BEFORE THE
U.S. MERIT SYSTEMS PROTECTION BOARD

CORRY B. MCGRIFF,	)	
	)	
Appellant,	)	
	)	**Docket Numbers**
v.	)	**DC–0752–09–0816–I–1**
	)	
DEPARTMENT OF THE NAVY,	)	
	)	
Agency.	)	**and**
	)	
ALEXANDER BUELNA,	)	
JOSEPH GARGIULO,	)	
JOHN GAITAN,	)	
	)	
Appellants,	)	
	)	
v.	)	**DA–0752–09–0404–I–1**
	)	**SF–0752–09–0370–I–1**
DEPARTMENT OF	)	**DA - 0752–10–0202–I–1**
HOMELAND SECURITY,	)	
	)	
Agency.	)	**November 4, 2011**
	)	

AMICUS BRIEF OF THE
METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

IDENTITY AND INTEREST OF THE *AMICUS*

The Metropolitan Washington Employment Lawyers Association (MWELA) is a local affiliate of the National Employment Lawyers Association. MWELA is comprised of over 300 members who represent plaintiffs in employment and civil rights litigation in the Washington, D.C. metropolitan area, including federal employees with appeals before the MSPB. MWELA's purpose is to bring into close association plaintiffs' employment lawyers in order to promote the efficiency of the legal system, elevate the practice of employment law, and promote fair and

equal treatment under the law. MWELA has participated in numerous cases as amicus curiae before the Board, the Court of Appeals for the D.C. Circuit, and other appellate courts regarding the proper interpretation of the federal, state, and local laws that protect employees.

STATEMENT OF THE ISSUES

The Board's Notice of Opportunity to File Amicus Briefs identified the legal issues posed by the cases on appeal as follows:

> (1) Should the Board apply the balancing test set forth in [*Gilbert v. Homar*, 520 U.S. 924 (1997)], in determining whether an agency violates an employee's constitutional right to due process in indefinitely suspending him or her pending a security clearance determination;
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> (2) If so, does that right include the right to have a deciding official who has the authority to change the outcome of the proposed indefinite suspension;
>
> (3) If the Board finds that an agency did not violate an employee's constitutional right to due process in this regard, how should the Board analyze whether the agency committed harmful procedural error in light of the restrictions set forth in *Egan*, 484 U.S. 518, on the Board's authority to analyze the merits of an agency's security clearance determination.

76 Fed.Reg. 59172 (Sept. 23, 2011).

SUMMARY OF THE ARGUMENT

Due process requires a pre-suspension opportunity that "provide[s] adequate assurance that the indefinite suspension is not unjustified." *Gilbert v. Homar*, 520 U.S. 924, 934 (1997). When an agency seeks to take an adverse action against an employee, the agency bears the burden of proving the merits of its action, by preponderant evidence. 5 U.S.C. § 7701(c); 5 C.F.R. § 1201.56(a). An employee is entitled to pre-action due process procedural rights as identified at 5 U.S.C. § 7513. When an agency fails to provide these pre-action due process rights, the adverse action cannot be sustained and the Board will overturn the action. *Cheney v.*

Dept. of Justice, 479 F.3d 1343, 1352-53 (Fed. Cir. 2007); King v. Alston, 75 F.3d 657, 659-661 (Fed. Cir. 1996).

When an adverse action is based on the denial, suspension, or revocation of a security clearance, the Board may determine whether an employee has been afforded minimum due process with respect to his constitutionally protected property interest in his employment. *Kriner v. Dept. of the Navy*, 61 M.S.P.R. 526, 531-32 (1994) (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532. 543, 546 (1985)). Although an employee enjoys a constitutionally protected interest in his employment, he does not enjoy such a right to a security clearance. *Id*. at 528. Additionally, security clearance determinations "must be made by those with the necessary expertise in protecting classified information." *Department of Navy v. Egan*, 484 U.S. 518, 529 (1998). The Board lacks this expertise, as do most officials tasked with deciding the justifications for the proposed indefinite suspension. Thus, the Board may not review the merits of the underlying security clearance decision.

The tension between *Egan* and § 7513 has resulted in array of case law which has effectively nullified § 7513's pre-termination due process protections. As illustrated by the cases at bar, the law currently provides that an agency need only follow the strict words of § 7513 and may wholly violate the due process guarantees § 7513 was designed to codify.

In an appeal of an indefinite suspension based on the suspension of a security clearance, the Board's review is limited to determining whether a security clearance was suspended, whether the clearance was a requirement of the appellant's position, and whether the procedures set forth in 5 U.S.C. § 7513(b) were followed. *See Hesse v. Dept. of State*, 82 M.S.P.R. 489, 492 (1999), aff'd, 217 F.3d 1372 (Fed. Cir. 2000); *Brown v. Dept. of the Navy*, 49 M.S.P.R. 425 (1991); *Cheney*, 479 F.3d at 1348, 1352. Under recent case law, the Board and the courts do not

ask whether the employee was given a genuine, bona fide opportunity to respond; rather, the question has been diluted to: "was the employee notified that he could submit a reply." Thus, an agency may indefinitely suspend an employee by giving only the appearance of due process.

Although recent case law suggests otherwise, the agency's § 7513 obligations – and the employee's due process rights -- are still substantive. The appearance of compliance, without substantive compliance, amounts to a deprivation of due process.

Mathews v. Eldridge, 424 U.S., 319, 335 (1976), identifies the critical factors to determine "what process is constitutionally due." *Homar*, 520 U.S. at 931, citing *Mathews*. As detailed below, *Mathews* and its sister cases outline the relevant factors which must be balanced: the employee's property interest in his job, the risk of an erroneous deprivation of that right, and the government's interests. *See* Sec. II, *infra*.

To avoid the risk of an erroneous deprivation, pre-suspension due process can be truncated or eliminated only when there are independent and adequate assurances that the suspension is not "baseless or unwarranted". *Homar*, 520 U.S. at 934. This factor will turn on whether "an independent third party has determined that" the underlying action (e.g., grand jury indictment, felony charge) is appropriate such that the resulting indefinite suspension is not "baseless or unwarranted." *Id*., quoting *Mallen*, at 240. Limitation of pre-suspension due process further requires "ample opportunity" post-suspension to invoke the discretion of the decision maker or other adequate due process guarantees. *Homar*, 520 U.S. at 935

In the context of security clearances, the underlying action typically arises in one of two scenarios. Under one scenario, an "independent third party," such as a properly designated security office, determines that the employee's security clearance should be suspended. Under another scenario, an individual or office not associated with the designated security office

triggers the suspension of the security clearance. In this second scenario, the suspension of the security clearance lacks the assurances of an independent third party and provides little or no protection against a "baseless or unwarranted" suspension of the security clearance.

When the suspension of the security clearance is the result of a determination by the "security personnel" of a duly "authorized investigative agency," the underlying security clearance determination provides assurances similar to those identified in *Mallen*. These determinations also enjoy the protections of *Egan*. Importantly, the authorized security personnel are an "independent third party" and have no role in the agency's decision to take an adverse personnel action, e.g., an indefinite suspension, based on the suspension of a security clearance.

However, these protections are sorely lacking when the decision is rendered by an agency official who is not an "independent third party," who is not charged with security personnel authority, or who is not associated with an "authorized investigative agency." In such situations, the agency official who triggered the security clearance suspension does not possess the specialized expertise of the "appropriately trained adjudicative personnel" who make security clearance decisions pursuant to delegated Executive authority. Further, this same agency official may also be the deciding official with respect to the suspension decision, or otherwise have input into the adverse action. Such decisions do not offer the assurances of *Mallen*, nor do they enjoy the protections of *Egan*.

These scenarios command different results under the *Homar* balancing test and, consequently, different pre-action due process. As detailed below, where the underlying security clearance suspension emanates from an "independent third party," the *Homar* balancing test demands that the employee be provided a "meaningful reply," which requires that the DO can

apply the Douglas factors, consider and issue a lesser consequence (e.g., leave with pay, assignment of other duties), and consider whether the agency was in compliance with its own security clearance procedures, consistent with *Romero*.

However, when the underlying security clearance determination lacks the appropriate imprimatur, due process demands additional assurances to reduce the risk of an erroneous deprivation: the employee must be given an opportunity to respond to the underlying factual allegations and the evidence relied upon in those allegations. Because such security determinations do not fall within *Egan's* protections, the merits of the underlying decision can be reviewed. Because such determinations do not provide *Mallen's* assurances, the merits must be reviewed.

ARGUMENT

I. FEDERAL EMPLOYEES ARE ENTITLED TO PRE-SUSPENSION DUE PROCESS

The Civil Service Reform Act ("CSRA") establishes a property interest in continued employment for non-probationary federal employees. The federal statutory scheme under the CSRA "plainly creates a property interest in continued employment." *Stone v. FDIC*, 178 F.3d 1368, 1375 (Fed. Cir. 1999). As the Supreme Court stated:

> [T]he Due Process Clause provides that certain substantive rights – life, liberty and property – cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct… The right to due process 'is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards'.

Cleveland Bd. Of Ed. v. Loudermill, 470 U.S. 532, 541 (1985), *quoting Arnett v. Kennedy*, 416 U.S. 134 (1974). The Supreme Court directs that once an employee is granted due process rights, such rights cannot be summarily removed.

> [T]he pretermination hearing... should be an initial check against mistaken decisions -- essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action. See *Bell v. Burson, 402 U.S., at 540*. The essential requirements of due process, and all that respondents seek or the Court of Appeals required, are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement.

Loudermill, at 545-46.

The CSRA's legislative history establishes unequivocally that Congress valued federal employee due process rights and sought to guarantee them by law:

> Protections against arbitrary or capricious actions have become established by practice and executive order—but not by statute—as a basic right of competitive service employees….[1] The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.

S. Rep. No. 95-454, at 48 (1978), 1978 U.S.C.C.A.N. 2765. These rights are codified in chapter 75 of the United States Code. *See* 5 U.S.C. § 7513.

Loudermill elaborated on the private interest in retaining employment:

> First, the significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood…. Second, some opportunity for the employee to present his side of the case is recurringly of obvious value in reaching an accurate decision. Dismissals for cause will often involve factual disputes. Even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decision maker is likely to be before the termination takes effect. [8]
>
> [8] ….[W]here there is an entitlement, a prior hearing facilitates the consideration of whether a permissible course of action is also an appropriate one. This is one way in which providing "effective notice and informal hearing permitting the [employee] to give his version of the events will provide a meaningful hedge against erroneous action. At least the [employer] will be alerted to the existence of disputes about facts and arguments about cause and effect… [His] discretion will be more informed and we think the risk of error substantially reduced." *Goss v. Lopez, 419 U.S., at 583-584*.

[1] This right was expanded to excepted service employees in 1990.

Id. at 543 (internal citations omitted).

The constitutionally protected interest in employment extends to discipline short of termination. Temporary suspensions, like terminations, are deprivations of employment that can implicate the protections of due process. *See Gilbert v. Homar*, 520 U.S. 924, 931-34 (1997); *FDIC v. Mallen*, 486 U.S. 230, 240 (1988). The Board confirmed in *Kriner v. Dept. of Navy*, 61 M.S.P.R. 526 (1994), that a suspension without pay infringes on these protected interests:

> The Board has previously recognized that "[an] appealable agency action taken without affording [such an employee] prior notice of the charges, an explanation of the agency's evidence, and an opportunity to respond, must be reversed because such action violates his constitutional right to minimum due process under *Loudermill*." *Stephen v. Dept. of the Air Force*, 47 M.S.P.R. 672, 681 (1991). Suspending an employee without notifying the employee of the charges and a statement of the evidence on which they are based denies the employee the meaningful opportunity to respond which both the Due Process Clause and section 7513(b) guarantee.

Id. at 532-33. The indefinite suspension of a federal employee implicates a deprivation of a protected property interest that triggers constitutional due process rights. *See, e.g.*, *Edwards v. USPS*, 112 M.S.P.R. 196, 200-202 (2009). This property interest is not diluted by the reasons for the indefinite suspension.

As the Federal Circuit explained in *King v. Alston*, "no one has a 'right' to a security clearance or access to classified information, *see Department of the Navy v. Egan*, 484 U.S. 518 (1988), an employee, as defined by 5 U.S.C. § 7501, has a property right in his continued employment." *King v. Alston*, 75 F.3d 657, 661 (Fed. Cir. 1996) Thus, even where an indefinite suspension is premised upon a suspension of a security clearance, an employee retains the constitutional protection of minimum due process regarding his or her suspension.

Federal employees serving in positions exempt from chapter 75 also have a property interest in continued employment and thus cannot be deprived of this property right without

constitutionally mandated due process.[2] Thus, when reviewing an indefinite suspension, the Board must examine whether the agency provided the employee minimum due process with respect to the employee's constitutionally protected interest in employment. Upon finding that an employee has not received due process, the court must reverse the removal action, regardless of the other merits of the government's reasons for dismissal or the employee's response. *See, e.g., Loudermill, id*. at 544, 547-48.

II. DUE PROCESS REQUIRES PRE-SUSPENSION ASSURANCES THAT THE INDEFINITE SUSPENSION IS NOT UNJUSTIFIED

"Once it is determined that due process applies, the question remains what process is due." *Mallen*, 486 U.S. at 240 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). Where a public employee has a property interest in continued employment, the Due Process Clause of the Fifth Amendment requires that the employee be afforded notice "both of the charges and of the employer's evidence" and an "opportunity to respond" before being removed from employment. *Ward v. United States Postal Serv.*, 634 F.3d 1274, 1279 (Fed. Cir. 2011) (citing *Stone v. FDIC*, 179 F.3d 1368, 1374-76 (Fed. Cir. 1999)); *see also Loudermill*, 470 U.S. at 546

[2] The entitlement to due process is not stripped by virtue of the fact that Petitioners Buelna, Gaitan and Gargiulo are employees of the Transportation Security Administration (TSA), which is expressly exempted from chapter 75 of Title 5. TSA employees have a property interest in continued employment, derived from TSA's internal policy governing adverse actions. Specifically, TSA's Management Directive (MD) No. 110.75-3 provides that TSA employees can only be removed or suspended for such cause as promotes efficiency of the service. *Winlock v. Dept. of Homeland Security*, 110 M.S.P.R. 521, 525 (2009); *Styles v. Dept. of Homeland Security*, 2011 MSPB LEXIS 522, *13 (Jan. 2011). TSA therefore has provided assurances of continued employment and conditions dismissal only for specific reason ("for cause," "efficiency of the service"). Thus, an employee of the TSA has a property interest in continued employed. *See, e.g., Loudermill*, 470 U.S. at 538; *Connell v. Higginbotham*, 403 U.S. 207, 208 (1971) (public teacher hired without tenure or formal contract, but with clearly implied promise of continued employment, had property interest). Further, the employees are entitled to the same pre-suspension due process rights as provided pursuant to chapter 75. The Board has held that TSA's MD 1100.75-3, which establishes procedures for adverse actions, including indefinite suspensions, provides procedural requirements for effecting an adverse action similar to those set forth in 5 U.S.C. § 7513(b). *Styles*, 2011 MSPB LEXIS 522, *13, n.5. Due process rights in the context of indefinite suspensions are thus equally applicable to Petitioners, regardless of whether employed by TSA or the Department of the Navy (not exempt from chapter 75).

("The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.").

Under *Egan*, the Board has no authority to review the merits of a security clearance determination. *Department of the Navy v. Egan*, 484 U.S. 518 (1988); *Cheney v. Dept. of Justice*, 479 F.3d 1343 (Fed. Cir. 2007). However, the employee maintains his or her "property right in his continued employment." *King v. Alston*, 75 F.3d 657, 661 (Fed. Cir. 1996) (citing 5 U.S.C. § 7513). Thus, the Board does have the authority, and the obligation, to review the constitutional and statutory adequacy of procedures that an agency has followed in imposing an adverse action based on the suspension of a security clearance. *Cheney*, 479 F.3d at 1350) (explaining that, under *Egan*, the Board and the courts review suspensions based on security clearance revocations to determine whether the employee received all the process he was due under the constitution and pursuant to section 7513), *citing Hesse v. Dept. of State*, 217 F.3d 1372 (Fed. Cir. 2000) (holding that the MSPB can 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).

The Federal Circuit and the Board recognize, without question, that once a federal employee attains a constitutionally protected property interest in his employment, "an employee cannot be deprived of that interest without the procedural protections provided by 5 U.S.C. § 7513(b)." Namely:

> An employee against whom an action is proposed is entitled to -- (1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action; (2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer; (3) be represented by an attorney or other representative; and (4) a written decision and the specific reasons therefor at the earliest practicable date.

Alston, 75 F.3d at 661 (quoting 5 U.S.C. § 7513(b)).

The inquiry as to whether due process requirements have been met does not begin and end with the statute. A federal employee's property interest in continued employment "is not defined by, or conditioned on Congress' choice of procedures for its deprivation." *Stone*, 179 F.3d at 1375 (citing *Loudermill*, 470 U.S. at 541). "In other words, § 7513 and § 4303 do not provide the final limit on the procedures the agency must follow." *Stone*, 179 F.3d at 1375. Rather, the level of process that is due depends on the "nature of the case." *Loudermill*, 470 U.S. at 542.

The Supreme Court explains that "due process is flexible and calls for such procedural protections as the particular situation demands," *Gilbert v. Homar*, 520 U.S. 924, 930, (1997) (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). Accordingly, resolution of whether the administrative procedures provided are constitutionally sufficient requires analysis of the governmental and private interests that are affected." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (citing *Arnett v. Kennedy*, 416 U.S. 134, 167-68 (1974) (Powell, J., concurring in part)).

In determining what pre-suspension procedures satisfy due process, courts apply the balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976). In *Gilbert v. Homar*, the Supreme Court reaffirmed the *Mathews* balancing test, which considers the following three factors:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest." *Mathews v. Eldridge*, 424 U. S. 319, 335 (1976).

Homar, 520 U.S. at 931-92. The Board recently applied the balancing test in *Edwards v. USPS*, 112 M.S.P.R. 196 (2009):

> Although the absence of any pre-suspension process is not a per se constitutional violation, *see Homar*, 520 U.S. at 930, the situations in which such a procedure is constitutionally permissible are rare. "An important government interest, accompanied by a substantial assurance that the deprivation [of property] is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation." *Homar*, 520 U.S. at 930-31 (quoting *FDIC v. Mallen*, 486 U.S. 230, 240 (1988)). Thus, a public employee may be suspended with little or no pre-suspension process where the employee has been charged with a serious crime. *Homar*, 520 U.S. at 933-34; *Rawls v. U.S. Postal Service*, 94 M.S.P.R. 614, ¶¶ 15-17 (2003). In those cases, the imposition of formal criminal charges by an independent body provides assurance that the suspension is not "baseless or unwarranted." *Homar*, 520 U.S. at 934 (citing *Mallen*, 486 U.S. at 240); *Rawls*, 94 M.S.P.R. 614, ¶ 16.
>
> In the present case, the agency did not assert that the appellant had been charged with any crime. Nor did the agency identify any other fact that would provide comparable assurance that the appellant's suspension was not baseless or unwarranted. Therefore, the agency was constitutionally required to provide the appellant with notice of the basis for the suspension and an opportunity to respond before the suspension took effect. The agency's failure to do so deprived the appellant of minimum due process and accordingly we must REVERSE the suspension. *See Clark*, 85 M.S.P.R. 162, ¶¶ 1, 6.

Id. at 200-02. Thus, *Homar*, *Mallen*, *Mathews* and *Edwards* instruct that due process requires pre-suspension assurances that an indefinite suspension is not unjustified.

As explained more thoroughly below, in the context of indefinite suspensions resulting from security clearances, the *Mathews* factors provide that our current jurisprudence falls short of constitutionally mandated due process. The impact of the suspension on the employee's rights weighs significantly. Unlike the suspensions considered in *Mathews* and *Homar*, the "indefinite" suspensions at bar are not likely to be brief, may well impact other employment benefits, and may nearly rise to the level of a termination. Additionally, the underlying indefinite suspension may reflect that the risk of an erroneous deprivation of rights is substantial. Unlike the criminal cases of *Mathews* and *Homar*, suspensions of security clearances may not provide an effective hedge against erroneous deprivations. Finally, as explained below, pre-suspension due process

mechanisms can provide assurances that reduce the risk of an erroneous deprivation while also not impinging on the government's recognized interests of protecting security.

A. The Impact Of An Indefinite Suspension For Security Clearance Reasons Weighs Heavily

The Supreme Court "recognize[s] the severity of depriving someone of the means of his livelihood." *Gilbert*, 520 U.S. at 932; see also *Loudermill*, 470 U.S. at 542-43; *Mallen*, 486 U.S. at 243. "Suspension for cause without pay is likely to cut off subsistence income and to prevent one from obtaining other gainful employment. Although temporary, such a suspension has great practical impact on the employee." *Engdhal v. Dept. of Navy*, 900 F.2d 1572, 1575 (Fed. Cir. 1990). Particularly in the context of a security clearance, an indefinite suspension can result in a long-term deprivation of livelihood.

First, such suspensions are not typically brief. Frequently, the indefinite suspension spans many months, even years. Reinvestigations of security clearances can take nearly a year. *See* Office of the Director of National Intelligence ("ODNI"), "Annual Intelligence Authorization Act Report on Security Clearance Determinations for Fiscal Year 2010," at p. 4 (Sept. 2011)[3] (as much as 299 days for a reinvestigation). The government's security agencies have identified a *target* whereby reinvestigations could be closed within 195 days. *See* ODNI, "IRTPA Title III Annual Report for 2010," p. 3 (Feb. 15, 2011).[4] During these periods, the employee is suspended without pay.

For federal employees, placement in an extended nonpay status means not only a loss of salary. *See* OPM, "Effect of Extended Leave Without Pay (LWOP) (or Other Nonpay Status) on

[3] *Available at* http://dni.gov/reports/Security%20Clearance%20Determination_Report.pdf.
[4] *Available at* http://www.dni.gov/reports/IRTPA%20Title%20III%20Annual%20Report.pdf.

Federal Benefits and Programs," at http://www.opm.gov/oca/leave/html/LWOP_eff.asp.[5] For example, after six months in a nonpay status, the employee's tenure and service compensation date are affected. *See* 5 C.F.R. 315.201(b)(4)(ii)(A); 5 U.S.C. §§ 6303(a), (f); 8332(f). Nonpay status affects an employee's within-grade increases. 5 C.F.R. 532.417(c). Nonpay status may result in the employee accruing less annual and sick leave. See, 5 C.F.R. 630.303 and 5 U.S.C. 6307. Enrollment in health benefits "continues for no more than 365 days in a nonpay status." *See*, OPM "Effect of Extended Leave Without Pay."

The situation of a federal employee facing an indefinite suspension pending review of his or her security clearance is much more dire than the situation considered in *Homar*. In *Homar*, the Court minimized the plaintiff's interest in "the uninterrupted receipt of his paycheck" because "the lost income is relatively insubstantial (compared with termination), and fringe benefits such as health and life insurance are often not affected at all." *Id*. at 932. Notably, the plaintiff in *Homar* was suspended for only 24 days. The instant matters sharply diverge from *Homar*, which referred to the suspension as "short" and for a "brief period." *Homar* at 933, 935. These factors demonstrate that the instant deprivation of rights is far more severe than that considered in *Homar*.

Homar also minimized the impact of those deprivations because "the suspended employee receives a sufficiently prompt post-suspension hearing." *Id*. at 932. In the cases at bar, however, the post-suspension hearing at the Board is equally ineffectual as the pre-suspension hearing. Under the current status of the law, an appeal to the Board is not likely to change the outcome of the indefinite suspension. Thus, there is no effective post-termination due process. Moreover, a post-suspension hearing at the Board takes months. *See, e.g., MSPB*

[5] Most cases arise in the context of an employee losing a clearance and thus a reinvestigation – not an initial investigation – is necessary.

Performance and Accountability Report for FY 2010, at 22 (Nov. 15, 2010) (in 2010, the average case processing time was 89 days for initial appeals and 134 days for Petitions for Review).[6]

In 1974, the Supreme Court considered these factors, concluding that an indefinite suspension can result in a severe and irreparable harm. *See Arnett v. Kennedy*, 416 U.S. 134 (1974). Justice Marshall, in his concurrence, stated:

> [T]he [federal] worker still has a significant interest in retaining his job pending a full hearing. Almost a fourth of all appeals from agency dismissals result in a finding that the termination was illegal. And, the delay from discharge to ultimate vindication at a hearing on appeal is far from insubstantial. More than 75% of adverse personnel actions take more than two months to process; over half take more than three months and a not insignificant number take more than a year. The longer the period between the discharge and the hearing, the more devastating will be the impact of the loss of employment.
>
> During the period of delay, the employee is off the Government payroll. His ability to secure other employment to tide himself over may be significantly hindered by the outstanding charges against him.…. Many workers, particularly those at the bottom of the pay scale, will suffer severe and painful economic dislocations from even a temporary loss of wages.… The plight of a discharged employee may not be far different from that of the welfare recipient in *Goldberg* who, "pending resolution of a controversy . . . may [be] deprive[d] . . . of the very means by which to live while he waits." Appellee…. was nonetheless driven to the brink of financial ruin while he waited. He had to borrow money to support his family, his debts went unpaid, his family lost the protection of his health insurance and, finally, he was forced to apply for public assistance. In this context justice delayed may well be justice denied.

Id. at 218-221 (Marshall, J., concurring in part, dissenting in part) (internal citations omitted)

Finally, in *Homar*, the employee's indefinite suspension was later corrected with back pay for the period of the suspension. *Id*. at 927-28. In security clearance cases, even if the security clearance is later restored, the employee is without remedy to recover the pay lost during the period of suspension pending the completion of the review. *Jones v. Dept. of Navy*, 978 F.2d 1223, 1227 (Fed. Cir. 1992).

[6] http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=552737&version=554319&application=ACROBAT.

Moreover, the employee is effectively precluded from mitigating those harms by seeking comparable alternative employment. Not only are there government regulations hindering the employee from working elsewhere while on suspension, but the employee cannot find similar alternative employment while the security clearance is in suspension. The employee's likelihood of finding an alternative federal job while on indefinite suspension is nil.

Homar instructs that when considering the impact of the suspension, the courts should look to the "length" and the "finality" of the deprivation. *Homar*, 520 U.S. at 924. In the context of a suspension based on a security clearance, the suspension will be lengthy, as much as a year. The suspension also represents a near "final" deprivation, as it impacts salary, benefits, and the ability to find alternative employment. For these reasons, an indefinite suspension in the context of a security clearance is more similar to a termination and, accordingly, pre-action due process cannot be truncated.

B. The Risk of Erroneous Deprivation of Rights Associated With Security Clearances Is High

The second factor of the *Mathews* balancing test considers "the risk of an erroneous deprivation of such interest through the procedures used, and the probably value, if any, of additional or substitute procedural safeguards." *Mathews*, 424 U.S. at 335, cited by *Homar*, 520 U.S. at 931-32.

Considering this factor, *Homar* found that a public employer can deprive a public employee of pre-suspension due process where the employee has been charged with a serious crime. 520 U.S. at 933-934. *Homar* reiterated the Supreme Court's guidance that an "important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation." *Id.*, *quoting Mallen*, 486 U.S. at 240

(1988). The Court emphasized that the "limited cases" involve those where an "independent body" imposed formal criminal charges. *Homar* considered this the "most important factor;" it weighs heavily and must be closely scrutinized. 520 U.S. at 933.

Homar explains that when the triggering event (e.g., felony charges, grand jury indictment) is imposed by "an independent body," that independent body demonstrates that "the suspension is not arbitrary." *Id.* at 934, *quoting Mallen*, at 244-245. The existence of criminal charges is an "objective fact" demonstrating that the charges are not "baseless or unwarranted" and that "an independent third party has determined that there is probable cause to believe the employee committed a serious crime." *Id*, quoting *Mallen*, at 240.

Homar notes that the purpose of a pre-suspension hearing "would be to assure that there are reasonable grounds to support the suspension without pay. But here that has already been assured by the arrest and filing of charges." *Id.* at 933-34 (internal citations omitted). This reasoning is fundamental to the Supreme Court's analysis: the denial or limitation of pre-suspension due process is acceptable because the circumstances already demonstrate that the employer's actions are not baseless or unwarranted.

At this stage of the analysis, the *Mathews* balancing test and *Homar's* analysis force a different conclusion. Unlike the grand jury indictment in *Homar*, the suspension of a security clearance does not carry the same assurances that the resulting indefinite suspension is not "baseless or unwarranted." An employee's security clearance may be suspended under a variety of procedures; many procedures do not provide the independence or objectivity so valued in *Homar*.

Security Clearance Determinations by Authorized Security Personnel

Executive Order 12698 provides that security clearance decisions shall be determined by an "authorized investigative agency." E.O. 12968.

> "'Authorized investigative agency'" means an agency authorized by law or regulation to conduct a counterintelligence investigation or investigation of persons who are proposed for access to classified information to ascertain whether such persons satisfy the criteria for obtaining and retaining access to such information." E.O. 12968, 1.1(c).
>
> "A determination of eligibility for access to such information is a discretionary security decision based on judgments by appropriately trained adjudicative personnel." E.O. 12968, 3.1(b).
>
> Agency personnel security programs established by E.O. 12968 "shall include active oversight and continuing security education and awareness programs to ensure effective implementation of this order." E.O. 12968, 6.1.
>
> Clearance determinations are to be made by "security personnel authorized by the agency head to make access eligibility determinations." E.O. 12968, 2.3.
>
> "Temporary eligibility for access may be granted only by security personnel authorized by the agency head to make access eligibility determinations and shall be based on minimum investigative standards developed by the Security Policy Board…." E.O. 129683.3(a)(2) (emphasis supplied).

In this context, security clearance determinations are similar to criminal indictments: the security personnel, like the courts or grand jury, is fairly presumed to be an independent third party. Security personnel, like the courts, are required to follow specific procedures. Both are presumed to be an "independent third parties." Thus, to the extent that an "independent third party" triggers the suspension of the security clearance, *Homar's* findings that the "risk" is minimized would apply similarly to the cases at bar. However, when these factors evaporate, *Homar's* findings no longer apply. When an "independent third party" is lacking, when procedures are not followed, the "risk" is no longer minimized.

Security Clearance Determinations by Non-Authorized Security Personnel

Many agency procedures allow non-authorized security personnel to immediately suspend an employee's security clearance. *See e.g.*, Army Regulation 380-67, Pars. 7-100(a), 8-102 (any commander or head of an organization may suspend an employee's security clearance). Such a clearance suspension can be wholly outside the purview of the duly authorized security office. The clearance suspension can still form the basis of the employee's indefinite suspension without pay – even though the duly appointed security office has not sanctioned it. The security office may not even be aware that the employee's security clearance has been suspended.

Under these circumstances, the employee's security clearance is *not* suspended by an "independent third party." Unlike a criminal indictment, the suspension of the security clearance is not protected against a "baseless or unwarranted" action; to the contrary, managers and supervisors can affect the security clearance without the participation, approval or review of any duly authorized security office. Agency procedures allow for decisions that do not give the assurances of "an independent third party [who] has determined that there is probable cause to believe the employee committed a serious crime." *See Homar*, 520 U.S. at 934.

When an agency suspends a security clearance without the imprimatur of the duly appointed security office, the assurances present in *Homar* disappear. Accordingly, limiting or denying the employee's pre-suspension hearing violates due process. Additional procedures and protections must be implemented to ensure that due process is not violated.

III. DUE PROCESS REQUIRES BONA FIDE PRE-SUSPENSION PROCEDURES

The *Mathews* factors command the conclusion that in the context of security clearances, an indefinite suspension is nearly tantamount to a removal; accordingly, pre-suspension due process requires more protections than are currently provided. Due process requires procedures

which will provide substantial assurances that the deprivation is not baseless or unwarranted. The *Mathews* factors command that due process demands a bona fide pre-suspension opportunity to affect the outcome of the proposal to suspend.

A. <u>Due Process Requires A Meaningful Opportunity to Reply</u>

The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 168 (1951)* (Frankfurter, J., concurring). The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo, 380 U.S. 545, 552 (1965)*; *see Grannis v. Ordean, 234 U.S. 385, 394 (1914*).

The process due a public employee prior to removal from office has been explained in *Loudermill*. The Supreme Court has stated:

> An essential principle of due process is that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case.". . . This principle requires "some kind of hearing" prior to the discharge of an employee who has a constitutionally protected property interest in his employment. . . .
>
> The pretermination hearing…. should be an initial check against mistaken decisions -- essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action. . . .
>
> The essential requirements of due process . . . are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. . . . *The tenured employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story*. . . .

Id. at 542-46 (emphasis added). The Supreme Court expressly noted that the need for a meaningful opportunity for the public employee to present his or her side of the case is important

in enabling the agency to reach an accurate result for two reasons. First, dismissals for cause will often involve factual disputes and consideration of the employee's response may help clarify such disputes. In addition, even if the facts are clear, "the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect." *Id. at 543*.

B. <u>The Deciding Official Must Have Authority to Change The Outcome</u>

Due process requires a process that insulates against erroneous decisions, that permits the invocation of the deciding official's discretion, and that seeks an accurate decision. A "meaningful opportunity" to respond to charges, therefore, requires that the decision maker has the freedom to invoke her discretion. When the procedures prevent a "deciding official" from invoking discretion, the employee is denied a bona fide reply. *See, e.g., Diehl v. Dept. of the Army*, 2011 MSPB LEXIS 4559, *21 (Jul. 26, 2011) (upholding indefinite suspension despite agency's "procedural error" in approving the suspension prior to receiving the employee's reply, finding error not "harmful" because even if the official had reviewed the reply prior to upholding suspension, it "would not have altered the decision he was ultimately forced to make based solely on the revocation of the employee's security clearance."); *Goins v. Dept. of Defense*, 2011 MSPB LEXIS 2470 *11-14 (Apr. 21, 2011) (deciding official wanted to restructure an employee's position after denial of eligibility to access classified information, but human resources would not allow the manager to explore that option).

A reply can be meaningful only if it can impact the outcome; when a reply cannot impact the outcome, it is meaningless. A meaningless hearing is no hearing at all and does not satisfy the requirements of procedural due process. *See Barry v. Barchi*, 443 U.S. 55, 66 (1979). If a reply has any hopes of influencing the outcome, the deciding official must be in a position to

change the outcome of the indefinite suspension. When a deciding official cannot alter from the pre-determined path of the proposal, the process loses all significance. To preserve constitutional due process, the deciding official must enjoy the authority and discretion to not sustain a proposed indefinite suspension. The decision maker must have the authority and opportunity to consider alternatives less severe than suspension, such a non-duty pay status or the assignment of alternative duties. The decision maker must be able to consider mitigating factors, i.e., *Douglas* factors. Without these protections, the opportunity to reply is hollow and a violation of due process.

C. When the Underlying Security Clearance Determination Lacks Appropriate Authority, The Deciding Official Must Have Authority to Evaluate the Underlying Suspension of the Security Clearance

Consistent with E.O. 12968 and its predecessors, the Supreme Court recognizes that "authorized security personnel" enjoy a "necessary expertise" in protecting classified information. *See Egan*. As explained above, the risk of an erroneous deprivation of rights is particularly high when the security clearance is suspended by an individual or official who is not an "authorized security personnel" or lacks the "necessary expertise."

> For 'reasons . . . too obvious to call for enlarged discussion,' *CIA v. Sims*, 471 U.S. 159, 170 (1985), the protection of classified information must be committed to the broad discretion of the agency[7] responsible, and this must include broad discretion to determine who may have access to it. Certainly, it is not reasonably possible for an outside nonexpert body to review the substance of such a judgment and to decide whether the agency should have been able to make the necessary affirmative prediction with confidence. Nor can such a body determine what constitutes an acceptable margin of error in assessing the potential risk.

[7] The term "agency" here refers to "agency heads" identified in Executive Order 12356 ("National security information,") 3 C.F.R. 174 (1983). *See Egan* at 528. E.O. 12356 required agency heads to create "special access programs to control access, distribution and protection of particularly sensitive information classified pursuant to this Order…." *Id*. E.O. 12356 required agencies to "designate a senior agency official to direct and administer its information security program, which shall include an active oversight and security education program to ensure effective implementation of this Order." E.O. 12356 5.3(a). In 1995, E.O. 12968 specified that not all agencies could authorize access to classified information; such authority is reserved for "authorized investigative agencies." E.O. 12968, 1.2(c).

Egan, 484 U.S. at 528-29.

Egan shields those security clearance decisions which are made by an "authorized investigative agency" and its "appropriately trained adjudicative personnel" who are "security personnel authorized by the agency head to make access eligibility determinations." E.O. 12968, 2.3, 1.1(c) and 3.1(b). *Egan* does not, however, shield determinations made by individuals or offices lacking the requisite training and authority.[8] *See Chatlin v. Navy*, EEOC Request No. 05900188 (1990) (an agency's decision to initiate a review of a security clearance was not the result of any substantive security-clearance decision making process and was thus reviewable by the Commission.)

Because such individuals/offices do *not* have the requisite training, their security clearance determinations lack the imprimatur necessary to survive due process scrutiny. For these same reasons, their security clearance determinations do not meet the standards of *Egan*. *Egan*'s protections are based upon the fact that the individual/office suspending the security clearance is sufficiently experienced – and certainly more experienced than the Board or the courts – to make a security clearance determination. When a security clearance determination lacks this quality, it loses the *Egan* shield while it simultaneously and substantially increases the risk of an erroneous deprivation of rights. When these factors are present, *Egan* does not prevent the deciding official or the Board from reviewing the underlying security clearance determination and due process commands that the employee's pre-suspension hearing should allow the employee to thoroughly challenge the merits of the underlying security clearance.

[8] It appears only one case has considered whether *Egan's* shield applies to decisions not based on "judgments by appropriately trained adjudicative personnel." *See Rattigan v. Dep't of Justice*, 643 F.3d 975, 984 (D.C. Cir., June 3, 2011) (actions outside the Security Division's purview do not enjoy *Egan's* shield), *vacated, reh'g granted* by 2011 U.S. App. LEXIS 18852 (D.C. Cir., Sept. 13, 2011) (oral argument scheduled for December 7, 2011)

Additionally, where a deciding official or the Board concludes that an individual/office without security authority suspends a security clearance, the deciding official or Board should have discretion to return the employee to work. If the agency maintains its security concerns, the agency may still submit the matter to a properly authorized security office, thus preserving the agency's interests.

As examples of additional methods of ensuring that due process is not violated, consider *Fonda-Wall v. Department of Justice*, EEOC Appeal No. 0720060035 (2009) where the Equal Employment Opportunity Commission found that an investigation and suspension of a clearance were the result of retaliation. The EEOC further ruled that the agency's reliance on the suspension of the security clearance to justify the subsequent adverse actions were not legitimate. The EEOC directed the agency to reactivate the investigation into complainant's security clearance.

Similarly, in *Lambert v. Department of the Navy*, 85 M.S.P.R. 130, 134 (2000) the Board suggested that if the issue were still alive, it would have remanded for a decision on "whether race discrimination... motivated the agency to impose the indefinite suspension after [the appellant's] access to classified data was suspended."

Also consider the context of a Board order of reinstatement. For example, in *Hill v. Department of Air Force*, 49 M.S.P.R. 271, 275 (1991), the appellant was fired and the Board ordered her reinstatement. Appellant's position required a security clearance and when she was reinstated, she did not have the required clearance. The Air Force assigned her to the closest position available that did not require a security clearance. Although the assigned job was at a lower grade, the Air Force maintained her higher-graded pay. The Board found the Air Force complied with the Board's order of reinstatement because: a) the Air Force afforded appellant

the due process to which she was entitled under Air Force regulations for the processing of security clearances; and b) because the Air Force detailed her to the next closest available position, with save pay. *Id*. at 275. *Hill* thus provides that the Board can consider mitigating circumstances, such as whether the agency mitigated the consequences by assigning the employee to a position not requiring a clearance and by mitigating the financial toll on the employee. Nothing precludes the Board from considering such consequences in the context of pre-suspension due process, rather than only in the context of compliance.

D. <u>Due Process Requires A Meaningful Pre-Suspension Notice</u>

The notice required by § 7513(b) is sufficient to satisfy the constitutional due process requirement of notice.

> The language of the statute is clear. Prior to an adverse action, the agency must provide an employee with "written notice . . . stating the specific reasons for the proposed action." A notice of a proposed adverse action "is sufficient under [5 U.S.C. § 7513(b)(1)] when it apprises the employee of the nature of the charges 'in sufficient detail to allow the employee to make an informed reply.'" *Brook v. Corrado*, 999 F.2d 523, 526 (Fed. Cir. 1993) (quoting *Brewer v. United States Postal Serv.*, 227 Ct. Cl. 276, 647 F.2d 1093, 1097 (Ct. Cl. 1981), cert. denied, 454 U.S. 1144 (1982)).

Alston, 75 F.3d at 661.

An employee is entitled to notice of the reasons for the suspension of his access to classified information when such a suspension is the reason for placing him on enforced leave pending a final decision on his security clearance. *See Cheney*, 479 F.3d at 1352; *Alston*, 75 F.3d at 661-62. *Cheney* and *Alston* were decided in the context of *Egan*.

When the decision to suspend the security clearance does not come from an authorized security office, the decision does not enjoy *Egan* protections. Accordingly, the employee should be entitled to all information relied upon for the underlying suspension of the security clearance.

This notice does not conflict with *Cheney*, where the underlying security clearance determination was the result of an authorized security office. *Id*. at 1345.

IV. AN "OBJECTIVE" HARMFUL ERROR ANALYSIS SHOULD APPLY TO AN AGENCY'S FAILURE TO FOLLOW ITS OWN PROCEDURES

The Board's Notice asked how the Board should analyze whether an agency committed harmful procedural error in light of *Egan*. As explained below, it is important to distinguish between an agency's own procedures and procedures resulting from Executive Orders relating to security clearances. Where an agency violates its own procedures, the Board should apply an objective harmful error test. "The objective test would not focus on whether the deciding official actually would have reached the same result if there had been no procedural defect, but rather would focus on whether the error is so likely to have prejudiced the deciding official that the proceeding should be void." *Stone*, 179 F.3d at 1373.

Section 7513 is not the only source of procedural protections for employees subject to adverse actions based on security clearance decisions; agencies must also follow the procedures established by their own regulations. *Romero v. Dept. of Defense*, 527 F.3d 1324, 1328 (Fed. Cir. 2008) ("*Romero I*"); *Drumheller v. Dept. of the Army*, 49 F.3d 1566, 1569-73 (Fed. Cir. 1995). In the event that 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 if the employee can show "harmful error in the application of the agency's procedures in arriving at such decision." *Romero I*, 527 F.3d at 1328.

In the context of an adverse action premised on the revocation or suspension of security clearances, an employee may argue that the agency failed to follow its own regulations in revoking his or her security clearance. This argument is distinguishable from an allegation that a

security clearance revocation violated the procedures established in Executive Order No. 12,968. That Order, however, provides that it is "intended only to improve the internal management of the executive branch and is not intended to, and does not, create any right to administrative or judicial review, or any other right or benefit." E.O. No. 12,968 § 7.2(e). Such language in Executive Orders bars a court from reviewing agency compliance with rules or regulations qualified in that manner. *Romero I*, 527 F.3d at 1330 n.1. In contrast, agency regulations and guidelines are published procedures that bind and guide both agency and employee. It is firmly established that an agency must comply with its own regulations. *Drumheller*, 49 F.3d at 1569-73 (reviewing Army regulations related to the revocation of security clearances). Employees are entitled to the benefits of the agency's procedural regulations, and the Board may review compliance with such procedures without delving into the merits of the agency's revocation action, the subject matter removed from Board purview by *Navy v. Egan*.

> *Egan* and this court's decisions following it are based on the principle that foreign policy is the "province and responsibility of the Executive." *Egan*, 484 U.S. at 529 (quoting *Haig v. Agee*, 453 U.S. 280, 293-94 (1981)). In light of that principle, the Supreme Court in Egan observed that "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." 484 U.S. at 530. 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, however, because the authority to formulate procedures for denying or revoking security clearances remains with the Executive

Cheney, 479 F.3d at 1352.

In *Romero I*, the Federal Circuit squarely declined to read *Egan*'s narrow holding as precluding the Board from reviewing the procedural validity of a security clearance violation. *Romero I*, 527 F.3d at 1329. Nothing in *Egan* overrules the Supreme Court's decisions in *Service v. Dulles*, 354 U.S. 363 (1957), and *Vitarelli v. Seaton*, 359 U.S. 535 (1959), which make

clear that federal employees may challenge an agency's compliance with its regulations governing revocation of security clearances. *Romero I*, 527 F.3d at 1329 (noting that the principle of these Supreme Court cases has been applied, post-*Egan*, in cases involving employee security issues) (citing *Duane v. Dept. of Def.*, 275 F.3d 988, 993 (10th Cir. 2002) (holding that court was not precluded from reviewing a claim that agency violated its own procedural regulations when revoking or denying a security clearance), and *Reinbold v. Evers*, 187 F.3d 348, 359 n.10 (4th Cir. 1999) (same)). Even where an agency has complied with the procedural requirements of section 7513 in suspending an employee following a revocation of a security clearance, the action may still be reversed for harmful error if the agency failed to follow its own regulations in revoking the security clearance. *Romero I*, 527 F.3d at 1329-1330.

The focus of the Board or the court in reviewing adverse actions involving revocation, denial, or suspension of a security clearance is limited to reviewing the procedures used rather than the substance of the revocation decision. *Romero v. Dept. of Defense*, 2011 U.S. App. LEXIS 20028, Docket No. 2010-3137 (Fed. Cir., Oct. 3, 2011) ("*Romero II*") (citing *Egan*, *Romero I*). Although limited in purpose, a review to determine whether the revocation of a security clearance complied with the agency's own internal procedures is detailed in scope. *Romero II*, at *14-15. The question of whether or not an agency complied with its own procedures in revoking a clearance necessitates a detailed factual inquiry, looking into not only the agency's regulations and policies but also "the way that the [agency's] procedures are interpreted and applied." *Romero I*, 527 F.3d at 1330.

Such a review delves into: the scope of the final decision of the security office; the authority of the body making the final decision to revoke a security clearance; the basis underlying the security office's final decision to revoke a clearance; the analysis used to reach

such a determination; which standards and adjudicative guidelines were applicable to the security clearance determination; whether those guidelines were properly applied; and whether the security office applied a harsher, more stringent standard than applicable under the proper adjudicative guidelines. *See Romero II*, 2011 U.S. App. LEXIS 20028, *17-19. If the employee meets his or her burden in establishing that the agency failed to follow its own regulations in revoking his security clearance, the Board must then consider whether such procedural deficiency resulted in harmful error. *Id*. at *23 (citing *Romero I*, 527 F.3d at 1330 n.2. (remanding for the MSPB to determine whether Mr. Romero could show that the DoD failed to follow its procedures and that the procedural deficiency constituted harmful error)).

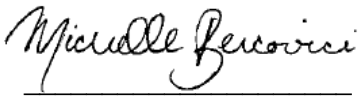
V. CONCLUSION

Based on the foregoing, MWELA submits that the *Homar* balancing test applies to determine the appropriate pre-suspension due process when an agency seeks to indefinitely suspend an employee on account of a security clearance; *Egan* does not shield all security clearance determinations from review; decisions excepted from *Egan* raise particular risk of an unwarranted deprivation of rights; deciding officials and the Board should have discretion to review the underlying merits of decisions excepted from *Egan*, to affect the outcome of the proposed suspension; and that when an agency violates its own procedures, harmful error should be determined by whether the error is so likely to have prejudiced the deciding official that the proceeding should be void. *See Stone*, 179 F.3d 1368, 1373 (1999).

November 4, 2011

Respectfully submitted,

Kristin D. Alden



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