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

OPENING 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

October 7, 2010

FORM 9. Certificate of Interest

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Wilfredo Romero v. U.S. Department of Defense

No. 2010-1337

CERTIFICATE OF INTEREST

Counsel for the (petitioner) (appellant) (respondent) (appellee) (amicus) (name of party) Petitioner certifies the following (use "None" if applicable; use extra sheets if necessary):

1. The full name of every party or amicus represented by me is:

Wilfredo Romero

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:

Wilfredo Romero

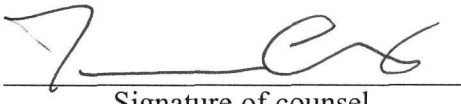
3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

None

4. ☑ The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

American Civil Liberties Union of the Nation's Capital - Arthur B. Spitzer; Jenner & Block LLP - James C. Cox; Law Office of Mark S. Zaid, PC - Mark S. Zaid, Bradley P. Moss.

10/7/2010
Date


Signature of counsel

James C. Cox
Printed name of counsel

Please Note: All questions must be answered

cc: Meredyth Cohen Havasy, Esq.

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STATEMENT OF RELATED CASES

Pursuant to Federal Circuit Rule 47.5, counsel for Petitioner Wilfredo Romero states that –

(a) This Court previously has decided two other appeals from the same proceeding before the Merit Systems Protection Board. Those decisions are:

> *Romero v. Department of Defense*, No. 2007-3322, 527 F.3d 1324 (Fed Cir. June 2, 2008) (Lourie, *Bryson*, and Dyk, J.J.)
>
> *Romero v. Department of Defense*, No. 2008-3294, 321 F. App'x 940 (Fed. Cir. Dec. 15, 2008) (Michel, C.J., and Rader and Prost, J.J.) (per curiam)

(b) Counsel is aware of no case pending in this Court or any other court that will directly affect or be directly affected by this Court's decision in the pending appeal.

JURISDICTIONAL STATEMENT

This appeal is from a March 25, 2010 decision of the Merit Systems Protection Board ("Board") denying Wilfredo Romero's appeal from actions by the U.S. Department of Defense in terminating and failing to reinstate his employment. Joint Appendix ("JA") 1. That decision became final on April 29, 2010. JA 41. The Board had jurisdiction over Mr. Romero's appeal pursuant to 5 U.S.C. § 7512(1) and 5 U.S.C. § 7701(a).

Mr. Romero timely filed a notice of appeal on June 28, 2010. This Court has jurisdiction pursuant to 5 U.S.C. § 7703(a)(1), (b)(1).

STATEMENT OF THE ISSUES

1. Whether, consistent with this Court's decision in *Romero v. Department of Defense*, 527 F.3d 1324 (Fed. Cir. 2008) ("*Romero I*"), an Executive agency violated Due Process by failing to follow its own procedures when the agency revoked a federal employee's existing security clearance based solely on the purported "reciprocal acceptance" of another body's decision that itself *did not* revoke the existing clearance, but rather denied an upgrade to a higher clearance with stricter eligibility requirements.

2. Whether the agency's failure to issue a final determination on the merits regarding the revocation of the existing clearance was "harmful error."

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Wilfredo Romero lost his job at the Department of Defense when the Department determined that his security clearance had been revoked. His Due Process challenge to the purported revocation of his clearance now is before this Court for a second time. In *Romero I*, this Court held that "federal employees may challenge an agency's compliance with its regulations governing revocation of security clearances," 527 F.3d at 1329, and remanded to the Board to "determine whether Mr. Romero can show harmful error resulting from any failure by the Department to follow its own procedures," *id.* at 1326. On remand, the Board again affirmed the Department's action. This appeal followed.

A. Background Regarding Security Clearance Procedures

A security clearance determination involves an investigation, in which the issuing agency seeks facts relevant to the applicant's eligibility, and an adjudication, in which the agency determines eligibility based on the facts discovered. The Department of Defense issues security clearances to its employees through a set of Central Adjudication Facilities, or CAFs. *See* JA 272 (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. JA 282 (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* JA 276 (*id.* § C7.1.2.3) ("Issuance, reissuance, denial, or 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."); *accord* JA 445 (Director of Central Intelligence Directive 6/4, Annex F, Part l(e)) ("[T]he agency *that made the original eligibility determination* may use new information obtained by another organization to adjudicate the person's continued eligibility . . . ." (emphasis added)).[1]

A Confidential, Secret, or Top Secret security clearance grants the holder access to information at a certain *level* of sensitivity. JA 76 (12/15/2009 Hearing

[1] DoD Reg. 5200.2-R is the governing procedural regulation for Department of Defense security clearance determinations. At all relevant times, Director of Central Intelligence Directive 6/4 ("DCID 6/4") was a parallel regulation applicable to intelligence agencies, including the Defense Intelligence Agency. *See* JA 76 (12/15/2009 Hearing Tr. at 83:24-85:1). (DCID 6/4 was superseded in October 2008 by Intelligence Community Director 704, issued by the Office of the Director of National Security, although most of the relevant procedural requirements remained unchanged.) We are aware of no material difference in the procedures required by DoD Reg. 5200.2-R and DCID 6/4 on the issues relevant to this case, although different substantive standards apply for SCI access under DCID 6/4 than for Secret clearances governed by DoD Reg. 5200.2-R.

Tr. at 84); *see also* JA 243 (DoD Reg. 5200.2-R § C3.4.2). In contrast, a clearance for Sensitive Compartmented Information ("SCI") grants the holder access to a particular *type* of information (*e.g.*, communications intelligence) regardless of sensitivity. JA 76-77 (12/15/2009 Hearing Tr. at 85-86); *see also* JA 253 (DoD Reg. 5200.2-R § C3.5.2). The investigative requirements and eligibility standards for SCI access are more stringent than those for both Secret and Top Secret clearances. JA 241, 253 (*id.* §§ C3.4.2.1, C3.4.2.2, C3.5.2.1); *accord Guillot v. Garrett*, 970 F.2d 1320, 1322 & n. 1 (4th Cir. 1992) ("Access to Sensitive Compartmented Information requires clearance beyond the 'Top Secret' level."); *Doe v. Weinberger*, 820 F.2d 1275, 1276 (D.C. Cir. 1987) ("Because of its nature, the work conducted at NSA has been designated 'Sensitive Compartmented Information,' which is a level of classified information above 'Top Secret.'"); JA 95 (12/15/2009 Hearing Tr. at 158:10-12) ("[SCI access involves] additional eligibility criteria over and above the normal criteria, again because of sensitivity or the level of the threat."). The most relevant distinction here is that "there is a . . . 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 158:18-159:4).[2]

[2] The term "collateral clearance" or "collateral access" is "used to describe a

Department of Defense regulations define certain circumstances in which a component may rely on the investigations and clearance determinations made by other components or other government agencies. *First*, "[a]ny previously granted security clearance or access, which is based upon a current investigation that meets or exceeds that necessary for the clearance or access required, shall provide the basis for issuance of a new clearance and/or access without further investigation or adjudication." JA 265 (DoD Reg. 5200.2-R § C4.1.1). *Second*, with respect to investigations, "any previous personnel security investigation that essentially is equivalent in scope to an investigation required by this Regulation will be accepted without requesting additional investigation." JA 265 (*id.* § C4.1.2). *Third*, with respect to adjudications, "[a]djudicative 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," unless, *inter alia*, "[t]he individual concerned is being considered for a higher level clearance." JA 265-66 (*id.* §§ C4.1.3.1, C4.1.3.2.2). Thus, as a general matter, a component may grant a

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security clearance without any special access authorizations." *Security Clearance Frequently Asked Questions*, *available at* http://www.clearancejobs.com/security_clearance_faq.pdf. In the record of this case, the phrase is often used to refer to Mr. Romero's Secret clearance or his access to classified information. Counsel's understanding is that the term originated when clearances and special access authorizations were separately adjudicated; thus, one was collateral to the other.

clearance based on an investigation conducted for a clearance at the same level or a higher level; may deny a clearance based on an investigation conducted for a clearance at the same level; must grant a clearance based on a favorable adjudication conducted for a clearance at the same or a higher level; and must deny a clearance based on an unfavorable adjudication conducted for a clearance at the same or a lower level. But, for entirely obvious reasons, the regulations do *not* provide that a component must reciprocally deny a clearance at a lower level based on an unfavorable adjudication conducted for a clearance at a higher level. Yet that is what happened here.

B. The Curious "Revocation" of Mr. Romero's Secret Clearance

Wilfredo Romero was a non-probationary career employee who worked as an auditor at the Department's Office of the Inspector General starting in 1999. JA 58 (12/15/2009 Hearing Tr. at 10:21-11:9). That job requires a Secret security clearance, which Mr. Romero obtained through the WHS-CAF. JA 58 (*id.* at 10:10-11).

In 2000, Mr. Romero married a citizen of Honduras who was then employed in the United States by the Honduran embassy. JA 58 (*id.* at 11:13-12:7). He advised the Department's security office when he and his future wife began dating and again when they were married, 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* JA 95 (*id.* at 158:18-159:4) (citing DoD Reg. 5200.2-R and DCID 6/4).

In 2002, Mr. Romero's supervisor asked the DIA-CAF to grant Mr. Romero eligibility to access SCI so that Mr. Romero could assist with auditing work at the National Security Agency. JA 58 (*id.* at 12:25-13:8). The only question before the DIA-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. Sadly, Mr. Romero was never informed, before agreeing to seek SCI access, that marriage to a foreign citizen is an unwaivable bar for SCI access. Had he been so informed, he never would have applied, and his existing clearance would have remained in place. JA 58 (*id.* at 13:9-12).[3]

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. JA 44. It issued a Letter of Denial, converting its preliminary decision into a final one, on March 8, 2005. JA 47.

[3] DOD regulations require a pre-application interview at which potential concerns can be surfaced and discussed. JA 226 (DoD Reg. 5200.2-R §§ C2.3.9.4, C2.3.9.5.1). No such interview was held with Mr. Romero. Had such an interview been held, Mr. Romero would have learned that his marriage was a bar and would not have applied for SCI access.

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 in person before an administrative judge with the Department Office of Hearings and Appeals ("DOHA") who would then make a written recommendation to the DIA-SAB. *See* JA 282-83 (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-CAF's decision with respect to the Secret clearance. JA 52.

The DIA-SAB, however, did not follow this recommendation. Instead, on December 7, 2005, it issued a determination 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." JA 53 (emphasis added). It never mentioned Mr. Romero's Secret clearance (or, equivalently, his eligibility to access collateral classified information). Mr. Romero therefore continued to hold that Secret clearance.

Then, 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." JA 54. 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* JA 58 (12/15/2009 Hearing Tr. at 10:10-11), the purported revocation of his clearance ultimately led the Department of Defense to suspend him on February 19, 2005 and to terminate his employment on December 29, 2006.

C. This Court's Decision in *Romero I*

Mr. Romero contested both his suspension and his removal before the Board. 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." *Romero v. Dep't of Defense*, 106 M.S.P.R. 397 (M.S.P.B. July 20, 2007) (table), included in appendix

at JA 459. In a separate decision, the Board partially granted his petition with respect to the suspension, concluding that the Department unreasonably delayed in proposing Mr. Romero's removal and therefore ordering the Department to provide Mr. Romero with back pay covering the final seven months of his suspension. *Romero v. Dep't of Defense*, 106 M.S.P.R. 284, 288 (M.S.P.B. 2007).

Mr. Romero appealed the removal decision to this Court. He raised two main arguments: "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" and "that the DIA-SAB did not actually revoke his Secret security clearance, even if it had the authority to do so." *Romero I*, 527 F.3d at 1329-30.

This Court vacated the Board's decision. *Id.* at 1330 (Bryson, J., joined by Lourie and Dyk, J.J.). It held that, to satisfy Due Process requirements in revoking a security clearance, "agencies must also follow the procedures established in their own regulations." *Id.* at 1328 (citing *Drumheller v. Dep't of the Army*, 49 F.3d 1566, 1569-73 (Fed. Cir. 1995)). Because "[t]he Board did not address whether the Department complied with its own procedures in revoking Mr. Romero's Secret security clearance," and "[b]ecause the answer to that question may turn on the way the Defense Department's procedures are interpreted and have been applied, matters that are not fleshed out in the record before us," the Court remanded the case to the Board. *Id.* at 1330. It directed the Board "to determine

whether Mr. Romero can show that the Department failed to follow its procedures and that any failure to do so resulted in harmful error." *Id.*

D. The Merit Systems Protection Board's Decision on Remand

Back before the Board, Mr. Romero raised the same main procedural objections – that the DIA-SAB had not revoked his Secret clearance, leaving no revocation for the WHS-CAF to reciprocally accept, and that, even if the DIA-SAB had attempted to revoke the Secret clearance, it lacked the authority to do so because it had not issued that clearance in the first place. The Board heard testimony from six witnesses over two days. Mr. Romero presented two of the chief architects of the current security clearance system: Peter Nelson, the former Deputy Director of Personnel Security for the Department, *see* JA 64 (12/15/2009 Hearing Tr. at 34:11-38:11), and J. William Leonard, the former Director of Security Programs for the Secretary of Defense and chair of an Office of Management and Budget working group on security clearance reciprocity, *see* JA 91 (*id.* at 142:14-144-2). Three current Department employees testified in support of the Department: Wayne Scheller, Chief of the Due Process Team of the Defense Intelligence Agency's Personnel Security Division, *see* JA 109 (*id.* at 216:25-219:4); Robert Smith, the director of WHS-CAF, *see* JA 163 (12/16/2009 Hearing Tr. at 429:13-18); Charleen Wright, a security policy and clearance appeal

officer with WHS, *see* JA 195 (*id.* at 558:1-5). Mr. Romero himself also testified. *See* JA 57 (12/15/2009 Hearing Tr. at 8:8-10).

The testimony focused on the meaning of DoD Regulation 5200.2-R – which, as noted above, is the core regulation governing Department of Defense security clearance determination procedures – and several memoranda interpreting it. Leonard and Nelson were among the officials responsible for drafting and authoritatively interpreting the regulations and memoranda; the Department's witnesses are among those tasked with applying them. Witnesses on the two sides disagreed on almost every relevant point. For example, Mr. Romero's witnesses explained that refusal to grant SCI access did not require the revocation a preexisting lower level clearance. *See* JA 82 (12/15/2010 Hearing Tr. at 107:17-19) (Nelson) ("Q. . . . [I]f you are denied SCI, [that] does not necessarily mean you lose your collateral access? A. Well, that is also correct."); JA 99 (*id.* at 176:9-10) (Leonard) ("when it is talking about reciprocity of revocations, it was meaning SCI to SCI or collateral to collateral"); *accord* JA 457 (Money Memorandum) ("A security clearance eligibility determination issued by a [CAF] will be promptly recognized and accepted by all other DoD components for access *at the same level* . . . ." (emphasis added)). By contrast, the Department's witnesses implausibly testified that the denial of SCI access necessarily entailed the loss of all security clearances. *See* JA 116 (*id.* at 244:12) (Scheller) ("if you

lose SCI, you lose everything"); JA 199 (12/16/2010 Hearing Tr. at 573:2-7) (Wright) ("So if he got full due process for his SCI, that incorporated – the decision incorporates the determination for a Top Secret and below. You lose Top Secret and below.").

On March 25, 2010, the Board's Administrative Judge again affirmed the Department's action. First, he concluded that the DIA-SAB "had the authority to revoke the appellant's Secret security clearance," JA 28, notwithstanding the regulation stating that "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. 5200.2-R § C7.1.2.3). He relied principally on a 1996 memorandum signed by Drew Winneberger, then the DIA Chief of Counterintelligence and Security Activity (the "Winneberger Memorandum"), which suggested that the DIA-CAF could "direct the suspension of the collateral classified access concomitant with delivery of the SCI access ineligibility notification." JA 449.

Second, the Administrative Judge concluded that the DIA-SAB did revoke Mr. Romero's Secret clearance, despite never mentioning that clearance in its opinion. JA 31. He explained:

> [A]lthough the SAB decision never specifically refers to the appellant's collateral clearance, there is nothing in that decision to indicate the SAB disagreed with the DOHA Administrative Judge's conclusions. . . . Rather

> than interpreting the SAB's silence with regard to his Secret clearance as disagreement with the Administrative Judge's decision, I find it more likely to be evidence of agreement or, at least, acquiescence.

JA 31-32. He did not discuss whether such a *sub silentio* revocation would comport with agency regulations or with Due Process.

Third, the Administrative Judge concluded that any procedural error by the Department was not harmful, because Mr. Romero "has already received all of the procedural protections to which he is entitled." JA 39.

The Administrative Judge also denied Mr. Romero's petition for enforcement of the 2007 board decision awarding back pay for a portion of his indefinite suspension, reasoning that the Department "is in compliance with that decision because it could not have returned him to duty in the absence of a valid Secret security clearance." JA 41.

The Administrative Judge's decision became the decision of the Board on April 29, 2010. Mr. Romero timely appealed that decision.

SUMMARY OF THE ARGUMENT

Wilfredo Romero was deemed to have lost his Secret security clearance, and therefore lost his job with the Department of Defense, without any agency adjudicative body issuing a final decision on the merits that his clearance should be revoked. In an earlier appeal, this Court ordered the Merit Systems Protection

Board to determine whether the Department failed to follow its own procedures in reaching this result and, if so, whether that failure was harmful to Mr. Romero. The Board remarkably found no procedural error. That result is not only inconsistent with the foundational Due Process principle that "administrative decisions must stand on better footing than speculation," *Malave v. Holder*, 610 F.3d 483, 487 (7th Cir. 2010), but also dependent on a legally erroneous interpretation of the governing statutes and Department regulations.

Mr. Romero held a Secret clearance granted by the Department's Washington Headquarters Service ("WHS") when he applied for eligibility to access Sensitive Compartmented Information ("SCI"). The first Department component to consider his application, the Defense Intelligence Agency Central Adjudication Facility ("DIA-CAF"), issued a preliminary decision denying Mr. Romero's access to SCI and suspending his Secret clearance. The DIA's final determination, however, denied Mr. Romero's request for access to SCI but *did not* revoke his Secret clearance. Nevertheless, the WHS issued a decision that "reciprocally accepted" the DIA's revocation of Mr. Romero's Secret clearance – a revocation that did not exist.

Thus, no Executive Branch body ever actually made a final decision on the merits that Mr. Romero's Secret clearance should have be revoked. Moreover, there is no reason to suppose that, had any adjudicative body issued a final merits

decision, its decision would have been to revoke that clearance. The Board's reliance on the phantom "revocation" decision is the type of "fundamental error" for which this Court presumes harm. *See Wagner v. United States*, 365 F.3d 1358, 1363 (Fed. Cir. 2004). The Department's basic procedural mistake deprived Mr. Romero of the process he was due, as well as his job, and this Court should reverse the Board's decision. Because Mr. Romero's Secret clearance was never properly, and therefore never actually, revoked, the case should be remanded for a determination of back pay.

ARGUMENT

This Court must reverse a decision of the Merit Systems Protection Board 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." 5 U.S.C. § 7703(c); *see Poett v. Merit Sys. Prot. Bd.*, 360 F.3d 1377, 1380 (Fed. Cir. 2004). A decision is necessarily arbitrary and capricious if it depends on a legal error, *see Germano v. United States*, 26 Cl. Ct. 1446 (1992), or on speculation, *see Horsehead Resource Dev. Co. v. Browner*, 16 F.3d 1246, 1269 (D.C. Cir. 1994). Here, the Board committed legal error by misapplying the statutes and regulations defining procedures for security clearance determinations and engaged in improper and clearly erroneous speculation to conclude that the DIA's final decision

intended to reference Mr. Romero's Secret clearance even though it did not. Its decision should be reversed.

I. THE REVOCATION OF MR. ROMERO'S SECRET CLEARANCE VIOLATED 5 U.S.C. § 7513 AND THE DEPARTMENT'S OWN PROCEDURES.

When a federal agency proposes to remove a federal employee from his job, the employee is entitled to Due Process, including written notice of the specific reasons for the proposed action, an opportunity to respond to the charges, and "a written decision and the specific reasons therefor at the earliest practicable date." 5 U.S.C. § 7513(b)(4). An agency must comply with Section 7513's procedural requirements even if the adverse employment action is based on the denial or revocation of a security clearance. *Cheney v. Dep't of Justice*, 479 F.3d 1343, 1352 (Fed. Cir. 2007); *see also Hesse v. Dep't of State*, 217 F.3d 1372, 1376 (Fed. Cir. 2000) ("[T]he Board may determine whether the security clearance was denied, whether the security clearance was a requirement of the appellant's position, and whether the procedures set forth in section 7513 were followed . . . ."). Furthermore, the agency "must also follow the procedures established by [its] own regulations" during the security clearance process. *Romero I*, 527 F.3d at 1328; *accord Drumheller*, 49 F.3d at 1569-73.

As detailed below, the Department here did not comply with either Section 7513 or its controlling internal regulation, DoD Regulation 5200.2-R. Contrary to

Section 7513, the Department failed to issue *any* final written decision on the merits of the clearance revocation, much less one giving "specific reasons therefor at the earliest practicable date." And, contrary to DoD Regulation 5200.2-R, the Department improperly conflated the very different standards for SCI access and a Secret clearance and improperly afforded one component, the DIA, the authority to revoke a clearance issued by another component, the WHS. The Board's failure to correct those errors requires reversal.

A. There Was No Decision Revoking Mr. Romero's Secret Clearance that Could Be "Reciprocally Accepted."

As an initial matter, neither of the Department components that considered Mr. Romero's case issued a final determination on the merits revoking his Secret clearance.

The DIA-CAF issued a preliminary Letter of Intent and then a Letter of Denial expressing intent to revoke the Secret Clearance, JA 44, 47, but Mr. Romero appealed its decision to the DIA-SAB, *see* JA 282 (DoD Reg. 5200.2-R § C8.2.2.3). The DOHA administrative judge who heard Mr. Romero's appeal recommended that the DIA-SAB affirm the 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 § C8.2.2.4.2). Despite the recommendation of the DOHA administrative judge, the final action taken by the DIA was the decision of the DIA-SAB, which never mentioned the Secret clearance at all and, quite

properly, dealt exclusively with Mr. Romero's ineligibility for SCI. JA 53 (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" (emphasis added)). Thus, there was no decision from the DIA-SAB as to the merits of Mr. Romero's Secret clearance revocation.

The WHS-CAF did not consider the merits of the Secret clearance either. Its decision stated that "this office has been notified of the Defense Intelligence Agency's final decision to deny your eligibility for *access to SCI*. . . . [T]his office reciprocally accepts the Defense Intelligence Agency's final decision. Therefore, the eligibility . . . for *access to classified information and to occupy a sensitive position* has been revoked." JA 54 (emphasis added). It made no references to any independent adjudicative consideration regarding the appropriateness of revoking the Secret clearance, deferring entirely to a non-existent revocation of that clearance by the DIA-SAB.[4] Indeed, the officer who signed the WHS-CAF decision testified that "[w]e did not adjudicate the collateral clearance." JA 181 (12/16/2009 Hearing Tr. at 502:3); *see also* JA 182 (*id.* at 503:8-9).

[4] If the WHS-CAF had made a decision on the merits regarding Mr. Romero's Secret clearance, Mr. Romero would have had the right to appeal that decision to the WHS-SAB. *See* JA 281, 282, & 333 (DoD Reg. 5200.2-R §§ C8.2.1, C8.2.2.4, & Appendix 5.6). WHS-CAF afforded Mr. Romero no such right, indicating that WHS-CAF itself did not purport to be making a decision on the merits.

The Board glosses over the problem by concluding that, "although the SAB decision never specifically refers to the appellant's collateral clearance," the DIA-SAB "likely" intended to revoke the Secret clearance as well as to deny to the application for SCI access. JA 31-32. But that would be contrary to Section 7513: the DIA-SAB opinion plainly is not a "written decision" giving "specific reasons" for the revocation of Mr. Romero's Secret clearance when it does not mention that clearance at all.

Furthermore, as a factual matter, the Board's conclusion is pure speculation, and clearly erroneous to boot. The Board suggests that "there is nothing in the decision to indicate the SAB disagreed with the DOHA Administrative Judge's conclusions" and hypothesizes that the decision reflects "agreement, or, at least, acquiescence" in those conclusions. *Id.* But it would be more consistent with the plain language of the DIA-SAB determination to say that there is nothing to indicate that the SAB *agreed* with the DOHA Administrative Judge's conclusions. And the Board's hypothesis is directly contradicted by witness testimony. JA 98-99 (12/15/2009 Hearing Tr. at 173:19-174:1) (Leonard) ("Q. … [I]s this letter revoking Mr. Romero's collateral access? A. No, it's not. It's very clearly entitled . . . 'Review of Appeal of Denial of Eligibility for Access to Sensitive Compartmented Information.' And the last paragraph, the penultimate sentence, clearly states that, 'Your eligibility for access to SCI is denied effective this

date.'"). Moreover, even if the Board's hypothesis were correct, the mere fact that one cannot tell renders the opinion procedurally deficient. When one has to guess whether an employee received Due Process, he did not. Indeed, Section 7513's requirements of a "written decision" that includes "specific reasons" for revocation was designed to prevent precisely this sort of guesswork.

B. The Decision Denying Access to SCI Did Not Compel Revocation of Mr. Romero's Secret Clearance Because Different Legal Standards Apply.

An alternative explanation, suggested by one of the Department's witnesses before the Board, is that the WHS-CAF could revoke Mr. Romero's clearance based on the "reciprocal acceptance" of the DIA-SAB's determination because the denial of SCI access *automatically* revokes the Secret clearance. JA 170 (12/16/2009 Hearing Tr. at 457:21-24) (Smith) ("Q. Did WHS advise Mr. Romero that his security clearance had been effectively revoked *by DIA's denial of SCI access*? A. Yes." (emphasis added)). This theory is unsupported by the Department's regulations concerning reciprocity.

The regulations are quite clear on this point. They require a Department component to grant clearance or access "without further investigation or adjudication" if the applicant already holds the same level or a higher level of clearance or access. JA 265 (DoD Reg. 5200.2-R § C4.1.1). They further mandate a component to deny a clearance "without requiring additional investigation" when

another component already has denied the individual a clearance at that level, JA 265 (*id.* § C4.1.3.1), but not when the other component only has denied a clearance at a higher level, JA 266 (*id.* § C4.1.3.2.2). In other words, "[f]ailure to meet an additional but not duplicative requirement [for SCI access] may not necessarily adversely affect a person's continued eligibility" for clearance at lower security levels. JA 445 (DCID 6/4, Annex F, Item 1(e)).

The Board rejected the "automatic revocation" explanation, noting that the standard to receive SCI access under the governing regulations is more stringent than the standard for a Secret clearance. JA 30; *accord* JA 241, 253 (DoD Reg. 5200.2-R §§ C3.4.2.1, C3.4.2.2, C3.5.2.1); *Guillot v. Garrett*, 970 F.2d 1320, 1322 & n. 1 (4th Cir. 1992) ("Access to Sensitive Compartmented Information requires clearance beyond the 'Top Secret' level."); *Doe v. Weinberger*, 820 F.2d 1275, 1276 (D.C. Cir. 1987) ("Because of its nature, the work conducted at NSA has been designated 'Sensitive Compartmented Information,' which is a level of classified information above 'Top Secret.'"); JA 95 (12/15/2009 Hearing Tr. at 158:10-12) ("[SCI access involves] additional eligibility criteria over and above the normal criteria, again because of sensitivity or the level of the threat."); JA 95 (*id.* at 158:18-159:4) ("[T]here is a . . . per se prohibition to grant someone access eligibility to SCI if they have an immediate family member who's a non-U.S. citizen. That is not a per se condition for collateral or Top Secret, Secret, or

Confidential information."); JA 108 (*id.* at 213:8-10) ("I'm married to a Canadian. I'll get a T[op] S[ecret] clearance any day of the week, all things being equal. I'm ineligible for SCI."); JA 161 (*id.* at 421:6-10) ("Where does it say . . . you loses SCI, you lose everything? You can't find that statement anywhere."); JA 457 (Money Memorandum) ("A security clearance eligibility determination issued by a [CAF] will be promptly recognized and accepted by all other DoD components for access *at the same level* . . . ." (emphasis added)).[5] The Board was correct to do so. If the Department based its actions on the belief that the denial of an application for SCI access automatically revokes a Secret clearance, that belief was contrary to its own regulations, as well as elementary logic and common sense.[6]

[5] The WHS-CAF cited the Money Memorandum as authority for its "reciprocal acceptance" of the DIA-SAB's decision. *See* JA 54 (citing "Office of the Assistant Secretary of Defense memorandum, with attachment, dated 16 July 1998, Subject: Clearance and Access Reciprocity in the Department of Defense"); *see also* JA 455 (Money Memorandum). But because the Money Memorandum speaks only to clearances at the same level, it does not provide any such authority to revoke a Secret clearance based on a denial of SCI access.

[6] In *Department of the Navy v. Egan*, 484 U.S. 518 (1988), the Supreme Court held that the courts (and by extension the Board) cannot review the merits of security clearance determinations because such determinations are "[p]redictive judgment of this kind must be made by those with the necessary expertise in protecting classified information." *Id.* at 529. That reasoning does not suggest that this Court, or the Board, cannot adjudicate this case, where a decision requires only the simple and obvious ruling that, as a matter of law, denial of an application for "above Top Secret" SCI access does not automatically revoke a lower level Secret clearance.

C. The DIA Lacked Authority to Revoke Mr. Romero's Secret Clearance.

In any event, the DIA-SAB's decision could not have revoked Mr. Romero's Secret clearance because DIA lacked the authority to do so. Only the component or agency that initially granted a security clearance may revoke it. *See* JA 276 (DoD Reg. 5200.2-R § C7.1.2.3) ("[R]evocation 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 445 (DCID 6/4, Annex F, Part l(e)) ("[T]he agency *that made the original eligibility determination* may use new information obtained by another organization to adjudicate the person's continued eligibility . . . ." (emphasis added)). Because Mr. Romero's Secret clearance was granted by the WHS-CAF, the DIA-SAB could not have revoked it.

Before the Board, the Department argued that three internal memoranda – referred to as the Munson Memorandum, the Money Memorandum, and the Winneberger Memorandum – gave components the authority to readjudicate security clearance grants initially made by other components notwithstanding Section C7.1.2.3 and Annex F, Part 1(e). That argument is unavailing as a matter of law. As an initial matter, as a matter of agency authority, such policy memoranda cannot overrule a controlling regulation. *See, e.g.,* JA 140 (12/16/2009 Hearing Tr. at 336:18-25) (Scheller) (testifying that Munson

Memorandum has not been formally adopted as a binding rule). Moreover, consistent with this limitation on authority, the policy memoranda indicate that they are interpreting, not purporting to supplant, DoD Regulation 5200.2-R. *See, e.g.*, JA 449 (Winneberger Memorandum) at ¶ 1 ("Attached herewith is the revised DIA CCF policy/procedure *implementing the access review and appeal requirements* outlined in . . . DoD Personnel Security Program Regulation, 5200.2-R, Change 3."); JA 140 (12/16/2009 Hearing Tr. at 336:11-14) ("[The Memoranda] clarified the point of the interpretation . . . [of] the change 3 of [DoD Regulation] 5200[.2-R]."). Thus, Section C7.1.2.3 controls, and would have precluded the DIA-SAB from revoking Mr. Romero's Secret clearance even if it had attempted to do so – though, for the reasons discussed in Sections I.A and I.B, above, it did not.

II. MR. ROMERO WAS HARMED BY THE DEPARTMENT'S ERRONEOUS ASSUMPTION THAT HIS SECURITY CLEARANCE HAD BEEN REVOKED.

This Court's remand order directed the Board not only to determine whether the Department failed to follow its own procedures but also whether "any failure to do so resulted in harmful error." *Romero I*, 527 F.3d at 1330. To the extent that Mr. Romero is required to demonstrate harm from the erroneous revocation of his Secret clearance without a final decision on the merits, he clearly can do so.

As an initial matter, notwithstanding this Court's prior language, it is not clear that the "harmful error" requirement applies to this case. The requirement comes from 5 U.S.C. § 7701, the statute authorizing appeals of agency personnel actions to the Board. Section 7701(c)(2) states:

> [T]he agency's decision may not be sustained . . . if the employee or applicant for employment–
>
> (A) shows harmful error in the application of the agency's procedures in arriving at such decision;
>
> (B) shows that the decision was based on any prohibited personnel practice described in [5 U.S.C. § 2302]; or
>
> (C) shows that the decision was not in accordance with law.

This Court's prior opinion assumes that the relevant subsection is (A) because the failure to make a final merits decision violated the Department's procedures. But, as discussed above, the Department's action also violated Mr. Romero's statutory rights under 5 U.S.C. § 7513(b)(4) ("a written decision and the specific reasons therefor") and constitutional rights under the Due Process clause, and therefore was "not in accordance with law" pursuant to subsection (C). Because subsection (C) does not include a harmfulness requirement, reversal of the Department's action is required regardless of whether Mr. Romero can show harm.

Furthermore, even if subsection (A) does control, the Department's error in this case is the type of "fundamental error" that is "not susceptible to review under

the harmless error test." *Porter v. United States*, 163 F.3d, 1304, 1319 (Fed Cir. 1998). As this Court explained in *Wagner*, there are "two justifications for refusing to apply the harmless error rule":

> (1) avoiding the erosion of essential components of a fair trial; and
>
> (2) the inability of a reviewing body to assess the magnitude of the error.

365 F.3d at 1363.[7] Fundamental errors "are not limited to statutory procedural error, but may also result from violations of regulations and even internal operating procedures" if the violation renders "the effect of the error . . . incapable of evaluation." *Id.* (citing *Evensen v. United States*, 654 F.2d 68, 75 (Ct. Cl. 1981)).

It 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. The Board attempted to divine the DIA-SAB's intent regarding the Secret clearance from its decision addressing only SCI access, but its effort was pure and unreliable speculation. *See* JA 31-32. Moreover, this Court consistently has held that the

[7] Although *Wagner* was decided in the context of civilian correction boards, the reasoning underlying the "fundamental error" analysis applies to this case. The *Wagner* Court noted that fundamental errors "penetrate to the heart of the process Congress deemed necessary for fair judgment" in officer selection. 365 F.3d at 1363 (citing *Doyle v. United States*, 599 F.2d 984, 1003 (Ct. Cl. 1979)). Here, Congress specified a process in 5 U.S.C. § 7513; the basic denial of that process poses the same concern.

substance of a security clearance determination is not susceptible to judicial review, "as those determinations are committed to the broad discretion of the responsible Executive Branch agency." *Hesse*, 217 F.3d at 1376 (citing *Dep't of the Navy v. Egan*, 484 U.S. 518 (1988)). Although the principle of executive discretion typically operates to shield agency decisions from second-guessing by the Court or the Board, it also counsels against the Court or the Board attempting to make clearance decisions in the first instance when the agency, because of a procedural error, failed to do so.[8]

Finally, even if the Court determines that the Department's error is subject to "harmful error" analysis, the error plainly harmed Mr. Romero. As discussed above, the adjudicatory standards for a Secret clearance, unlike those for SCI access, permit an employee to mitigate concerns stemming from his close familial relationship with foreign citizens. *See* JA 95 (12/15/2009 Hearing Tr. at 158:18-159:4) ("[T]here is a . . . per se prohibition to grant someone access eligibility to SCI if they have an immediate family member who's a non-U.S. citizen. That is not a per se condition for collateral or Top Secret, Secret, or Confidential

[8] To the extent that the Board believed it could discern what the decision would have been, its evaluation was clearly erroneous. Mr. Romero had been retained a Secret security clearance for over two years while married to a foreign national – a fact that he had fully disclosed to the security officials. There is no rational basis on which the Board could conclude that *the absence of any change in his circumstances* would likely have resulted in the revocation of his clearance. To the contrary, if a decision can properly be made, the only supportable decision is that his clearance would not have been revoked.

information.").[9] The Department's failure to render a final decision on the merits regarding his Secret clearance deprived him of a decision addressing his mitigation arguments. Based on the process Mr. Romero did receive, there is no indication that his clearance would have been revoked absent the procedural error.

CONCLUSION

This Court should reverse the Board's decision affirming the Department's termination of Mr. Romero, reverse the Board's decision denying Mr. Romero's petition for enforcement of its earlier decision regarding his suspension, and remand the matter to the Board to identify and enforce appropriate remedies, including back pay, interest, other benefits authorized by the regulations of the Office of Personnel Management, and an order directing the Department to clarify its records to show that Mr. Romero's Secret clearance was never revoked.[10]

[9] *Accord In the matter of [Redacted]*, No. 08-03707 (Dep't of Defense Office of Hearings & Appeals Nov. 25, 2008), included in appendix at JA 459, at JA 463 (separately adjudicating whether employee should lose Top Secret clearance after having SCI access revoked for smoking marijuana, and recognizing that different considerations apply).

[10] After his discharge, Mr. Romero suffered a long period of unemployment, but he is now employed as an auditor at the U.S. Department of Veterans Affairs. He also turned 61, and is eligible for retirement if the Court agrees that his Secret clearance was never properly revoked.

Respectfully submitted,

/s/

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

October 7, 2010

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

WILFREDO ROMERO,
Appellant,

v.

DEPARTMENT OF DEFENSE,
Agency.

DOCKET NUMBERS
DC-0752-07-0328-M-3
DC-0752-06-0136-M-2

DATE: March 25, 2010

Mark S. Zaid, Esquire, Washington, D.C., for the appellant.

Keith L. Williams, Esquire, Arlington, Virginia, for the agency.

BEFORE
Jeremiah Cassidy
Regional Director

INITIAL DECISION

INTRODUCTION

The appellant was employed as an auditor for the Office of Inspector General (OIG) at the agency. On December 29, 2006, the agency removed the appellant from his position as a GS-12 Auditor for failing to maintain his security clearance. *See* Agency File, Tab C. The appellant then filed an appeal with the Board. *See* Appeal File (AF), Tab 1. In a March 28, 2007 initial decision, the Administrative Judge affirmed the agency's action, holding that the Board could not review the merits underlying a security clearance revocation. *See* AF, Tab 10. Subsequently, the appellant appealed that decision to the United States Court of Appeals for the Federal Circuit, and the court remanded the appeal to the

Board for further consideration. *See Romero v. Department of Defense*, 527 F.3d 1324 (Fed. Cir. 2008).[1] On December 15-16, 2009, I held a hearing in this appeal.

For the reasons set forth below, the agency's action is AFFIRMED.

ANALYSIS AND FINDINGS

Background

The appellant had worked as an auditor at the agency's OIG since 1999. His position required a Secret security clearance, which he had been granted by the Washington Headquarters Service Consolidated Adjudication Facility (WHS-CAF). In 2002, the appellant's supervisor asked the Defense Intelligence Agency Central Adjudication Facility (DIA-CAF) to grant the appellant clearance to obtain access to Sensitive Compartmented Information (SCI) so he would be able to assist with auditing work at the National Security Agency (NSA).

After conducting an investigation, the DIA-CAF issued a September 24, 2004 letter of intent informing the appellant a preliminary decision had been made to deny him clearance for access to SCI. *See* Remand Appeal File (RAF), Tab 22, Subtab 1. The letter of intent further stated the appellant's "access to collateral information has been suspended pending resolution of this matter." *Id.* The DIA-CAF stated the appellant's personal history showed a security risk existed that "could cause vulnerability to coercion, exploitation, or pressure due to foreign influence." *Id.* The DIA-CAF stated that immediate family members of individuals requiring SCI access must be United States citizens. In this connection, DIA-CAF cited as a specific security risk the Honduran citizenship of

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1. On January 30, 2009, I joined the appellant's appeal of his removal based on the agency's revocation of his security clearance with another appeal the court had remanded to the Board. That appeal concerns a petition for enforcement he had filed regarding an earlier suspension. *See* RAF, Tab 3.

the appellant's wife and stepson. DIA-CAF stated that if its preliminary decision became final, the appellant would not be eligible for access to SCI or collateral classified information. *Id*.

As an enclosure to the letter of intent, DIA-CAF provided the appellant with a statement of reasons (SOR) regarding its investigation and preliminary findings. *See* RAF, Tab 22, Subtab 1 (Enclosure 1). In the SOR, DIA-CAF cited additional information it asserted showed a susceptibility to exploitation or pressure due to foreign influence. In this regard, DIA-CAF stated "your spouse . . . is currently working in the Honduran Embassy in Washington, D.C. as a Cultural Attache." DIA-CAF explained his admitted association with Honduran Nationals is one "of affection and familial" as "your spouse is invited to Embassy functions for which you are required to attend in accordance with the diplomatic raison d'etre." *Id*.

By letter dated October 1, 2004, Michael P. Lessard, Chief, Office of Security, for the agency's Inspector General, notified the appellant his access to classified and sensitive unclassified information had been suspended pending resolution of the decision to deny his eligibility for access to SCI issued by DIA-CAF. *See* RAF, Tab 22, Subtab 3. Mr. Lessard further stated the appellant's access to classified and sensitive unclassified information would remain in a "suspended status until a final determination" by DIA-CAF regarding his SCI eligibility. *Id*.

By letter dated January 31, 2005, Karl C. Glasbrenner, the Chief of DIA-CAF, requested that the agency's Inspector General provide DIA-CAF with a "Certification of Compelling Need." *See* RAF, Tab 22, Subtab 4. Mr. Glasbrenner stated although Director of Central Intelligence Directive (DCID) 6/4 requires that SCI access eligibility be predicated upon the SCI candidate's own and immediate family members' United States citizenship to prevent the potential for undue foreign influence, exploitation, pressure or coercion, consideration for an exception to the citizenship requirement may be

given based upon a specific national security requirement and a certification of a compelling need. *Id*. Mr. Glasbrenner explained the services of the individual SCI applicant must be deemed essential to operation or mission accomplishment.

In response to that letter, Thomas Gimble, the agency Inspector General's Senior Intelligence Officer (SIO), provided a request for a Certification of Compelling Need. *See* RAF, Tab 22, Subtab 5. Mr. Gimble asserted, among other things, the appellant was the only auditor available to work with DIA who had the necessary training and experience. Further, Mr. Gimble stated the agency had no reason to suspect the appellant would not be able to secure a clearance. Mr. Gimble also noted since the appellant's "security clearance was suspended . . . [w]e will not be able to adequately perform our required audit coverage until we can get another auditor with the required clearance . . . ." *Id*. Mr. Gimble added he and the appellant's first-line supervisor had closely observed the appellant for three years and had no reason to question his loyalty to the United States.

Notwithstanding the request for a Certification of Compelling need, by letter dated March 8, 2005, Mr. Glasbrenner notified the appellant of DIA-CAF's final decision to deny his eligibility for access to classified information. *See* RAF, Tab 22, Subtab 6. In this connection, Mr. Glasbrenner stated "[e]vidence from past espionage cases supports the conclusion that foreign connections are a relevant risk factor." *Id*. Mr. Glasbrenner stated the information the appellant provided regarding foreign influence failed to mitigate the security concerns "as it pertains to your spouse's continued employment with the Honduran Embassy in Washington, DC." Further, Mr. Glasbrenner asserted the potential security risks, as represented by the facts of the appellant's case, included "that your spouse is not a U.S. Citizen, and is an accredited diplomat of the Government of Honduras." Mr. Glasbrenner contended it was "inconsequential" that her title was "first Secretary," rather than Cultural Attache, because in the

"legal/diplomatic definition, she is an agent of a foreign power."[2] Mr. Glasbrenner concluded because these security interests were deemed to be inconsistent with national security interests, the appellant's eligibility for access to SCI "is denied and your access eligibility to collateral classified information is revoked effective this date." *Id*.

Subsequently, the appellant appealed DIA-CAF's final decision to the agency's Defense Office of Hearings and Appeals (DOHA). *See* RAF, Tab 22, Subtab 8. DOHA provided the appellant with a "personal appearance" before an Administrative Judge on May 4, 2005. In an August 26, 2005 decision, the DOHA Administrative Judge recommended that DIA's Security Appeals Board (SAB) sustain the revocation of the appellant's access to collateral classified information. The Administrative Judge found because individuals with foreign immediate family members are precluded from obtaining access to SCI under DCID 6/4, DOHA lacked jurisdiction to consider whether an exception should apply to that denial. The Administrative Judge, therefore, limited his recommendation to the issue of whether the appellant should be granted access to collateral classified information. *Id*.

The Administrative Judge found the only relevant Mitigating Condition set forth in the agency's regulations, Foreign Influence Mitigating Condition (FI MC) I: *A determination that the immediate family member(s), cohabitant, or associate(s) in question would not constitute an unacceptable security risk*, was not applicable to the appellant. *See* RAF, Tab 22, Subtab 8. In this connection, the Administrative Judge stated that "[a]s an employee of the Honduran Embassy, Appellant's wife is an agent of a foreign power." The Administrative Judge also found that her assignment to the Honduran embassy in the United States uniquely

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2. "Agent of a foreign power" means – (1) any person other than a United States person, who – (A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power. 50 U.S.C. § 1801(b)(1)(A).

placed her in a position to be exploited by the Honduran government in such a way that could force the appellant to choose between his affection for her and his loyalty to the United States. *Id*. Consequently, the Administrative Judge found it was not consistent with interests of national security to grant the appellant access to collateral classified information, and recommended the DIA-SAB sustain DIA-CAF's decision to revoke appellant's access to collateral classified information. *Id*.

By letter dated December 7, 2005, the DIA-SAB notified the appellant that, following a "careful review of [his] personnel security case," the original determination that he did not currently meet the minimum personnel security standards for SCI was affirmed. *See* RAF, Tab 22, Subtab 9. In this regard, the SAB concluded he failed to mitigate the foreign influence security concerns. The SAB further found that, as "noted by the DOHA Administrative Judge, the Foreign influence standard applies and mitigating factors do not apply as your wife is, by definition, an agent of a foreign power (50 U.S.C.A. § 1801(b)(1)(A))." *Id*. Because the security issues were "deemed to be inconsistent with national security interests," the SAB denied his eligibility for access to SCI. The SAB stated the denial was effective the date of its decision, was "final," and concluded the "administrative review of this process." The SAB's final decision made no specific reference to the revocation of his access to collateral classified information (i.e., his Secret security clearance).

On December 16, 2005, Robert A. Smith, Chief, WHS-CAF, advised the appellant WHS-CAF had received from DIA-CAF its final decision to deny the appellant his eligibility for access to SCI. *See* RAF, Tab 22, Subtab 10. Further, Mr. Smith stated the following:

> In accordance with DoD Regulation 5200-2.R, Department of Defense Personnel Security Program, and Office of the Assistant Secretary of Defense memorandum, with attachment, dated 16 July 1998, Subject: Clearance and Access Reciprocity in the

> Department of Defense, this office reciprocally accepts the Defense Intelligence Agency's final decision. Therefore, the eligibility granted to you by the [WHS-CAF] for access to classified information and to occupy a sensitive position has been revoked.

Id.

On July 26, 2006, the OIG issued a notice of proposed removal to the appellant based on the DIA-SAB's denial of his access to SCI and the WHS-CAF's revocation of his access to classified information. *See* Agency File, Tab D. By letter dated December 21, 2006, Patricia A. Marsh, the Principal Deputy Assistant Inspector General for the Defense Financial Auditing Service, notified the appellant that the agency had decided to affirm the charges set forth in the proposal letter, and advised he would be removed from his position effective December 29, 2006. *See* Agency File, Tab C.

The appellant appealed the agency's action to the Board. *See* AF, Tab 1. He argued the agency denied his right to due process because the agency did not give him the opportunity to challenge the WHS-CAF's reciprocal revocation of his collateral clearance. He further argued that the WHS-CAF's revocation of his access to classified information was invalid because the DIA-SAB only denied his eligibility for access to SCI. In addition, he argued that his removal was retaliatory.

In a March 28, 2007 initial decision, the Administrative Judge affirmed the agency's action, holding that the Board could not review the merits underlying a security clearance revocation. *See* AF, Tab 10. The Administrative Judge rejected the appellant's due process argument because he was given the opportunity to challenge the DIA-CAF's decision and because the agency's regulations do not require an opportunity for review of a reciprocal acceptance of a security clearance revocation. The Administrative Judge also determined the appellant's security clearance had been revoked, that his position required "access to sensitive compartmented information (SCI) and access to classified information," and that the agency had fully complied with the requirements of 5

U.S.C. § 7513. The Administrative Judge rejected his other challenges to the agency's action as challenges to the merits of the decision to revoke his security clearance, an issue that is not within the scope of the Board's review in an appeal regarding the revocation of a security clearance. The full Board denied the appellant's petition for review of the initial decision.

The appellant then filed an appeal with the United States Court of Appeals for the Federal Circuit (the court). *See* Litigation File (LF), Tab 1. In its decision, the court found the Board did not address whether the agency complied with its own procedures when revoking the appellant's security clearance. *See Romero v. Department of Defense*, 527 F.3d 1324, 1329-30 (Fed. Cir. 2008). The court further found the Board may review whether the agency has complied with its procedures for revoking a security clearance, even though it may not review the substance of the revocation decision. *See id.*, 527 F.3d at 1329. In this connection, the court noted that the Board did not address the appellant's argument that the agency failed to follow its own regulations in revoking his Secret security clearance. The court noted he had raised two challenges to the procedural validity of the agency's revocation of his Secret security clearance. First, he argued even though the DIA-SAB was authorized to review the denial of his eligibility for access to SCI, the DIA-SAB could not revoke his Secret security clearance. Second, he argued that the DIA-SAB did not actually revoke his Secret security clearance, even if it had authority to do so. The court noted he asserted the WHS-CAF's "reciprocal revocation" of his Secret security clearance was invalid because there was no revocation to reciprocally accept. He argued, therefore, to properly revoke his Secret security 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. *See id.*, 527 F.3d at 1330. The court, therefore, vacated the Board's decision and remanded the appeal for the Board to determine whether the

appellant could show that the agency failed to follow its procedures and that any failure to do so resulted in harmful error. *Id*.

On remand, the appellant reiterates the arguments he made below. *See* RAF, Tab 5 & 6. During the telephonic prehearing conference, he referred to several agency regulations and executive orders that he argued support his claim that the agency's action was not in accordance with its procedures. *See* RAF, Tab 8.

The agency argues that its removal action was consistent with its rules, practice, and regulations. *See* RAF, Tab 4. In support of its argument, the agency has set forth an explanation of the organizational framework that it uses to make various security clearance determinations for its employees. The agency states that it has ten security clearance and/or SCI access determination authorities. In the instant appeal, the two relevant authorities are the DIA and WHS. The agency authorizes both to grant, deny, or revoke personnel security clearances (Top Secret, Secret, and Confidential). The DIA also has authority to grant, deny, or revoke access to SCI. WHS-CAF possesses delegated authority for security clearance determinations. Within DIA, DIA-CAF has delegated responsibility for security clearance determinations as well as SCI access eligibility decisions. For civilian employees, the agency split adjudication authority between DIA and WHS. The agency gave WHS-CAF responsibility for security clearance determinations, and gave DIA-CAF responsibility for SCI access eligibility decisions. The agency asserts that to prevent duplication of adjudication efforts, the agency established in DoD Regulation 5200.2-R standard adjudicative guidelines for both security clearance determinations and SCI access eligibility decisions. Similarly, to ensure consistency, the agency established a single due process procedure for both security clearance determinations and SCI access eligibility decisions.

The agency asserts adjudicative authority for the agency's various components, including the OIG, is shared by DIA-CAF and WHS-CAF. *See*

RAF, Tab 4. Because administrative divisions of labor are generally based upon levels of access, WHS-CAF handles security clearances, while DIA-CAF normally handles access to SCI. Nevertheless, the agency asserts this division of labor does not limit the authority to grant, deny, or revoke personnel security clearances. For purposes of efficiency, WHS desired DIA to address security clearance issues when adverse SCI decisions are made. Therefore, because the DIA-CAF found information that adversely affected its decision with regard to the appellant's SCI access and his Secret security clearance, the DIA addressed both matters. Consequently, the agency argues the DIA-CAF had the authority to revoke his security clearance.

In this connection, the agency contends that by letter dated March 8, 2005, DIA actually revoked his security clearance. *See* RAF, Tab 4; Agency File, Tab K. Further, the agency argues the same guidelines are applicable to both SCI and security clearance determinations. Notwithstanding the appellant's argument to the contrary, the agency argues WHS-CAF could reciprocally accept the DIA-CAF denial of SCI eligibility as the basis for the revocation of his Secret security clearance. The agency states that once DIA-CAF determined there was information that indicated the appellant was subject to foreign influence, that information affected both the SCI decision as well as the appellant's Secret security clearance. The agency argues the appellant mistakenly assumes different guidelines exist for determining access to the various levels of classified information. Rather, the agency argues, the different types of access to classified information are distinguished by the scope of the background investigation for the different types of access, not by the adjudicative guidelines. Under this framework, information impacting access to SCI will generally impact access to other types of classified information. The agency argues, therefore, it would be inefficient to repeat the same process for different adjudications that are based on the same adjudicative guidelines.

By order dated January 30, 2009, I joined the appellant's removal appeal with a second appeal, *Romero v. Department of Defense*, MSPB Docket No. DC-0752-06-0136-M-1 (Romero 2). *See* AF, Tab 3 (*Romero v. Department of Defense*, MSPB Docket No. DC-0752-07-0328-M-2). That appeal involves the appellant's petition for enforcement of the Board's decision finding the agency improperly continued his indefinite suspension following the agency's final revocation of his security clearance. *See Romero v. Department of Defense*, 106 M.S.P.R. 284 (2006).

The appellant subsequently filed a petition for enforcement of that decision. *See* Compliance File (CF), Tab 1. In that petition, he argued the agency had failed to comply with the Board's order, and had not paid back pay and other benefits to him for the time period that the agency had improperly extended his suspension. The Administrative Judge denied the petition, finding that because the agency could not return him to duty due to his lack of a security clearance during the relevant time period, he was not entitled to back pay or other benefits. *See* CF, Tab 13. Although the Board then affirmed that decision, the court granted the agency's motion to remand the compliance appeal so that it could be joined with the removal appeal. *See* Romero 2, AF, Tab 1. I find the remedy in the compliance matter is contingent upon the resolution of the central issue in the removal appeal, that is, whether the agency properly revoked his security clearance.

Legal Standard

Under 5 U.S.C. § 7512(1), an agency's removal of an employee is an "adverse action." An employee subject to an adverse action is entitled to the protections of 5 U.S.C. § 7513. Those protections include written notice of the specific reasons for the proposed action, an opportunity to respond to the charges, the requirement that the agency's action is taken to promote the efficiency of the service, and the right to review of the action by the Board. When reviewing an

adverse action under 5 U.S.C. § 7701, the Board may sustain the agency's action only if the agency can show that its decision is supported by a preponderance of the evidence. 5 U.S.C. § 7701(c)(1)(B). In most cases, the agency must provide evidence supporting the reasons for the adverse action. But in cases in which the adverse action is based on the denial or revocation of a security clearance, section 7701(c)(1)(B) does not require the agency to prove that the reasons for its decision to deny or revoke a security clearance are supported by a preponderance of the evidence. In *Department of the Navy v. Egan*, 484 U.S. 518, 531, 108 S.Ct. 818, 825, 98 L.Ed.2d 918 (1988), the Supreme Court observed that imposing such a burden would be inconsistent with the normal standard applied when granting security clearances, that is, granting such clearances is "clearly consistent with the interests of the national security." Instead, the Court stated that in reviewing a for-cause removal action of an employee who was denied a security clearance, the Board may only determine "whether such cause existed, whether in fact clearance was denied, and whether transfer to a nonsensitive position was feasible." *Id.* at 530, 108 S.Ct., at 825.

In *Hesse v. Department of State*, 217 F.3d 1372, 1376 (Fed. Cir. 2000), the court addressed the scope of review of removal actions that involve the revocation or denial of security clearance:

> The principles we draw from the Court's decision in *Egan* are these: (1) there is no presumption that security clearance determinations will be subject to administrative or judicial review, as those determinations are committed to the broad discretion of the responsible Executive Branch agency; (2) unless Congress specifically provides otherwise, the Merit Systems Protection Board is not authorized to review security clearance determinations or agency actions based on security clearance determinations; and (3) when an agency action is challenged under the provisions of chapter 75 of title 5, the Board may 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 section 7513 were followed, but the Board may not

> examine the underlying merits of the security clearance determination. *See King v. Alston*, 75 F.3d 657, 662-63 (Fed. Cir. 1996); *Drumheller v. Department of the Army*, 49 F.3d 1566, 1571 (Fed. Cir. 1995); *Lyles v. Department of the Army*, 864 F.2d 1581, 1583 (Fed. Cir. 1989).

See Hesse, 217 F.3d at 1376.

Under § 7513(b), an appellant is entitled to (A) 30 days advanced written notice of the reasons for the agency's action, (B) a reasonable time to answer orally and in writing and to provide relevant evidence supporting his position, (C) the opportunity to be represented, and (D) a written decision explaining the reasons for the agency's decision. *See* 5 U.S.C. § 7513(b). Here, the court has already found the agency afforded these procedural protections to the appellant. *See Romero*, 527 F.3d at 1329.

Nevertheless, the court has found that § 7513 requires, in some circumstances at least, that an agency do more than simply state an adverse action is based on the revocation or denial of a security clearance. *See Romero*, 527 F.3d at 1328. Recent decisions issued by both the court and the Board appear to have expanded the scope of the protections afforded by § 7513(b). For example, the court and the Board have stated that an employee's right to 30 days notice under § 7513(d) includes enough information for the employee to make a meaningful response to the agency's proposal to suspend the employee's security clearance. *See, e.g., Cheney v. Department of Justice*, 479 F.3d 1343, 1352 (Fed. Cir. 2007); *Rothlisberger v. Department of the Army*, 111 M.S.P.R. 662, 668, ¶ 13 (2009).

Moreover, the court has found § 7513 is not the only source of procedural protections for employees subject to adverse actions based on a security clearance decision. Rather, agencies must also follow the procedures established by their own regulations. *See Romero*, 527 F.3d at 1328. In its remand decision, the court found that in the event an agency does not follow its own regulations, 5 U.S.C. § 7701(c)(2)(A) provides that an adverse action decision may not be

sustained by the Board if the employee can show "harmful error in the application of the agency's procedures in arriving at such decision." *Id.*

The court noted *Egan* stands for the principle that foreign policy is the "province and responsibility of the Executive," and that, unless Congress has provided otherwise, "courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *See Romero*, 527 F.3d at 1329 (quoting *Egan*, 484 U.S. at 530, 108 S.Ct. 818). Nevertheless, the court found the statutory provision allowing review of an agency's compliance with its own procedures leading to an adverse action does not amount to an unwarranted intrusion upon the authority of the Executive, because the authority to formulate procedures for denying or revoking security clearances remains with the Executive.

The appellant has not established the agency failed to follow its own regulations in revoking his Secret security clearance.

The appellant argues the agency failed to correctly implement its regulations in effecting the revocation of his Secret security clearance. In this connection, he argues that 1) the DIA-CAF did not have the authority to revoke his collateral Secret security clearance, and the denial of his SCI eligibility did not automatically revoke his Secret security clearance; 2) the WHS-CAF was required to independently adjudicate his eligibility for a Secret security clearance following the DIA-CAF's denial of his eligibility for SCI; and 3) the WHS-CAF was required to provide the appellant with a pre-screening personal interview prior to his nomination to DIA for SCI eligibility. *See* RAF, Tab 12 (at 14-40). I find the appellant has failed to establish the agency violated any of its procedures in revoking his Secret security clearance.

1. The DIA-CAF's Revocation Authority and its Effect on the Appellant's Collateral Clearance

At the hearing, the appellant offered testimony from two expert witnesses, Peter Nelson and J. Liam Leonard, to support his argument that the DIA-CAF lacked the authority to revoke his Secret security clearance. Mr. Nelson testified he worked for the agency in the area of Personnel Security for over 20 years. *See* Hearing Transcript (HT), at 31-35. He testified that, prior to his 2002 retirement, he was the Deputy Director, Security Directorate, Office of the Deputy Assistant Secretary of Defense (Security & Information Operations), Office of the Assistant Secretary for Defense. *See id*.; RAF, Tab 6 (Exhibit M). He testified that from 1980 to 1991, he was the Assistant Deputy Director for Personnel Security, Counter-Intelligence and Investigative Programs Directorate, Office of the Under Secretary of Defense for Policy. *Id*.

Mr. Nelson testified that as the Assistant Deputy Director, he was responsible for the development of policies and procedures for the entire agency, "from investigations to security clearances to due process and reciprocity . . . ." *See* HT, at 34. With respect to DoD Regulation 5200.2-R, the Defense Personnel Security Regulation, Mr. Nelson testified that in the 1980s he was the principal action officer responsible for consolidating "a number of diverse directives and regulations" that covered "various aspects of the personnel security program." *See id*., at 35. He testified he and his colleagues "combined and consolidated [sic][these directives] into one single regulation for ease of understanding and implementation." *Id*. He further testified they developed "adjudication guidelines," and he was involved with "the development[,] . . . upkeep, maintenance, and implementation of that particular regulation." *Id*.

Mr. Nelson testified that when he assumed the Deputy Director position in 1991, he was "the lead" for the office, and chaired many of the senior-level working groups that considered changes to policy. *See* HT, at 36. He testified he

"interfaced with all of the intelligence community during that period of time." *Id*. In this connection, he testified he was the "first chair" of the personnel security working group the agency convened following the Ames espionage case. *Id*. As part of that group, he testified he helped develop Executive Order 12968, and developed and implemented "not only the new investigative standards, but the adjudicative guidelines as well that were implemented." *Id*.

Mr. Nelson explained that Executive Order 10450, which the president issued in the 1950s, was the first Executive Order to address personnel security on a national level. *See* HT, at 36. He testified Executive Order 10450 set forth the criteria for access to due process procedures, "the standards that were supposed to be followed," and the "guidelines and investigative standards which were directed" by the Executive Order and "then came later." *Id*. He testified Executive Order 12968 essentially replaced Executive Order 10450, and that he worked with the Justice Department and members of the National Security Council in drafting the order. *See id*., at 37. He testified they took, in essence, the requirements from the 1994 Intelligence Authorization Act and "translated that congressional mandate" into the Executive Order that President Clinton signed in 1995. *Id*.

Mr. Nelson testified the agency amended, modified, and clarified DoD Regulation 5200.2-R on several occasions after various intelligence or security professionals had identified problems the agency needed to address. *See* HT, at 37-38. He testified it was very difficult to arrive at a consensus among the agency's various components to update the entire document. *See id*., at 38. He testified, therefore, the "change route" was the most effective way to "get the needed policy out relatively quickly." In this connection, he testified the agency and the Intelligence Community (IC) referred to the integration of Executive Order 12968 into DoD Regulation 5200.2-R as "Change 3." *Id*.

Mr. Nelson also testified he prepared a February 2, 1996 policy memorandum from the Office of the Assistant Secretary of Defense to the

Director, Personnel & Security, WHS, on the subject of "Duplicate Adjudications," that was signed by Margaret Munson, the Acting Director for Counterintelligence and Security Programs (the Munson Memo).[3] *See* HT, at 39; RAF, Tab 22, Subtab A-13. Further, he testified he prepared a July 16, 1998 policy memorandum from the Office of the Assistant Secretary of Defense to senior level agency managers on the subject of "Clearance and Access Reciprocity in the Department of Defense," that was signed by Arthur Money, the Assistant Secretary for Command, Control, Communications, and Intelligence (the Money Memo).[4] *See* HT, at 39-41; RAF, Tab 22, Subtab A-14.

Mr. Nelson testified that although the WHS-CAF was not within his chain of command because it was a "discrete and separate entity within the Office of the Secretary of Defense," he frequently dealt with the WHS-CAF due to their responsibility for implementing the DoD Regulation 5200.2-R procedures. *See* HT, at 42. He testified that, as Deputy Director, he met with the Chiefs of all of the various CAFs within the agency, including the WHS-CAF, to discuss "implementation of the program, any concerns or problems, ways to do things better, and that sort of thing." *Id*. With respect to the WHS-CAF, he testified "they kind of were responsible to us for the correct and accurate implementation of the provisions of the 5200.2-R." *Id*.

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3. The Munson Memo states, in relevant part, that "whenever DIA denies or revokes SCI access" for agency employees "using the same common due process procedures contained in Change 3 to DoD 5200.2-R, it will be unnecessary for the WHS CAF to repeat the process." The memo further states, however, the WHS-CAF must "advise the individual in writing that his or her security clearance has been effectively revoked pursuant to the due process action already administered by DIA." *See* RAF, Tab 22, Subtab A-13.

4. The Money Memo states, in relevant part, that "Clearance and SCI access denials or revocations within DoD will also be mutually and reciprocally recognized." *See* RAF, Tab 22, Subtab A-14.

As to the reciprocity issue, Mr. Nelson testified as follows:

> [Reciprocity] was an enduring issue then as unfortunately it remains so today, to a lesser degree. But basically, the challenge was to be able to get – within DoD, at least, if not across the government, but certainly within DoD – to have the discrete elements of the department to recognize clearances granted by other elements without replicating the very costly investigative and adjudicative procedures in the case of a favorable determination of a security clearance.
>
> So hence to that end we not only built the common adjudicative guidelines, rather than as was the case in the '70s where everybody kind of had their own guidelines. We had a single national standard now. We also had single national standards for investigation . . . which I was directly involved in developing.
>
> I was also directly involved in common training standards for adjudicators, again to improve the level of competence and, hopefully, consistency in applying these single set of national standards, such that if you got a TS [Top Secret] clearance in the Army, there was a great likelihood that if it had been a Navy case, they would have come to the same result.
>
> And hence, as in the department happens on a daily basis, people move around and change and go to other jobs, that they would be able to take their clearance with them and, relatively seamlessly, go back to work without little or no loss of time.
>
> That worked to a greater or lesser degree in some cases. I also led the development of the joint personnel adjudication system which, along with the other critical areas that I mentioned, was also designed to transmit or retain the clearance outcome, such that it would be visible throughout DOD.
>
> That would help facilitate clearance reciprocity. So if somebody moved around from Army to Air Force, or a contractor went from contract to contract with a different DOD entity, that we could save time, money, and resources in not having to replicate a costly process.

See HT, at 43-44. Mr. Nelson testified his office, the Security Directorate, initiated the agency's reciprocity policies, not the WHS-CAF. *See id.*, at 48.

As to DoD Regulation 5200.2-R, Mr. Nelson testified the agency published the first version of that regulation in 1979 with an initial set of adjudication guidelines. *See* HT, at 50. He testified the regulation "consolidated a multiplicity of other documents," and "then evolved . . . eight years later we published the wholesale change of 1987." *Id*.

Mr. Nelson further testified that Director of Central Intelligence Directive 6/4 (DCID 6/4) is a document that contains the IC's guidelines for Personnel Security and access to SCI. *See* HT, at 51-52. He testified DCID 6/4 is the equivalent of DoD Regulation 5200.2-R for the IC. He testified both of these policies contain the same adjudicative guidelines. *See id*., at 74. He explained the DIA, the National Security Agency (NSA), the Central Intelligence Agency (CIA), and the National Geospatial Intelligence Agency (NGIA) follow DCID 6/4 when they adjudicate access for SCI, while the DoD and its various components follow DoD Regulation 5200.2-R when they adjudicate eligibility for Confidential, Secret, and Top Secret clearances, all of which are referred to as "collateral clearances." *See id*., at 84. He testified that SCI, unlike the collateral clearances, protects intelligence "sources and methods." *See id*. at 85-86. He testified the collateral clearances, on the other hand, protect only information that is classified under Executive Order 12968. *Id*. He also testified that DCID 6/4, like DoD Regulation 5200.2-R, incorporates the policy set forth in Executive Order 12968. *See id*., at 84.

Mr. Nelson testified that in this case, the WHS-CAF had exclusive authority over the appellant's Secret security clearance, while the DIA-CAF had authority to adjudicate his eligibility for SCI. *See* HT, at 52. Mr. Nelson also testified the DIA-CAF "had no authority over his collateral security clearance" issued by the WHS-CAF "in conjunction with his employment with the Office of the Inspector General." *See id*., at 52-53. He testified, therefore, the DIA-CAF had no authority to revoke the appellant's Secret security clearance. *See id*., at 73. Mr. Nelson testified, rather, that only the WHS-CAF had the authority to

revoke the appellant's Secret security clearance. Mr. Nelson testified the DIA-CAF lacked this authority because the WHS-CAF had granted the appellant this collateral clearance in the first instance. *Id.* Mr. Nelson explained that all agency components lack the authority to revoke a clearance initially granted by another component. *Id.* In this connection, Mr. Nelson testified Mr. Glasbrenner incorrectly stated in an interrogatory response he provided during discovery in this appeal that Appendix 5.1.8 of DoD regulation 5200.2-R gave the DIA-CAF the authority to revoke the appellant's Secret security clearance. *See id.*, at 92-95; RAF, Tabs 6 (Exhibit E, Interrogatory Response # 19), and 22, Subtab A-18. Mr. Nelson testified, rather, that Appendix 5 was not drafted for that purpose.

Mr. Nelson testified, on the other hand, that the WHS-CAF could have designated the DIA-CAF to act in its place with respect to collateral clearances issued by the WHS-CAF. *See* HT at 96-97. He testified, however, he was unaware the WHS-CAF had ever issued such a designation. *Id.*

Similarly, Mr. Nelson testified there was no controlling legal authority that required the WHS-CAF to accept the DIA-CAF's revocation of the appellant's Secret security clearance. *See* HT, at 102. Mr. Nelson further testified there was no need for the WHS-CAF to accept the DIA-CAF's conclusions. *Id.* Although he testified that the WHS-CAF correctly informed the appellant he was not entitled to any further due process following the DIA-CAF's final decision, Mr. Nelson explained the WHS-CAF still needed to explain "what the underlying reason was, and perhaps that they had reviewed the case file and come to the same decision as the DIA." *Id.*

Mr. Nelson testified that when the agency provides an individual with SCI access, that individual automatically obtains all of the lower collateral clearances. *See* HT, at 103-07. He testified, however, that the inverse is not true, that is, the denial of SCI access does not necessarily mean an individual is ineligible for one of the lower collateral clearances, such as a Secret security clearance. *Id.* He

testified both DCID 6/4 and DoD Regulation 5200.2-R state a determination for eligibility to SCI includes eligibility for access to Top Secret and below. *See id*., at 109.

Mr. Nelson testified nothing in the Money or Munson memos, or even in DoD Regulation 5200.2-R, gave the DIA-CAF the authority to revoke the appellant's collateral clearance. *See* HT, at 109-15. Mr. Nelson testified, rather, that the agency's reciprocity policy was designed to ensure an agency component need not repeat a security clearance determination that was already done by another agency or agency component. *See* HT, at 115. He explained that:

> [F]or example, where DIA would take an adverse SCI determination and then that would be entered into the clearance database, that if this individual . . . decided to apply for a job at Army or Navy that also required SCI, when they looked into the record and saw that the person's SCI was denied or revoked, then they would be obligated to stop and cease processing
>
> They would not be able to go ahead and grant based on at least a reasonable recent action that denied or revoked.
>
> . . . .
>
> The paragraph in the [Money] memo, in this case, is saying . . . if you denied SCI or you denied a clearance – what was happening at the time, a lot of people would go shop around. So they would just recently deny – and this still happens in government, where the person is denied at one place and they quickly run over and apply for another organization, who goes through the whole process and whatnot and finds out they were revoked and so forth.
>
> So the goal was to try to say not only do we have reciprocity with the favorable part, the clearances, which is really 95, 98 percent of the benefit of reciprocity, but it also occurred to us then that because of the shopping around aspect, that the adverse outcomes should also be mutually acceptable.
>
> So if you got a denial for SCI and you come up for SCI somewhere else in DoD or, for that matter, the government, then this decision to revoke or deny should be governing, if you will.

See HT at 115-16. With respect to the Munson and Money Memos, he testified those memoranda meant that once the DIA-CAF had denied SCI access and provided an individual with the due process rights set forth in DoD Regulation 5200.2-R, the WHS-CAF need not replicate the process that had already been provided. *See* HT, at 120-22.

In addition, Mr. Nelson testified that DoD Regulation 5200.2-R specifically prohibits an agency component from denying or revoking the clearance of personnel whom another agency component has found eligible for such a clearance. *See* HT, at 118; RAF, Tab 22, Subtab A-19 (DoD Regulation 5200.2-R, C7.1.2.3). He testified, therefore, the DIA-CAF lacked the authority to revoke the appellant's Secret security clearance due to this regulatory provision.

J. Liam Leonard testified that he worked for the agency in the area of Personnel Security for over 20 years. *See* HT, at 142-45. *See id.*; RAF, Tab 6 (Exhibit M). He testified he was appointed to the Senior Executive Service (SES) in 1996 when he worked on the staff of the Office of the Secretary of Defense (OSD) as the Director for Security Programs. He testified in that position he had responsibility for a number of security programs, including the personnel security program, which involved the development of policy and the oversight of its implementation throughout the agency. *See* HT, at 142. He testified the agency then promoted him to the position of Deputy Assistant Secretary of Defense for Security and Information Operations. In that position, he had responsibility for personnel security, as well as counterintelligence, information assurance, infrastructure protection, and information operations. *See id.*, at 142-43.

Mr. Leonard testified that when he retired in 2008, he was the Director of the Information Security Oversight Office, where he reported directly to the President, who appointed him to that position in 2002. *See* HT, at 142. He testified he was then responsible for executive branch-wide oversight for the implementation of the executive order which governs the classification, handling, and declassification of classified national security information. *See* HT, at 143.

He testified during that period, there was "significant attention given to what was known as security clearance reform." *Id*. He testified the impetus for that reform was the Intelligence Reform and Terrorism Prevention Act, which set forth "specific goals and guidelines directing that further steps be taken to alleviate the backlog, shorten the times, and enhance reciprocity." *Id*. He testified that as part of that process, the Office of Management and Budget created an interagency taskforce to oversee the reform of the clearance process. *Id*. He testified he was part of that task force, and was the chair of the Reciprocity Working Group. *See id*., at 143-44.

Mr. Leonard further testified he was Mr. Nelson's third or fourth-line supervisor during the time Mr. Leonard served as Deputy Assistant Secretary of Defense. *See* HT, at 152. Mr. Leonard testified he assisted with the drafting of the Money Memo, as well as Executive Order 12968. *See* HT, at 145-149. He testified that Executive Order 12968 established the common adjudicative guidelines set forth in DCID 6/4, and DoD Regulation 5200.2-R. *See id*., at 150-52.

Mr. Leonard testified SCI is a "special access program," or SAP. *See* HT, at 157. He testified there is a strict prohibition against foreign spouses for SCI eligibility, although that prohibition is frequently waived. *See id*., at 157-60. He testified, however, there is no strict prohibition with regard to foreign spouses to obtain eligibility for a collateral clearance. *Id*. He testified, instead, that the existence of a foreign spouse is a factor that can be mitigated in collateral clearance eligibility cases. *Id*.

Mr. Leonard also testified that nothing in the agency's regulations gave the DIA-CAF the authority to revoke the appellant's Secret security clearance. *See* HT, at 157-66. For example, he testified Mr. Glasbrenner incorrectly stated in an interrogatory response he provided during discovery in this appeal that Appendix 5.1.8 of DoD regulation 5200.2-R gave the DIA-CAF the authority to revoke the appellant's Secret security clearance. *See id*., at 160-64; RAF, Tabs 6 (Exhibit E,

Interrogatory Responses 14, 16, and 19), and 22, Subtab A-18. Mr. Leonard further testified that nothing in Chapter 4 of DoD Regulation 5200.2-R provided DIA-CAF with such authority, either. He testified, rather, that:

> With respect to 4.1.1[of Chapter 4 of DoD Regulation 5200.2-R], the intent here was to avoid duplication of investigations and . . . also to avoid duplication of adjudications if the investigation and if the adjudication already meets the standard.
>
> We had a serious problem that, quite frankly, probably hasn't been totally eradicated, but whereby even though individuals may have a current clearance, if they went from agency A to agency B, just in order to assure themselves, agency B might do an entirely new investigation or even just part of a new investigation, and might do an entirely new adjudication, even though the individual had a – you know, the day before had a current clearance and had a current investigation.
>
> So 4.1.1 is intended to preclude that, to ensure, irrespective of who conducted the investigation or irrespective of who conducted the adjudication, that it would be reciprocally recognized and honored, provided it is at the proper level. So Secret to Secret, Top Secret to Top Secret, SCI to SCI, for example.
>
> Okay. 4.1.3.1 [of Chapter 4 of DoD Regulation 5200.2-R]. Again, this addresses the same thing in terms of the adjudicative determinations that had been made, that we will not - that DOD components would not, as a routine matter, readjudicate a clearance unless new derogatory information had been - had been developed since the last investigation.
>
> So if an individual went from the Army to the Navy, Secret to Secret, had the proper clearance and had the proper adjudication, Navy should without question accept that investigation. However, if Navy was [sic] aware of new adverse information that had been developed since the last investigation, then they would be responsible to at least adjudicate that new piece of information.

See HT, at 167-68. He explained, in essence, that Chapter 4 of DoD Regulation 5200.2-R applies to reciprocal recognition of favorable security clearance adjudications, rather than unfavorable adjudications such as the one at issue in this appeal. *See id*., at 168. He testified "that was always the issue, that investigative and adjudicative resources were being wasted to reinvestigate and readjudicate people that already had been determined to be trustworthy, and just because they changed the agency that they might be getting a paycheck from." *See id*., at 168.

As to Chapter 7 of DoD Regulation 5200.2-R, section C7.1.2.3, Mr. Leonard testified that provision "expressly prohibited" a denial or revocation of a clearance by an agency component concerning personnel who have been determined to be eligible for clearance by another component. *See* HT, at 169; RAF, Tab 22, Subtab A-19. He testified, for example, the Navy may not revoke a clearance that had been previously granted by the Army. *See id*., at 170. He testified, therefore, this provision also prohibited the DIA-CAF from revoking the appellant's Secret security clearance. *Id*.

Mr. Leonard further testified Charleen Wright, the WHS-CAF Chief for Security Policy, incorrectly stated in her October 8, 2008 prehearing declaration in this appeal that Chapter 3 of DoD regulation 5200.2-R gave the DIA-CAF the authority to revoke the appellant's Secret security clearance. *See* HT, at 169-71; RAF, Tab 22, Subtab D (Paragraph 9a). In this connection, he testified section C3.5.2.3 does not require that an agency's revocation of access to an SCI mandates the loss of any or all collateral clearances. *See id*., at 170-71; RAF, Tab 22, Subtab 20 (DoD Regulation 5200.2-R, C3.5.2.3). He testified, rather, that:

> It is contrary to every understanding and every - it's contrary to the entire concept of special access programs, number one. And number two, it directly conflicts with a plain text reading of 3.5.2.3.

> 3.5.2.3 addresses, and only addresses, that if you're eligible for SCI, then you're also eligible for access to Top Secret and below. It does not state what Ms. Wright states in her declaration, that an unfavorable SCI determination means the person is not - the inverse is nowhere to be found in this. It's nowhere stated.
>
> Besides which, it's contrary to common sense because again, SCI is a special access program determination. It makes no sense to have - for the criteria for a special access program to be identical to a not-special access program because then what's so special about the special access program?

See HT, at 170-71. In addition, Mr. Leonard testified agency employees are sometimes denied SCI but maintain a collateral clearance of some kind. *See* HT, at 171. He testified the regulation supports the proposition that an individual the agency finds eligible for SCI automatically obtains the lower collateral clearance, but that Ms. Wright mistakenly interpreted the regulation to provide that the inverse was also true, i.e., that an "unfavorable SCI determination means the individual is not eligible for access to Top Secret and below, essentially, no clearance." *See id.*, at 171-72; RAF, Tab 22, Subtab D (Paragraph 9a). He testified, therefore, the DIA-CAF's denial of the appellant's eligibility for SCI did not necessarily require the agency to revoke his Secret security clearance.

Mr. Leonard also testified nothing in the Money Memo required the WHS-CAF to revoke the appellant's Secret security clearance. *See* HT, at 176. He testified that:

> The intent of the [Money Memo] letter was in no make [sic], shape, or form to precipitate the action that WHS took in this case, that is, to assume that the revocation of an SCI access authorization automatically called for the revocation of a collateral security clearance.
>
> And in fact, if you read the Money memo, especially the attachment, I think it makes it - it makes it clear that when it was talking about reciprocity of revocations, it was meaning SCI to SCI or collateral to collateral because again, if you look at the last page of the enclosure to the Money memo, the second bullet there talks about reciprocity

> of access, that is, clearance eligibility and SCI determinations will be reciprocally accepted by all DOD components.
>
> That in no make, shape, or form means that if I have a Secret clearance, that I'm eligible for a SCI clearance. It likewise doesn't mean if I have a TS clearance that I'm eligible for an SCI clearance.
>
> I think the intent is clearance. Level to level, SCI to SCI, because there's no way that we could promulgate a policy that says, just because you're eligible for TS, you're eligible for SCI because, as we already established, there's a per se prohibition to having immediate family members who are U.S. citizens (sic).

See HT, at 176. He testified, therefore, the WHS-CAF needed to determine whether the basis for the denial of the appellant's access to SCI was relevant to his eligibility for a collateral clearance. *See id.*, at 180-200, and 215.

In response to the appellant's evidence and argument, the agency provided testimony from several agency employees. Wayne Scheller, who has been the Chief of the DIA-CAF's Due Process Team since 1999, testified he reviewed the appellant's case after the DIA-CAF drafted its statement of reasons. *See* HT, at 219. Mr. Scheller testified he usually performed the first review of a case, and after that the Office of General Counsel (OGC) would review the file. He testified that following OGC's review, Mr. Glasbrenner would review the file.

Mr. Scheller testified the DIA-CAF denied the appellant's eligibility for SCI due to both his foreign spouse and the issue of foreign influence. *See* HT, at 404-09. He testified the main factors were "his wife being employed by the Honduran Embassy" and "her not being a U.S. citizen." *See id.*, at 405.

Mr. Scheller testified the Munson Memo states that if an individual loses their SCI clearance, then they also lose any collateral clearance they might have had. *See* HT, at 226-27, and 270-73. Due to the common adjudicative guidelines, he explained, any additional due process for a collateral clearance would be duplicative and unnecessary following the denial of eligibility for SCI. He testified, therefore, "if you lose SCI, you lose everything." *See id.*, at 144. In this connection, he testified an October 23, 1996 memorandum by Drew R.

Winneberger (the Winneberger Memo), who was then DIA's Chief, Counterintelligence and Security Activity, essentially authorized the DIA-CAF to make determinations regarding SCI and collateral clearances at the same time because the agency used common adjudicative guidelines for both kinds of determinations. *See id.*, at 226-28. Mr. Scheller testified they had followed this policy from "day one," after the implementation of Change 3. *See* HT, at 227, 232 and 240.

After analyzing the evidence in this appeal, I find the DIA-CAF had the authority to revoke the appellant's Secret security clearance. I note that Mr. Winneberger states in his memo that:

> [T]his DIA CCF will direct the suspension of the collateral classified access concomitant with delivery of the SCI access ineligibility notification to the named individual. Final denial/revocation of collateral eligibility will be accomplished via the correspondence from the Washington Headquarters Service upon completion of the DIA CCF process.

See RAF, Tab 7 (Agency Hearing Exhibit 1). The Winneberger Memo shows the WHS-CAF and the DIA-CAF had agreed the DIA-CAF would adjudicate both SCI and collateral clearances for employees. This arrangement was initiated, apparently, in the wake of Executive Order 12968 and Change 3 to DoD Regulation 5200.2-R.

In reaching this finding, I am not suggesting that the testimony of Messrs. Nelson and Leonard was not credible.[5] In fact, their testimony helped clarify

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5. The agency provided a June 10, 1998 e-mail from Mr. Nelson to Maria R. DiMarco, an agency CAF official, in which he discusses a specific instance where the Department of the Army refused to reciprocally recognize another CAF's revocation of an Army Reservist's clearance. *See* RAF, Tabs 7 (Agency Hearing Exhibit 2), and 10. For several reasons, I find nothing in this e-mail to undermine Mr. Nelson's credibility. For example, the information in the e-mail is insufficient to show exactly what happened to the Army Reservist being discussed. In the beginning of the e-mail, it is unclear whether a denial or revocation is at issue. If it had been the former, then there would be no basis for concluding Mr. Nelson once held an opinion inconsistent with his

many of the issues in this appeal, and was, for the most part, persuasive. Nevertheless, I find they simply were not in a position to know the WHS-CAF and the DIA-CAF had made an arrangement where the DIA-CAF would, in essence, adjudicate both SCI and collateral clearance eligibility. Apparently, the Winneberger Memo was, in effect, too far "into the weeds" to come to their attention. Therefore, although the appellant proffered both Mr. Nelson and Mr. Leonard as expert witnesses, I have given only some weight to their testimony because I find they were not privy to a key decision that was made by the agency in this case. *See Mitchell v. Department of Defense*, 54 M.S.P.R. 641, 644 (1992) (the Board found that an administrative judge did not err by declining to give any weight to the testimony of an expert witness on classification because an administrative judge is always free to reject the opinion of a witness proffered as an expert).

Indeed, Mr. Nelson testified that, "in theory," the WHS-CAF could have designated a different CAF to adjudicate the WHS-CAF's collateral clearances, but that he was "not aware of anything like that." *See* HT, at 96-97. Nevertheless, the Winneberger Memo did exactly that, and shows the WHS-CAF allowed the DIA-CAF under certain circumstances to adjudicate collateral clearances granted by the WHS-CAF. The Winneberger Memo, however, never came to the attention of, at least some, senior policymakers, such as Mr. Nelson and Mr. Leonard.

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current testimony because revocations, rather than denials, are at issue in this appeal. Toward the end of his e-mail, he states "if a CAF has just revoked a clearance, CAF#2 should honor it . . . ." Again, that statement, standing alone, is not inconsistent with his testimony. Mr. Nelson did not testify that a CAF cannot reciprocally recognize another CAF's revocation of a security clearance. Rather, he testified that a CAF may not revoke the clearance granted by another CAF, as occurred in the instant appeal. There is nothing in his e-mail that clearly indicates he once espoused an opinion inconsistent with that testimony.

In the appellant's closing brief, he argues that the Board should disregard the Winneberger Memo and the agency's interpretation of the Munson Memo. *See* RAF, Tab 16 (Appellant's Closing Brief, at 38-40). In this connection, he argues that:

> [T]o allow the [a]gency's interpretation . . . control[] the disposition of this case, particularly in light of the fact that it was issued contemporaneously with the very DoD regulations that do govern the disposition of this case, would essentially condone the existence of DoD 'secret law' of which the public, and more specifically the DoD constituency, would have and has no knowledge.

Id. He argues, therefore, "[w]hen an agency adopts an interpretation actually changing a program requirement affecting an individual's substantive rights, publication is required in order to prevent the reign of secret law."

I find the appellant's argument is misplaced in the context of this appeal. It is well established that there is no substantive right to a security clearance. *See Egan*, 484 U.S. at 528. In *Egan*, the Supreme Court stated "[i]t should be obvious that no one has a 'right' to a security clearance." *Id.*

Further, I find unpersuasive the appellant's argument that the agency specifically prohibits a CAF from revoking a clearance granted by another CAF. *See* RAF, Tab 16 (Appellant's Closing Brief, at 14-21). In support of this argument, he relies upon DoD Regulation 5200.2-R, which states, in relevant part:

> Personnel security clearances of DoD military personnel shall be granted, denied, or revoked only by the designated authority of the parent Military Department. Issuance, reissuance, denial, or 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. Investigations conducted on Army, Navy, and Air Force personnel by DIS will be returned only to the parent Service of the subject for adjudication regardless of the source of the original request.

See RAF, Tab 22, Subtab A-19 (DoD Regulation 5200.2-R, C7.1.2.3). During the hearing, there was conflicting testimony regarding the correct interpretation of this portion of the regulation. *See* HT, at 168-70, and 584-90. Even Ms. Wright, an agency witness, testified the above-cited paragraph was "confusing." *See* HT, at 599. Nevertheless, the first sentence of this provision clearly refers to "military personnel," and while the following sentence does not repeat that specific designation, there are no specific references to "civilian personnel." Therefore, I find this regulatory prohibition applies only to military, as opposed to civilian, personnel. In any event, even if this provision applied to civilian personnel, I see no reason why the WHS-CAF could not have designated the DIA-CAF to adjudicate WHS collateral clearances, particularly since there is no substantive right to a security clearance.

As noted above, one of the issues the court identified for the Board's consideration on remand was whether the SAB did, in fact, revoke the appellant's Secret security clearance. *See supra* p.8; *Romero*, 527 F.3d at 1330. Although the appellant did not focus on this issue in his closing brief, he has argued during the course of this litigation that the SAB did not revoke his Secret security clearance because the SAB failed to refer to that matter in its decision.

Nevertheless, although the SAB decision never specifically refers to the appellant's collateral clearance, there is nothing in that decision to indicate the SAB disagreed with the DOHA Administrative Judge's conclusions. *See* RAF, Tab 22, Subtab A-9. Further, given that the DOHA Administrative Judge's decision is less than four pages long, it seems unlikely that the SAB did not notice that the Administrative Judge had found the appellant ineligible for a Secret clearance due to "foreign influence" security concerns. Indeed, 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. Rather than interpreting the SAB's silence with regard to his Secret clearance as disagreement with the

Administrative Judge's decision, I find it more likely to be evidence of agreement, or, at least, acquiescence.

In this connection, I note Mr. Winneberger, the President of the SAB, signed the SAB's decision. *See* RAF, Tab 22, Subtab A-9. It seems unlikely Mr. Winneberger, who authored the Winneberger Memo, would have, as Mr. Nelson testified, "got it right," and concluded the DIA-CAF lacked the authority to adjudicate the appellant's eligibility for a Secret security clearance. *See* HT, at 101. That conclusion would have been inconsistent with the Winneberger Memo. I find, therefore, the appellant has failed to show either the DIA-CAF lacked the authority to revoke his Secret security clearance, or that the DIA-CAF's denial of his SCI eligibility did not automatically revoke his collateral access. Consequently, I find he has not shown here the agency committed any error by violating its internal procedures.

2. The Scope of the WHS-CAF's Review Following the DIA-CAF's Final Decision

The appellant further argues the WHS-CAF was required to independently adjudicate his eligibility for a Secret security clearance following the DIA-CAF's denial of his eligibility for SCI. Mr. Smith, the Chief of the WHS-CAF, testified the agency had decided to allow the DIA-CAF to adjudicate both SCI and collateral clearances whenever agency employees were considered for eligibility for SCI access. *See* HT, at 440-45. He further testified that after the DIA-CAF issued its final decision, there was nothing more for the agency to do other than notify the appellant of the agency's decision. He explained that because of the common adjudicative guidelines for all clearances, it would not have made any sense to provide the appellant with any further due process. *Id.* He testified that, following the DIA-CAF's final decision, the WHS-CAF was required to do the following:

> WHS receives notification. We would receive a notification of the initial intent. We would receive a notification of the final action and the result of the appeal.
>
> And like any reciprocal that we would get at the WHS CAF, even reciprocals for favorable clearances, we do due diligence in reviewing and validating and ensuring that all of the pieces are there that need to be there And based upon that, we would issue a memorandum to the affected individual telling them what the effect would be on their collateral clearance.
>
> In the situation of the case that we're here for today, what WHS did was, within the DCII recorded an R, revocation. We are the only ones that could touch our clearance line in the DCII. No other CAF has the authority to go in and touch that line.
>
> And so that reconcile did the housekeeping measure for the DCII. Concurrent with that, at the time that this case was working through the process, JPAS had been fully implemented and DIA had taken the action to record the eligibility in JPAS for the department. And that eligibility was denied. Okay? And that served as the clearance determination for the department.

See id., at 447.

Ms. Wright testified the DIA-CAF had the authority to revoke the appellant's collateral clearance when it denied his eligibility for SCI access. *See* HT, at 564. She testified that because the DIA-CAF provided the appellant with all of the due process protections required under Change 3 to DoD Regulation 5200.2-R, all the WHS-CAF needed to do was to notify the appellant of the agency's decision.

In light of this testimony and my findings above with regard to the Winneberger Memo, I find the appellant has not established the WHS-CAF failed to properly adjudicate the revocation of his Secret security clearance following the DIA-CAF's final decision. Consequently, I find he has not shown here the agency committed an error by violating its internal procedures.

3. Personal Interview

The appellant argues the DoD-OIG should have given him a personal interview prior to his nomination to the DIA-CAF for an SCI clearance. *See* RAF, Tab 16 (at 41-43). In support of his argument, he relies on DoD Regulation 5200.2-R, C2.3.9.4., which states:

> Applicants/Potential Nominees for DoD Military or Civilian Positions Requiring Access to SCI or Other Positions Requiring SBI. A personal interview of the individual concerned shall be conducted, to the extent feasible, as part of the selection process for applicants/potential nominees for positions requiring access to SCI or completion of an SBI. The interview shall be conducted by a designee of the Component to which the applicant or potential nominee is assigned . . . .

See RAF, Tab 10 (appellant's Hearing Exhibit A). In essence, he argues that had the agency properly conducted this interview, the WHS-CAF would have decided not to nominate him for SCI access because the DIA-CAF would have found he was ineligible for such access due to his foreign spouse.

Nevertheless, it is axiomatic that interpretive analysis of a regulation begins with the language of the regulation itself. *Watson v. Department of the Navy*, 86 M.S.P.R. 318, ¶ 7 (2000), *aff'd*, 262 F.3d 1292 (Fed. Cir. 2001), *cert. denied*, 534 U.S. 1083 (2002). Here, I find there is nothing in the agency's regulation to suggest that a pre-nomination interview was a mandatory requirement for the WHS-CAF prior to nominating the appellant for SCI access. Indeed, the regulation states agencies should conduct these interviews "to the extent feasible." *See* RAF, Tab 10 (appellant's Hearing Exhibit A).

Although DoD Regulation 5200.2-R, C2.3.9.5.2.3. requires the agency to annotate an SCI candidate's DD Form 1879[6] with the reason for not conducting

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6. The DD Form 1879 is used by the agency to request a Single Scope Background Investigation (SSBI).

an interview, there is nothing in the regulations to suggest that the failure to meet this requirement potentially vitiates any subsequent clearance decision taken. *See* RAF, Tab 10 (appellant's Hearing Exhibit A). I find, therefore, the appellant has not shown the agency violated any of its own procedures when it did not provide him with a personal interview prior to his nomination for SCI.

In any event, had the agency conducted this pre-nomination interview, it would have discovered the appellant had a foreign spouse who worked at the Honduran embassy. I find it likely, therefore, the WHS-CAF would have revoked his Secret security clearance. Further, as explained in more detail below, I find any failure by the agency to follow its internal procedures would have constituted harmless error. *See infra*, pp. 35-41.

Even if the appellant had demonstrated the agency failed to follow its own procedures, he has not shown how such a failure might have resulted in harmful error.

Reversal of an action for harmful error is warranted where the procedural error, whether regulatory or statutory, likely had a harmful effect upon the outcome of the case before the agency. *Stephen v. Department of the Air Force*, 47 M.S.P.R. 672, 681 (1991). Harmful error cannot be presumed, and the burden of showing harmful error lies with the appellant. *Id*., at 685; 5 U.S.C. § 7701(c)(2)(A); 5 C.F.R. § 1201.56(c)(3). In order to show harmful error, an appellant must prove that any procedural error was likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. *Id*.

The court remanded this appeal so the appellant might have an opportunity to show the agency committed harmful procedural error in effecting the revocation of his Secret security clearance. *See Romero*, 527 F.3d at 1329. As explained above, I find the appellant has failed to show the agency violated any of its procedures when the WHS-CAF reciprocally recognized the revocation of

his Secret security clearance by the DIA-CAF. Further, I find that even if the appellant had established such a violation occurred, that violation would have constituted harmless error.

In making this finding, I recognize I must proceed with caution. I find there is an inherent tension between the court's instruction that I evaluate the appellant's harmful error claim regarding the agency's compliance with its regulations governing revocations of security clearances, and the prohibition against Board review of the merits of an agency's security clearance determination. *See Egan*, 484 U.S., at 530, 108 S.Ct. at 825. In essence, although the court's remand decision potentially puts the Board in the position of directing the agency to provide relief to the appellant on the basis that the agency improperly processed the revocation of his Secret security clearance,[7] there is existing court precedent that precludes the Board from reviewing security clearance revocations because the Board has no jurisdiction to review these actions.

For example, in *Robinson v. Department of Homeland Security*, 498 F.3d 1361, 1364-65 (Fed. Cir. 2007), the court ruled that a federal agency's "security-clearance decisions are not reviewable for 'minimum due-process protection.'" *See also Hesse*, 217 F.3d at 1381. *Robinson* seems to suggest the manner in which the WHS-CAF processed the revocation decision would be

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7. The court's decision could also place the Board in the unusual position of directing an agency to provide relief to an employee on the basis of the manner in which the agency processed an action that the Board has no jurisdiction to review. The Board does not appear to have any authority to order the agency to reverse its finding that the appellant is not eligible to occupy a position such as the appellant's that requires a Secret security clearance. Therefore, if the Board were to find harmful error in an agency's decision-making process leading to a finding that an appellant was not eligible to occupy such a position, the Board would be required to order the agency to employ an individual for whom the agency does not have a vacant position for which the individual is qualified.

immaterial to the adjudication of the instant appeal. In fact, Judge Rader's concurring opinion in *Robinson* stated:

> [T]his court has no authority whatsoever with respect to a security clearance suspension or removal . . . . [A]ny procedural safeguards during security clearance determinations are committed solely to the Executive Branch and occur in Personnel Security Appeals Boards.

See Robinson, 498 F.3d at 1367 (Rader, J., concurring), citing *Egan*, 484 U.S. at 533. Therefore, the court's holdings in *Robinson* and *Hesse* seem to suggest an appellant may not challenge the agency's implementation of the procedures it used to effect the revocation of a security clearance.[8]

Nevertheless, 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. *But see Egan*, 484 U.S. at 529 (it is not reasonably possible for the Board as an outside nonexpert body to review the

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8. In a recent United States Court of Appeals for the Third Circuit decision, the appeals court affirmed the district court's decision to dismiss an action filed by a government contractor after the Department of Energy (the agency) had revoked his security clearance. *See El-Ganayni v. United States Department of Energy*, 591 F.3d 176 (3rd Cir. 2010). The appeals court, however, found that the district court had erred by dismissing for lack of jurisdiction the appellant's claims that in revoking his clearance the agency had violated his First Amendment rights to free speech and the free exercise of religion, and his Fifth Amendment right to equal protection by discriminating against him on the basis of his religion and national origin. The appeals court found, rather, it had jurisdiction over these claims, but that the appellant had failed to state a claim upon which the court could grant relief. In this connection, the appeals court found the "legal framework governing" these claims would "inevitably involve scrutiny of the merits" of the agency's decision to revoke the clearance. Finding that *Egan* "presents an insuperable bar to relief," the court concluded it could not require the agency to explain the reasoning behind its revocation decision, or show that its decision was not either discriminatory or retaliatory. *See id.*, at 180-86. *El-Ganayni* is not, of course, in any way controlling in this context, and I have not relied upon it in adjudicating the instant appeal. Nevertheless, I have included it for discussion because I find the appeals court's reasoning clarifies, to some extent, the complexities involved in resolving the appellant's harmful error claim.

substance of such a judgment and determine what constitutes an acceptable margin or error in assessing potential risks to national security); *Robinson*, 498 F.3d at 1364 (security clearance determinations are not reviewable for "minimum due process protection" because a federal employee does not have a liberty or property interest in access to classified information). 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.

From the standpoint of process, I find even if the appellant had established the agency erred somehow in effecting the revocation of his Secret security clearance, it is unclear what actions the WHS-CAF would then take to "adjudicate" his case. As stated above, the court held in its remand decision he had received all of the due process afforded to an employee under 5 U.S.C. § 7513. Moreover, the appellant's own witnesses, Messrs. Nelson and Leonard, testified the appellant had received all of the due process he was entitled to through the agency's internal revocation procedures. *See* HT, at 127-29, 180, and 204-15. While both of these witnesses testified they disagreed with Mr. Smith's statement that the WHS-CAF needed to perform only "administrative housekeeping" following the DIA-CAF's final decision, Messrs. Nelson and Leonard indicated the appellant was not entitled to any further internal agency due process after the SAB issued its decision. *Id*.

In this connection, Mr. Nelson testified the WHS-CAF should have effected a "separate revocation" of the appellant's clearance, but "without all the procedural due process." *See* HT, at 126-27. Mr. Nelson testified there was no need for the WHS-CAF to replicate the due process the appellant had already been afforded by the DIA-CAF. *See id*., at 129.

Mr. Leonard testified the WHS-CAF was required to do more than "administrative housekeeping" following the DIA-CAF's final decision. *See* HT, at 180. He testified the WHS-CAF needed to determine the "basis" of

the DIA-CAF's denial, and whether that denial "necessarily pertain[ed] to the clearance issued" by the WHS-CAF. *Id*. Nevertheless, he testified there was no need to "replicate" the due process the appellant had already received. *See id*., at 199. Mr. Leonard testified, rather, that the WHS-CAF needed to "examine[] the case file," inform themselves "as to what the basis for the denial was," and "ascertain[] whether or not the basis for a denial included additional criteria that did not apply" to the appellant's collateral clearance. *Id*. Mr. Leonard explained the WHS-CAF was responsible for exercising "due diligence," instead of due process, with respect to the appellant's Secret clearance following the DIA-CAF's final decision. *See id*., at 204-05. In this regard, Mr. Leonard testified the appellant was entitled to something more than the "administrative housekeeping" described by Mr. Smith, but less than due process. *Id*. For example, Mr. Leonard testified the WHS-CAF should have allowed the appellant to say whether "anything had changed" since the DIA-CAF's final decision. *See* HT, at 205. Mr. Leonard testified the appellant might have been entitled to "adjudicative due process," although he never provided a precise definition of that term, and I know of none. *See* HT, at 208-15.

I find that if the appellant had established the agency violated one of its internal procedures in revoking his Secret security clearance, such an error would be harmless because there would be no point in returning the appeal to the agency since he has already received all of the procedural protections to which he is entitled. In this connection, I note the appellant received not only the due process required under 5 U.S.C. § 7513, but also almost all of the procedural protections set forth in 5 U.S.C. § 7532, which provides for removals in the interests of national security without any appeal to the Board.[9] *See* 5 U.S.C. § 7532. If I

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9. It appears the appellant received all the procedural protections he would have been entitled to under 5 U.S.C. § 7532, except for "a written statement of the decision of the head of the agency." *See* 5 U.S.C. § 7532(c)(3)(E).

were to accept the appellant's argument that the Board should reverse the agency's action so that the WHS-CAF could review his eligibility for a Secret security clearance, I would put the agency in the peculiar position of being required to provide the appellant with more pre-removal procedural rights than he might have received had the agency elected to remove him under 5 U.S.C. § 7532, where he would have had no right to appeal that action. From the standpoint of process, therefore, I find that even if the agency committed a procedural error of some kind, that error would have been harmless due to the process he received prior to the revocation.

Further, as to the substance of any potential decision the agency might have made, assuming for the sake of argument the appellant had established error by the agency in the application of its procedures, I find that if the WHS-CAF had adjudicated the appellant's clearance based on the information that was then available in his file, the WHS-CAF would have revoked his Secret security clearance. The appellant's wife was not only a foreign national, but also an agent of a foreign power as defined by 50 U.S.C. § 1801(b)(1)(A).[10] In this connection, I note an agency need not meet the preponderant evidence standard for a revocation decision, unlike a removal decision under Chapter 75 based on such a revocation. In my view, therefore, it would not have been unreasonable for the WHS-CAF to revoke his clearance due to his wife's position at the Honduran Embassy.

Therefore, I find that even if the appellant had established agency error, such an error would have been harmless because it would not have affected the agency's revocation with respect to either the procedural protections to which he was entitled, or the substance of the revocation decision. Consequently, I find the

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10. The appellant's wife "lost" her position with the Honduran Embassy on October 13, 2009. *See* RAF, Tab 16 (at 7).

appellant has failed to establish the agency committed harmful error in revoking his Secret security clearance.[11]

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD: _____/S/_____
Jeremiah Cassidy
Regional Director

NOTICE TO APPELLANT

This initial decision will become final on **April 29, 2010**, unless a petition for review is filed by that date or the Board reopens the case on its own motion. 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. You must establish the date on which you received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

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11. In light of my conclusion with regard to the appellant's removal appeal, I must deny his petition for enforcement of the decision that reversed his indefinite suspension. I find the agency is in compliance with that decision because it could not have returned him to duty in the absence of a valid Secret security clearance.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

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

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review 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).

If you file a 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. Your petition 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 more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you claim that you received this decision more than 5 days after its issuance, you have the burden to prove to the Board the date 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 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).

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information 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, and 11.

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.

CERTIFICATE OF SERVICE

I hereby certify that, on October 7, 2010, two copies of the Opening Brief of Petitioner Wilfredo Romero served by United States mail, with a courtesy copy by electronic mail, to the following counsel for Respondent:

Meredyth Cohen Havasy, Esq.
Commercial Litigation Branch, Civil Division
U.S. Department of Justice
1100 L Street, N.W.
Washington, D.C. 20530
meredyth.havasy@usdoj.gov

_____
James C. Cox

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

The foregoing Brief for Petitioner Wilfredo Romero complies with the type-volume limitation of Rules 29(d) and 32(a)(7)(B) of the Federal Rules of Appellate Procedure. The brief contains a total of 7,091 words, including footnotes, as counted by Microsoft Word, and excluding those materials exempted from the word-count limitation.

_____

James C. Cox