eligibility. JA 449. A suspension pending adjudication is an entirely different matter from a revocation.

[7] To the extent that the Munson Memorandum may have assumed identical eligibility requirements for different clearances, the stark differences between Appendix 8 of DoD Regulation 5200.2-R (regarding collateral clearances) and the subsequently enacted DCID 6/4 (regarding SCI) show that any such assumption was wrong, and any guidance based on that assumption is erroneous.

The Department's alternative reading of the two 1996 memoranda is inconsistent not only with the later Money Memorandum but also with the underlying regulations and directives.

In sum, no component of the Department ever made a final decision on the merits revoking Mr. Romero's Secret clearance. The decision to deny his application for SCI access eligibility cannot stand in for a decision regarding his Secret clearance because different substantive standards apply to the two clearance types. And although the Department's regulations, directives, and interpretive memoranda set forth common adjudicative guidelines and investigative standards governing all determinations regarding access to classified information at all levels, those sources in no way mandate that a person who does not meet the more stringent SCI requirements must also lose his Secret clearance. The MSPB's contrary conclusion rests on an error of law that this Court can and should reverse.

D. In Any Event, DIA Did Not Have the Authority to Revoke Mr. Romero's Secret Clearance.

Finally, there is an independent basis to reject the Department's "reciprocal acceptance" theory. Under DoD Regulation 5200.2-R, "revocation of a personnel security clearance by any DoD Component concerning personnel who have been determined to be eligible for clearance by another component is expressly prohibited." JA 276 (DoD Reg.-R § C7.1.2.3). DIA-SAB could not have revoked

Mr. Romero's Secret clearance, because only the component that issued it – WHS – could revoke it.

The Department relies on a reference to "military personnel" earlier in the regulation to argue that the restriction on who may revoke a clearance does not apply to civilian personnel. Resp. Br. at 34-35. Before the MSPB, however, two chief architects of the security clearance system testified otherwise. Peter Nelson, the former Deputy Director of Personnel Security for the Department, reviewed Section C7.1.2.3 and testified that the relevant provision "appl[ies] to Mr. Romero's fact pattern" and is not "limited to military personnel." JA 85 (12/15/2009 Hearing Tr. at 119:4-12). Likewise, Mr. Leonard, the Department's former Director of Security Programs, testified that "it was up to Washington Headquarters Service to take any action" to revoke Mr. Romero's Secret clearance because "DIA could not do that on their own." JA 97-98 (*id.* at 169:24-170:4). This testimony is consistent with other regulatory provisions indicating that the entity granting a clearance is responsible for revoking it. JA 445 (DCID 6/4, Annex F, § 1(e)) (stating that, although "the agency that made the original eligibility determinations may use new information obtained by another organization," it is that original granting agency that must "readjudicate the person's continued eligibility"); JA 333 (DoD Reg. 5200.2-R, §§ AP5.7.1.2,

AP5.7.1.3) (distinguishing entities that may revoke security clearances from entities that may revoke access to SCI).

The Department contends that WHS had designated DIA as having authority to revoke clearances that WHS had granted. Resp. Br. at 36-37. As Mr. Romero demonstrated in his opening brief, that purported delegation would be invalid because it is inconsistent with the controlling regulations and directives. Op. Br. at 24-25. Moreover, the record does not indicate that the alleged delegation actually was made. According to the Department, the delegation "was documented in the Winneberger Memorandum." *Id.* at 36. But the relevant portion of that memorandum states only that DIA may "direct the *suspension* of the collateral classified access concomitant with delivery of the SCI access ineligibility notification to the named individual," not that DIA has final authority to *revoke* the clearance. JA 449 (emphasis added). Thus, at most, WHS delegated to DIA the authority to take interim action pending WHS's final decision on the merits regarding a Secret clearance. It is clear that WHS never made such a final decision in Mr. Romero's case.

III. THE AGENCY'S HARMFUL ERROR ARGUMENTS ARE UNAVAILING.

The Department also has presented no persuasive rebuttal to Mr. Romero's showing that he was harmed by the absence of a decision on the merits addressing his Secret clearance. Under 5 U.S.C. § 7701, reversal of an agency personnel

action is required when the employee "shows harmful error in the application of the agency's procedures in the arriving at such decision" or "shows that the decision was not in accordance with law." 5 U.S.C. § 7701(c)(2). Here, the Department concedes that the MSPB erred in its harmful error analysis, and it does not offer a compelling alternative basis to reach the same result.

First, the MSPB's error: the Board stated that, "to fulfill the court's directive that I evaluate the appellant's harmful error claim, I find I must determine whether, in the absence of the alleged error, the WHS-CAF would have made the same prediction that the appellant would pose a national security risk." JA 37; *see also* JA 38 ("In effect, to resolve the harmful error issue, I must engage in a certain degree of speculation regarding whether the agency would have revoked his security clearance in the absence of any error."). Mr. Romero showed why that analysis was improper, *see* Op. Br. at 27-28, and the Department concurs, *see* Resp. Br. at 55. Because the MSPB recognized that its harmful error determination depended on considerations that the Department has now disavowed, that determination cannot stand.

Second, the alternative standard: Mr. Romero, in his opening brief, contended that "[i]t was impossible for the Board, and is impossible for this Court, to assess the impact of the Department's failure to make a final decision on the merits, because one cannot know what that decision would have been." Op. Br. at

27. The Department disagrees: it claims that the MSPB could have assessed whether the error was harmful by determining "whether the agency complied with its internal procedures notwithstanding the alleged irregularities in the process." Resp. Br. at 51. The Department's proposed approach is incoherent. The harmful error inquiry is triggered only if "the Department failed to follow its procedures." *Romero I*, 527 F.3d at 1330. Under the Department's rule, it appears that an error would be deemed non-harmful if "the agency complied with its internal procedures." But the Department could not have "complied with its internal procedures" while at the same time "fail[ing] to follow its procedures." Thus, as long as this Court agrees with Mr. Romero that the Department committed procedural error, the Department's proposed approach recognizes that the error necessarily was harmful. That result is consistent with this Court's decisions in the context of civilian boards for the correction of military records, acknowledging in that certain "fundamental errors" are not susceptible to harmful error analysis because "the effect of the error is incapable of evaluation." *Porter v. United States*, 163 F.3d 1304, 1319 (Fed. Cir. 1998); *accord Wagner v. United States*, 365 F.3d 1358 (Fed. Cir. 2004); *Evensen v. United States*, 654 F.2d 68, 75 (Ct. Cl. 1981).[8]

[8] The Department distinguishes these cases on the ground that the harmful error analysis here is statutorily mandated, whereas the harmless error analysis there resulted from a judge-made rule. Resp. Br. at 51-52. This Court's reasoning in

Third, the Department's factual argument: the Department contends that there was no real procedural error because, in its view, Mr. Romero "received all of the due process to which he was entitled" and "was not deprived of any procedural protections." Resp. Br. at 53. Mr. Romero is not arguing, however, that he was entitled to more hearings or more notice. He is arguing that he was entitled to a final decision on the merits regarding the continuing validity of his Secret clearance. He did not receive one.[9] The Department concedes that one cannot speculate about what the decision would have been. In light of the different eligibility requirements stated in DCID 6/4 and Appendix 8 of DoD Regulation 5200.2-R, there is no guarantee or even likelihood that the decision on the Secret

---

Porter, *Wagner*, and *Evensen*, however, was that the nature of the error made it impossible to evaluate its effect. Fundamental errors "penetrate to the heart of the process Congress deemed necessary for fair judgment," and as a result harm from those errors can be presumed. *Wagner*, 365 F.3d at 1363. Nothing about Section 7701's statutory mandate renders the Board or this Court any more capable of determining the effect of the Department's failure to render a final decision on the merits regarding Mr. Romero's Secret clearance, nor does it alter the central significance of receiving a final decision in an administrative process premised on reasoned decision-making. The inability of the Board or the Department to formulate an effective way to conduct the harmful error analysis here confirms the importance of the fundamental error concept.

[9] Thus, the Department's contention that Mr. Romero's expert witnesses conceded that Mr. Romero "received the procedural protections to which he was entitled" misses the point. Resp. Br. at 54. The testimony at issue dealt with the procedural steps the Department followed: the notices, hearings, and appeals it provided to Mr. Romero. Notwithstanding the completion of the procedural steps that typically would lead to a valid final decision on the merits resolving the Secret clearance issue, no component within the Department ever made such a final decision.

clearance would have been the same as the one regarding SCI access eligibility.[10] As a result, treating Mr. Romero's Secret clearance as revoked absent a valid final decision revoking it is a clear example of harmful error.

CONCLUSION

For the reasons stated above and in Mr. Romero's opening brief, this Court should grant the relief detailed in the opening brief. Op. Br. at 29.

Respectfully submitted,

ARTHUR B. SPITZER
ACLU OF THE NATION'S CAPITAL
1400 20th Street, N.W.
Suite 119
Washington, D.C. 20036
(202) 457-0800

JAMES C. COX
JENNER & BLOCK LLP
1099 New York Ave., N.W.
Suite 900
Washington, D.C. 20001
(202) 639-6000

February 18, 2011

[10] The Department asserts that the result would have been the same because "mitigating conditions were evaluated with respect to both his secret clearance and his request for SCI access." Resp. Br. at 56. The evidence belies that claim. Although the DOHA Administrative Judge's non-binding recommendation to the DIA-SAB evaluated mitigating factors with respect to both clearance types, the DIA-SAB itself referred to mitigation only in reference to the SCI eligibility determination, without ever mentioning the Secret clearance. JA 53. For the Board, or this Court, to speculate that the DIA-SAB would have applied the same analysis to the Secret clearance is to engage in precisely the kind of substantive civilian security clearance review that the Department has disclaimed.

CERTIFICATE OF SERVICE

I hereby certify that, on February 18, 2011, two copies of the Reply Brief of Petitioner Wilfredo Romero were served by United States Mail, with a courtesy copy by electronic mail, to the following counsel for Respondent:

Elizabeth M. Hosford, Esq.
Senior Trial Counsel
Commercial Litigation Branch, Civil Division
U.S. Department of Justice
Attn: Classification Unit, 8th Floor
1100 L Street, N.W.
Washington, D.C. 20530
elizabeth.hosford@usdoj.gov

James C. Cox

CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATIONS

The foregoing Reply Brief of Petitioner Wilfredo Romero complies with type-volume limitation of Rules 29(b) and 32(a)(7)(B) of the Federal Rules of Appellate Procedure. The brief contains a total of 6,957 words, including footnotes, as counted by Microsoft Word, and excluding those materials exempted from the word-count limitation.

_____

James C. Cox