Kristof v. Air Force

2023 | Cited 0 times | Federal Circuit | February 23, 2023

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NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit _____

DALE E. KRISTOF, Petitioner

v.

DEPARTMENT OF THE AIR FORCE, Respondent _____

2021-2033 _____

Petition for review of the Merit Systems Protection Board in No. CH-0752-20-0057-I-2.
_____

Decided: February 23, 2023 _____

JEFFREY M. SILVERSTEIN, Freking Myers & Reul LLC, Dayton, OH, for petitioner.

LIRIDONA SINANI, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washing- ton, DC, for respondent. Also represented by BRIAN M. BOYNTON, TARA K. HOGAN, PATRICIA M. MCCARTHY. _____

Before LOURIE, DYK, and CUNNINGHAM, Circuit Judges.

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PER CURIAM. Dale E. Kristof appeals a decision of the Merit System Protection Board. See Kristof v. Dep't of the Air Force, No. CH-0752-20-0057-I-2, 2021 WL 847879 (M.S.P.B. Mar. 5, 2021). The Board affirmed the decision of the Depart- ment of the Air Force to indefinitely suspend Mr. Kristof without pay, pending a final decision regarding his eligibil- ity for a security clearance. J.A. 1. We

affirm. BACKGROUND Mr. Kristof was employed by the Air Force as a Sys- tems Integration Engineer. This position required access to classified information, which meant Mr. Kristof had to obtain and retain a security clearance as a condition of his employment. On February 20, 2015, Mr. Kristof's access to classified information was suspended due to "alleged illegal distribu- tion of International Traffic in Arms Regulation infor- mation to a foreign national." J.A. 150. Mr. Kristof was informed that after an investigation into the alleged inci- dent, the Department of Defense ("DoD") Consolidated Ad- judications Facility ("CAF") would make a final determination regarding his security clearance eligibility. 1 Mr. Kristof was placed on administrative leave with pay, pending a final decision regarding his security clearance. Mr. Kristof remained in this status until 2019.

1 DoD CAF has been renamed the Defense Counter- intelligence and Security Agency Consolidated Adjudica- tion Services. See DCSA Consolidated Adjudication Services (CAS), Def. Counterintel. & Sec. Agency, https://www.dcsa.mil/mc/pv/dcsa_cas/ (last visited Feb. 7, 2023).

On July 22, 2019, Mr. Kristof received notice that the Air Force was proposing to suspend him indefinitely with- out pay, pursuant to Air Force Instruction ("AFI") 36-704, Discipline and Adverse Actions of Civilian Employees (July 3, 2018), because Mr. Kristof did not have access to classi- fied information, a requirement of his position. The indef- inite suspension would continue until Mr. Kristof was granted eligibility to maintain a security clearance. If DoD CAF, or another agency responsible for adjudicating secu- rity clearances for Air Force personnel, were to issue a final decision denying Mr. Kristof's eligibility to maintain a se- curity clearance, his indefinite suspension would continue until the Air Force took further action, potentially includ- ing his removal. On October 24, 2019, the deciding officer issued a final written decision upholding Mr. Kristof's indefinite suspen- sion. Mr. Kristof's suspension became effective that same day. Mr. Kristof appealed to the Board. He subsequently sought to dismiss his appeal without prejudice to "explore his retirement and employment options with regard to his security status." J.A. 218. The Board granted this request for a dismissal without prejudice on February 28, 2020. Mr. Kristof has now retired. On August 26, 2020, Mr. Kristof requested to reopen his appeal, "to establish that the Agency denied [him] his due process rights as set forth in [5] CFR §6329(b)." 2 J.A. 237. In his close of record submission, Mr. Kristof

2 Section 6329(b) of Title 5 of the Code of Federal Regulations does not exist. The administrative judge in- terpreted Mr. Kristof's affirmative defense to be based on 5 U.S.C. § 6329b, which includes provisions related to in- vestigative leave. See J.A. 266.

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challenged the delay in the conclusion of his security clear- ance investigation, arguing that he had not been afforded due process in challenging the revocation of his security clearance and that his decision to retire constituted a con- structive discharge. In this submission, Mr. Kristof relied particularly on AFI 31-501, Personnel Security Program Management (Jan. 27, 2005), which provided that "[t]he Air Force goal for processing personnel security investigation requests at base level is 14 duty days." On March 5, 2021, the administrative judge issued an initial decision affirming the indefinite suspension. Mr. Kristof did not petition for Board review, so that decision became the final decision of the Board. This petition for review followed. We have jurisdiction under 28 U.S.C. § 1295 (a)(9) and 5 U.S.C. § 7703 (b)(1). On December 7, 2022, we ordered the government to file a supplemental brief addressing whether the DoD had violated DoD Manual 5200.02: Procedures for the DoD Per- sonnel Security Program (PSP) § 9.4.i 3 and allowed Mr. Kristof to respond. Both parties filed supplemental briefs. DISCUSSION We will affirm a decision by the Board unless it is: "(1) arbitrary, capricious, an abuse of discretion, or other- wise not in accordance with law; (2) obtained without pro- cedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence."

3 Section 9.4.i provides: "Suspension cases must be resolved as quickly as circumstances permit. Suspensions exceeding 180 days must be closely monitored and man- aged by the adjudication facility concerned so as to expedi- tiously reach a new national security eligibility determination." J.A. 171.

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5 U.S.C. § 7703 (c); Hornseth v. Dep't of the Navy, 916 F.3d 1369 , 1373 (Fed. Cir. 2019). Certain adverse employment actions can be appealed to the Board under 5 U.S.C. § 7513 (d), which provides that "[a]n employee against whom an action is taken under this section is entitled to appeal to the [Board]." Section 7512 defines the actions covered by § 7513(d) to include "a sus- pension for more than 14 days" but not the denial of a se- curity clearance. In Department of the Navy v. Egan, the Supreme Court held that "[a] denial of a security clearance is not such an 'adverse action' [defined in § 7512 and ap- pealable under § 7513(d)], and by its own force is not sub- ject to Board review." 484 U.S. 518 , 530 (1988). The Court explained "no one has a 'right' to a security clearance." Id. at 528 . Following Egan, "[w]e consistently have held that a federal employee does not have a liberty or property in- terest in access to classified information, and therefore the revocation of a security clearance does not implicate consti- tutional procedural due process concerns." Robinson v. Dep't of Homeland Sec., 498 F.3d 1361 , 1364–65 (Fed. Cir. 2007) (per curiam); see also Gargiulo v. Dep't of Homeland Sec., 727 F.3d 1181 , 1184–85 (Fed. Cir. 2013); Ryan v. Dep't of Homeland Sec., 793 F.3d 1368 , 1374 (Fed. Cir. 2015). In deciding an appeal from an adverse action related to the denial or

revocation of a security clearance, "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 [5 U.S.C. § 7513 (b)] were followed, but the Board may not examine the underlying merits of the security

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clearance determination." 4 Hesse v. Dep't of State, 217 F.3d 1372 , 1376 (Fed. Cir. 2000). In addition to claiming a violation of the procedural protections outlined in § 7513(b), which concern notice and opportunity to be heard, an employee may also challenge an agency decision to the Board if the employee can show "harmful error in the application of the agency's procedures in arriving at such decision." 5 U.S.C. § 7701 (c)(2)(A). We have held that, under § 7701(c)(2)(A), an employee may challenge an agency's failure to comply with the agency's own regulations with respect to a security clearance deci- sion. Romero v. Dep't of Defense, 527 F.3d 1324 , 1329 (Fed. Cir. 2008) ("[W]e decline to interpret Egan as having pre- cluded such review [under § 7701(c)(2)(A)] . . . ."). Here, the Board correctly held that the procedural re- quirements of § 7513(b) relating to notice and opportunity to be heard had been satisfied, a conclusion which Mr. Kristof has not contested. Nor were the provisions of AFI 31-501 violated. AFI 31-501 § 5.6.1 only states that processing security clearance investigation requests within 14 days is a "goal." Mr. Kristof also raised an affirmative defense based on 5 U.S.C. § 6329b, relating to investigative leave. Under § 6329b, an agency may place an employee under investi- gative leave, with pay, for a maximum of 130 days. 5

4 Section 7513(b) requires: "(1) at least thirty days' advance written notice stating the reasons for the proposed action; (2) a reasonable time to answer orally and in writ- ing and the right to furnish affidavits and other documen- tary evidence in support of the answer; (3) the opportunity to be represented; and (4) a written decision and the rea- sons therefor." Adams v. Dep't of Def., 688 F.3d 1330 , 1334 (Fed. Cir. 2012); see 5 U.S.C. § 7513 (b).

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U.S.C. § 6329b(b)(1)(A), (b)(3)(A), (c)(1)–(2). But the ad- ministrative judge determined that Mr. Kristof was never placed on investigative leave, and Mr. Kristof has not demonstrated this was erroneous. In the course of this review proceeding, we noted that Mr. Kristof cited DoD Manual 5200.02. Subsection 9.4.i of that manual requires: "Suspension cases must be resolved as quickly as circumstances permit. Suspensions exceed- ing 180 days must be closely monitored and managed by the adjudication facility concerned so as to expeditiously reach a new national security eligibility determination." J.A. 171. This regulation was potentially violated by the delay in resolving Mr.

Kristof's security clearance investi- gation, which the government admits was "substantial." Resp't's Br. 27. In the government's supplemental brief, it argued that Mr. Kristof had not properly raised this issue; that subsection 9.4.i was not violated; and that this subsec- tion does not, in any event, confer enforceable rights. In his response to the government's supplemental brief, Mr. Kristof clarified that, while he had mentioned DoD Manual 5200.02 in his brief, he "did not specifically raise the issue of the violation of DoD Manual 5200.02." 5 Under these circumstances, we do not reach the question of whether the agency's own procedures were violated. We have considered Mr. Kristof's remaining argu- ments and find them unpersuasive. AFFIRMED COSTS No costs.

5 Pet'r's Resp. Agency Suppl. Br., Kristof v. Dep't of the Air Force, No. 2021-2033, Docket No. 55, at 2 (Jan. 30, 2023).