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FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C.

DEPARTMENT OF HOMELAND SECURITY U.S. CUSTOMS AND BORDER PROTECTION SWANTON, VERMONT RESPONDENT AND NATIONAL BORDER PATROL COUNCIL, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 2774 CHARGING PARTY	Case No. BN-CA-09-0171

Gerard M. Greene
For the General Counsel

David A. Markowitz
For the Respondent

Patricia T. Nighswander
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

STATEMENT OF THE CASE

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority), 5 C.F.R. part 2423.

On March 3, 2009, the National Border Patrol Council, American Federation of Government Employees, AFL-CIO, Local 2774 (the Union or the Charging Party) filed an

unfair labor practice charge against the Department of Homeland Security, U.S. Customs and Border Protection, Swanton, Vermont (the Agency or the Respondent). After investigating the charges, the Acting Regional Director of the Boston Region of the Authority issued a Complaint and Notice of Hearing on December 18, 2009, alleging that the Agency had refused to fully comply with a final arbitration award as required by Sections 7121 and 7122 of the Statute, and that such refusal constituted an unfair labor practice in violation of section 7116(a)(1) and (8) of the Statute. The Respondent filed its Answer to the Complaint on January 12, 2010, denying that it refused to comply with the award or committed any unfair labor practice.

A hearing was held in this matter on February 3, 2010, in Burlington, Vermont. All parties were represented and afforded the opportunity to be heard, to introduce evidence, and to examine witnesses. The General Counsel and Respondent filed post-hearing briefs, which I have fully considered.

Based on the entire record[1] including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

Ross D. Schofield was hired by the Immigration and Naturalization Service (which later merged into the Respondent) in 1997 as a Border Patrol Agent. In February of 2005, he was working as a GS-1896-11 Border Patrol Agent assigned to the Newport, Vermont, Border Patrol Station, which is one of eight stations in the Swanton Sector that covers the U.S.-Canada border in New York and Vermont. At that time, Agent Schofield and two other agents were involved in the apprehension and release of a drug smuggling suspect and the seizure of 60 pounds of marijuana. Jt. Ex. 1 at 8-9. In the weeks after the incident, officials of the Agency, as well as officials of Immigration and Customs Enforcement, the Drug Enforcement Administration and the Newport police, came to believe that the three agents had falsified information on the documents relating to the drug seizure: although the documents prepared by the agents indicated that they had found the marijuana "abandoned" on a roadside and concealed the fact that a suspect in possession of the drugs had initially been arrested, contradictory details began to surface. *Id.* at 10-11. Upon further questioning, Schofield and the other two agents admitted that they had falsified details of their reports in order to utilize the drug suspect as an informant and to provide the suspect with a plausible alibi for losing his drugs. *Id.* at 9-10, 12, 18-20. They believed that such falsification was justifiable based on a prior case at the Newport Station. *Id.* at 10, 13.

After an investigation, the agents were indicted in November 2005 by a Federal grand

[1] The General Counsel noted some corrections to the transcript in its post-hearing brief. While these corrections were untimely under 5 C.F.R. § 2423.21(b)(4), I have independently determined that they, as well as other corrections are appropriate, as follows: 1) Wherever the name "Aguila" occurs, it should be replaced with "Aguilar"; 2) On page 9, line 6, "McCole" should be replaced with "make whole"; 3) On page 75, line 25, "his" should be replaced with "your"; and 4) On page 125, line 17, "OPF" should be replaced with "OPM."

jury on a series of charges including conspiracy and the making of materially false statements to Federal officials. Shortly thereafter, Schofield was placed on indefinite suspension by the Agency, based on his indictment. *Id.* at 13. However, the criminal charges against Schofield were dropped by the U.S. Attorney in July 2006, causing the Agency to rescind his suspension, place him on paid duty status and on administrative leave pending further disciplinary investigation. *Id.* The case was presented to the Agency's National Disciplinary Review Board, and in November 2007 the Agency issued a notice of intent to remove Agent Schofield from the Federal service. The Agency characterized his series of false statements as "wrong and deceptive," alleging that he had "jeopardized the mission and significantly damaged the credibility of the CBP/Border Patrol as a law enforcement agency," and that he had "demonstrated complete disregard for the drug interdiction process and the interagency coordination that exists." *Id.* at 14.

The Union filed a grievance on Agent Schofield's behalf, challenging the removal; after conducting a hearing on the grievance, Arbitrator Parker Denaco issued a decision and award on December 5, 2008. Jt. Ex. 1 (the Award). The Union challenged the Agency's removal of Agent Schofield both on the merits of the case and on the ground that the Agency had violated Article 32(G) of the collective bargaining agreement, which requires the Agency to furnish employees with notices of proposed adverse actions "at the earliest practicable date[.]" The arbitrator analyzed prior arbitration precedent between these parties concerning Article 32(G), concluding that the provision is not merely procedural but substantive, thus obviating the need for the grievant to show harmful error from a delay. *Id.* at 23-24. Noting that the Agency proposed Schofield's removal 33 months after the alleged misconduct, or 16 months after the Federal indictment against Schofield was dismissed, the arbitrator determined that the latter period was unjustifiable; thus he concluded that the Agency had violated Article 32(G). *Id.* at 24-25.

Arbitrator Denaco stated that his finding of an Article 32(G) violation was "dispositive of this case", but he went on nonetheless to express reservations concerning the substantive charges against Schofield. *Id.* at 27-28. He found that the Agency did not prove that Schofield knew the actions of his fellow agents were improper or that they had received training on the use of informants. *Id.* at 27. He also cited mitigating factors that might have weighed in favor of a lesser penalty than removal. *Id.* at 28. Based on his conclusion that the Agency had violated Schofield's Article 32(G) rights under the CBA, the arbitrator ordered the Agency to vacate the adverse action against the grievant, to expunge all records referring to the adverse action, and to reinstate the grievant with back pay and benefits from the date of his removal; he further gave Schofield the right to request reassignment out of his current chain of command. *Id.* at 29-30.

Upon receiving the arbitrator's decision and award, the Agency did not appeal, but rather began to implement it. Schofield was put back on active duty on January 5, 2009 and told to report to the Newport Station headquarters. Tr. 17. The parties stipulated that he was paid back pay and benefits from the date of his removal to his reinstatement. Jt. Ex. 3. However, Schofield's service on active duty was short-lived. Officials at the Agency's national headquarters initially directed Swanton Sector's Chief Patrol Agent not to put Schofield in uniform and instead to assign him to administrative duties. Tr. 75, 79, 118. Schofield had been either suspended, removed or on administrative leave since early 2005,

and until he passed a periodic background reinvestigation (PRI) he would not have access to the Agency's computer systems or email, precluding him from performing his duties as a Border Patrol Agent.[2] Tr. 115, 162. They were also concerned that Federal prosecutors would refuse to pursue future criminal cases involving Schofield, because Schofield's prior actions in the drug seizure had compromised his credibility and might trigger a "*Giglio*" obligation.[3] Headquarters officials checked with the Agency's Office of Internal Affairs and ascertained that Schofield was due to have a PRI performed. Tr. 118. They considered a variety of positions for Schofield and decided to assign him to the Swanton Sector headquarters as a mission support specialist, but after a day or two in that position, Agency officials determined that there was little or no work that Schofield could do, in light of his inability to access the computer systems; instead, Schofield was placed on (paid) administrative leave, and he has remained in that status since approximately January 7, 2009. Schofield was notified by the Agency's Office of Internal Affairs on January 22, 2009, that it was beginning Schofield's PRI. Tr. 161. The result of this process was that Schofield did not "clear" his reinvestigation; that is, he did not pass. Tr. 163. These results were turned over to Agency management in approximately September 2009 to determine what further action would be taken. Tr. 145, 147, 168. At the time of the hearing, Schofield remained on administrative leave, receiving pay and benefits but not working or having the opportunity to earn administratively uncontrollable overtime and other types of premium pay or to be considered for training, details or promotion. Tr. 19-20, 39-40, 45, 46, 51.

DISCUSSION AND CONCLUSIONS

Positions of the Parties

General Counsel

The General Counsel (GC) argues that the Respondent has intentionally refused to comply with the Award, by allowing Agent Schofield to work only for two days before placing him back on administrative leave, a status in which he is unable to earn a variety of premiums or to be considered for promotion, training or details. Although the GC agrees that the Agency paid Schofield full back pay, expunged any references to the adverse action from Schofield's personnel file, and briefly reinstated him to duty status, it argues that this does not constitute full compliance with the Award, citing *Kerr v. National Endowment for the Arts,* 726 F.2d 730, 733 (Fed. Cir. 1984). Because Schofield is not being allowed to perform the duties he performed before his adverse action, and because he is not enjoying many of the benefits of active employment, the clear intent and purpose of the Award is being

[2] An official of the division within the Office of Internal Affairs that performs employee security clearance investigations and periodic reinvestigations testified that the position of Border Patrol Agent is classified as "critical sensitive" and that all such employees must have a "single scope background investigation" performed every five years. Tr. 150, 154-55; see also Resp. Ex. 1.

[3] Giglio v. United States, 405 U.S. 150 (1972)(Giglio), requires Federal prosecutors to disclose to defense counsel information that bears on the credibility of a government witness.

thwarted.

The General Counsel further submits that the Authority has long held that an agency's failure to comply with a final arbitration award, even in termination cases on which the agency cannot file exceptions under section 7122(a) of the Statute, constitutes an unfair labor practice under section 7116(a)(1) and (8). *U.S. Army Adjutant General Publications Center, St. Louis, Mo.,* 22 FLRA 200 (1986)(*Army Adjutant General*). Once an award has become final and binding, either through the denial of exceptions, the failure to file exceptions, or the Federal Circuit's denial of a petition for judicial review, the Authority will not review the merits of the award in an unfair labor practice proceeding. *Id.* at 206. Accordingly, the GC argues that the Respondent's justifications for putting Schofield on administrative leave are nothing more than collateral attacks on the Award and must be rejected.

The GC recognizes that the Merit Systems Protection Board (MSPB), which directly reviews appeals of agency adverse actions and enforces compliance with its own decisions, will excuse an agency's refusal to reinstate an employee to his former position, notwithstanding a Board decision in favor of the employee and a *status quo ante* remedial order, when the agency shows "that an outside event or determination rendered the appellant incapable of performing the duties of his prior position." *Marcotrigiano v. Dep't of Justice*, 95 MSPR 198, 204 (2003). In *Marcotrigiano,* the Board held that the agency did not have to reinstate an INS investigator to his former position after he was acquitted on charges of pornography and his removal was overturned, because two U.S. Attorneys had advised the employee's supervisors that they would not use him as a witness, based on *Giglio*-type concerns related to his criminal trial. While the Board recognized that the credibility concerns about the employee were related to matters that had been raised in his removal appeal, the Board noted that these concerns had been raised not by the agency itself but by Federal prosecutors. *Id.* at 203-05. The General Counsel argues, however, that *Marcotrigiano* is distinguishable from the instant case, because here the *Giglio* concern was raised by Agency officials, not outside prosecutors, and that it was mere speculation at the time Schofield was removed from duty. Similarly, the GC argues that in January 2009, Agency management could only speculate as to whether Schofield would pass his PRI. Even if Schofield did not pass the reinvestigation, the decision of what action to take against Schofield rests with the Respondent, not the division investigating him. Finally, the GC notes that the Agency's concerns – both those relating to possible *Giglio* problems and those relating to Schofield's inability to pass a reinvestigation – were based on the same conduct as that which was litigated in his arbitration hearing. Thus, the GC argues that the Respondent is improperly attempting to collaterally attack the Award itself, which considered all of the same facts and found that Schofield should be reinstated.

Respondent

The Respondent defends its actions on several grounds. First, it asserts that it fully complied with the Award, arguing that its reinstatement of Schofield on January 5, 2009, fulfilled the requirements of the Award, and that its decision to place him on administrative leave two days later was a distinct and separate action that was justified by the facts of the case. Citing the case of *Noble v. Dep't of Justice*, 68 MSPR 524 (1995), Respondent asserts that an agency is not prohibited from instituting a subsequent personnel action against an employee after rescinding his prior removal. Citing *U.S. Dep't of the Treasury, IRS, Austin*

Serv. Ctr., Austin, Tex., 25 FLRA 71 (1987), Respondent further argues that its compliance with the Award must be evaluated in terms of whether its construction of the Award was reasonable, and that in the circumstances of this case, it acted reasonably in placing Schofield on administrative leave until his PRI was completed. It noted testimony that Border Patrol Agents cannot perform most of their work without access to the Agency's computer systems, and that employees who have been in a non-duty status for as long as Agent Schofield must pass a PRI before being allowed access to those systems. In this context, the Respondent's removal of Schofield from duty status on January 7, 2009, was a reasonable precaution, based not on the conduct for which Schofield had been removed, but on Schofield's inability to perform the duties of his job until he passed a PRI.

Additionally, the Respondent submits that it had a "strong overriding interest" justifying its refusal to keep Schofield on duty status. *LaBatte v. Dep't of the Air Force,* 58 MSPR 586, 594 (1993). In *LaBatte,* the MSPB upheld an agency's refusal to return an employee to his former position because his security clearance had been revoked; in *Marren v. Dep't of Justice,* 32 MSPR 285, 287 (1987), the Board upheld the agency's revocation of a Border Patrol Agent's government driver's license, despite the fact that the agent's removal for causing a serious car accident in his government vehicle and for related conduct had been overturned. The Respondent also cites the *Marcotrigiano* decision for this same principle. In all of these cases, the Board held that despite prior decisions ordering an employee's reinstatement, the lack of some required job qualification (a government driver's license, a security clearance) justified the agencies' refusal to return the employees to their former jobs. Similarly, Respondent argues here that all its Border Patrol Agents must have passed a PRI in order to access the Agency's computer systems and to perform their duties, and they must also be able to testify in criminal cases against people they investigate. The Respondent submits that Schofield lacked the former qualification when he was reinstated in January 2009, and that they reasonably feared he would not be able to meet the latter qualification.

The Respondent agrees that once an arbitration award is final and binding, as the Award was in this case, it cannot be collaterally attacked. *U.S. Dep't of Transportation, Fed. Aviation Admin., Northwest Mountain Region, Renton, Wash.,* 55 FLRA 293, 296-97 (1999). It insists that it is not attacking the Award here, but rather that an "outside event or determination" rendered Schofield incapable of performing his duties. Resp. Brief at 19, paraphrasing the *Marcotrigiano* decision, 95 MSPR at 204.

Analysis

If this case simply involved the question whether Respondent complied with the Award, it would be fairly straightforward, and it would be resolved in favor of the General Counsel. It is not that simple, however, and requires a consideration of precedent from the MSPB as well as the Authority, ultimately tipping the scales in favor of the Respondent.

As noted by the General Counsel, the Authority has long held that once an arbitration award is final, the parties must comply with it and may not collaterally attack it. *Army Adjutant General, supra,* 22 FLRA at 202. The Respondent recognizes that the Award in this case was final and binding. Resp. Brief at 19. A party's refusal to comply with a final award is an unfair labor practice enforceable by the Authority, even when the Authority lacks jurisdiction (pursuant to section 7121(f) of the Statute) to hear exceptions to the award.

Dep't of HHS, SSA, 41 FLRA 755 (1991). Where the award is unambiguous, a strict compliance test is employed. *See United States Dep't of the Treasury, IRS, Austin Compliance Ctr., Austin, Tex.,* 44 FLRA 1306, 1315 (1992). Where the award is ambiguous, the test for compliance is whether the agency's action is consistent with a reasonable construction of the award; *United States Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Marianna, Fla.,* 59 FLRA 3, 4 (2003).

In accordance with these precedents, the Respondent argues that it acted reasonably in reinstating Schofield and then putting him on administrative leave, in light of the logistics involved in putting an agent back on the rolls within a short time frame. This argument is premised, however, on the notion that the Award was ambiguous, and I cannot accept that premise. There was nothing ambiguous about the arbitrator's order to reinstate Agent Schofield. Reinstating Schofield for two days and then placing him in a non-duty status was considerably less than full compliance with the Award, and it cannot be rationalized in terms of administrative difficulties in fulfilling the arbitrator's demands. The Agency was not simply looking for a few additional weeks to put Schofield back into a full duty status;[4] rather, it was citing a new basis for keeping him off duty. Respondent's argument conflates the issue of whether it complied with the Award and the separate issue of whether it had legitimate reasons for refusing to do so. Although, as I explain later, I agree that it was justified in putting Schofield on extended administrative leave, I will not indulge in the illusion that this constituted compliance with the Award.

The Award directs the Respondent, *inter alia,* to reinstate Agent Schofield, to make him whole in regard to pay and benefits, to expunge all records of the adverse action, and not to use those records in the future to detract from Schofield's promotional opportunities or other administrative actions. Jt. Ex. 1 at 29. The Respondent was further directed to grant any request Schofield might make in the subsequent year for reassignment out of his current chain of command. *Id.* The Award is clear in its intent to return Schofield to his original duty status and to enable him to resume his career as a Border Patrol Agent. While he is currently being paid his base salary while on administrative leave, he is not earning administratively uncontrollable overtime (which can routinely amount to a quarter of an agent's base pay) or premiums such as night differential and Sunday pay, and he is not being considered for promotions or career-enhancing details or training. Tr. 19-20, 39-40, 45, 46, 51. The Award clearly intended that Schofield be allowed to work as a Border Patrol Agent and to have the advancement opportunities of other agents, and both these purposes are being frustrated by the Respondent's actions.[5]

The true issue in this case is not whether the Respondent complied with the Award, but whether it had a valid justification for refusing to comply. There is little or no Authority precedent on this point, particularly in employee removal cases, but there is a substantial

[4] See, e.g., Dep't of HHS, SSA, 22 FLRA 270, 282-84 (1986).

[5] In analogous situations, the MSPB has held that placing an employee on administrative leave following his reinstatement is not full compliance with a reinstatement order. Special Counsel v. Dep't of Transportation, 72 MSPR 104, 107 (1996); Rauccio v. U.S. Postal Service, 44 MSPR 243, 245 (1990).

body of precedent at the MSPB, whose jurisdiction covers most Federal employee removals, and whose case law also applies to arbitration proceedings challenging such removals. Section 7121(e)(2) of the Statute; *see also Cornelius v. Nutt,* 472 U.S. 648, 652 (1985). The Board has long held that while an agency is generally required to return a reinstated employee to his former position, it may refuse to do so when there is "a strong, overriding interest" against doing so. *Payne v. U.S. Postal Service,* 55 MSPR 317, 319-20 (1992). In *Payne,* an employee's removal for mishandling of the mails was overturned, but subsequently he was convicted on criminal charges arising out of the same actions for which he had been removed. The Board noted that the criminal conviction was directly related to the employee's official duties and held that it was "a compelling reason for not returning appellant to active duty status[.]" *Id.* at 320, 321. The Board cited *Burrell v. Dep't of the Navy,* 43 MSPR 174 (1990), where the agency successfully argued that despite an order to reinstate a motor vehicle operator, the employee's convictions for reckless driving and driving under the influence rendered him unfit to transport explosives.[6] Moreover, in *Yokley v. U.S. Postal Service*, 57 MSPR 482, 285-86 (1993) and *Connor v. U.S. Postal Service,* 50 MSPR 389, 392-93 (1991), the Board held that the agency was justified in requiring the employees to undergo fitness for duty examinations as a prerequisite for reinstatement, based on the nature of their prior actions and the length of time the employees had been off duty.

The case law in this area was summarized by the Board in *Sink v. U.S. Postal Service,* 65 MSPR 628, 632-34 (1994).[7]

In the *Sink* decision, the Board also noted that agencies are entitled to "special deference" when "the issue of compliance [is] entwined with security concerns." *Id.* at 634, citing *LaBatte*, 58 MSPR at 594. In *LaBatte,* a firefighter holding a sensitive position requiring a security clearance was removed for using cocaine, and while his removal action was pending, the agency suspended his security clearance. The MSPB overturned the removal and ordered him reinstated, but in a subsequent compliance proceeding it held that the agency was justified in placing him in another job until his security clearance was reinstated. "The lack of a security clearance constitutes a compelling reason not to return the appellant to his Firefighter position." 58 MSPR at 595. *See also King v. Dep't of the Navy*,

[6] In Burrell, the agency agreed to place the appellant in a lower position, but in Payne, the agency's insistence that it had no other position for the appellant was upheld by the Board.

[7] The Board has also held that an agency's concern (pursuant to the Supreme Court's 1972 Giglio decision) that prosecutors would not allow an employee to testify in court may justify its refusal to place an employee into a job that requires him to appear in court. Marcotrigiano, supra. In our case, Respondent cites this as an additional justification for its refusal to put Schofield back onto active duty. But in Marcotrigiano, the agency's concern was based on letters from two U.S. Attorneys' offices that they would not call the appellant as a witness. 95 MSPR at 202. In the instant case, no prosecutors have raised Giglio concerns about Schofield to the Agency, and the Agency's fears are thus speculative to this point. Accordingly, I do not consider this to be a sufficient reason to keep Schofield off active duty, and I do not discuss it further.

98 MSPR 547, 555 (2005).

In *LaBatte,* the appellant's return to his old job was merely delayed, but the Board has also upheld the outright removal of employees due to the revocation of their security clearance. *See, e.g., Payne, supra,* and *Egan v. Dep't of the Navy,* 28 MSPR 509, 522 (1985), which was ultimately affirmed by the Supreme Court in *Dep't of the Navy v. Egan,* 484 U.S. 518 (1988)(*Egan*). Similarly, in *Blagaich v. Dep't of Transportation,* 90 MSPR 619 (2001), the agency removed an air traffic control specialist (a position requiring a security clearance) after he was criminally convicted on several unspecified charges. An arbitrator reduced his removal to a suspension and ordered him reinstated, but after receiving the arbitration decision the agency revoked his security clearance based on the same underlying misconduct and removed him once again. Despite the prior arbitration decision, the Board refused to apply the doctrine of *res judicata* or to overturn the employee's removal. *Id.* at 623-24. It held that the initial removal had been based on the misconduct leading to his criminal conviction, while the subsequent removal was based on separate and distinguishable grounds: his loss of the security clearance that was required for his job. *Id.* Pursuant to the Supreme Court's decision in *Egan, supra,* 484 U.S. at 530, the Board stated that it could not review the merits of a decision to revoke a security clearance. In light of the employee's loss of his security clearance, the Board held that his removal was valid. *Blagaich*, 90 MSPR at 626. Finally, the Board held in *Blagaich* that the agency was not required to place the employee in a nonsensitive position. Citing *LaChance v. Jowanowitch,*

144 F.3d 792, 793 (Fed. Cir. 1998), the Board found no statute, agency regulation or other evidence that the employee had a right to reassignment to a nonsensitive position. As in *LaChance,* Blagaich had been hired for a position requiring a security clearance, and once he lost that clearance he could not perform his job. 90 MSPR at 626. *See also Lyles v. Dep't of the Army,* 864 F.2d 1581, 1583 (Fed. Cir. 1989).

In the case at bar, Schofield was employed as a Border Patrol Agent, which is designated by the Agency as a "Critical-Sensitive" position, which requires employees to undergo periodic reinvestigation every five years. Tr. 155. *See also* Resp. Ex. 1 at 9, 16 (Personnel Security Handbook, HB 1400-07, December 2006) and 5 C.F.R. §§ 732.201(a) and 732.203. 5 C.F.R. § 732.201(a) provides:

> For purposes of this part, the head of each agency shall designate, or cause to be designated, any position within the department or agency the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security as a sensitive position at one of three sensitivity levels: Special-Sensitive, Critical-Sensitive, or Noncritical-Sensitive.

5 C.F.R. § 732.203 requires periodic reinvestigations of all Critical-Sensitive employees every five years and further states: "The employing agency will use the results of such periodic reinvestigation to determine whether the continued employment of the individual in a sensitive position is clearly consistent with the interests of the national security."

Pursuant to the above regulation, Chapter 1, Section 4 of the Agency's Personnel

Security Handbook provides, in regard to Position Sensitivity Designation, "CBP [Customs and Border Protection] positions are designated High Risk Public Trust or Critical-Sensitive National Security." Resp. Ex. 1 at 9. It defines Critical-Sensitive positions as "hav[ing] the potential for causing exceptionally grave damage to national security." *Id.* Later, it states: "All employees are subject to a periodic reinvestigation (PRI) to ensure continued suitability for employment." *Id.* at 16.

It should also be noted that the definition section of the Personnel Security Handbook contains a separate definition for "Security Clearance" than for "Position Sensitivity Designation," (*Id.* at 10) and it devotes separate chapters for periodic reinvestigations and for security clearances. It appears that while all CBP employees are designated as either High Risk Public Trust or Critical-Sensitive National Security positions, and that Border Patrol Agents are designated as Critical-Sensitive National Security, not all CBP employees are required to have security clearances. *See* Resp. Ex. 1 at 19. The record does not indicate whether Border Patrol Agents are required to have a security clearance.

The *Egan, LaBatte, Blagaich* and *LaChance* decisions cited above all, involve the removal of employees from, or reinstatement to, positions requiring a security clearance. Pursuant to *Egan*, reviewing agencies and courts are prohibited from examining the substance of an agency decision to revoke a security clearance. 484 U.S. at 530. It is not entirely clear, based on the evidence of record and the case law, whether the same principles of "special deference" to executive decisions on security clearances are applicable to cases involving periodic reinvestigation. *Sink, supra,* 65 MSPR at 634.

The Authority has applied the holding and underlying principles of *Egan* in a variety of contexts, although not in circumstances analogous to the instant case. Pursuant to *Egan,* it stated in *United States Information Agency,* 32 FLRA 739, 745 (1988), that an arbitrator may not review the merits of an agency's security clearance determination. In *IFPTE, Local 3,* 57 FLRA 699, 700 (2002), the Authority stated that it "has consistently indicated that proposals which would permit arbitrators to review the merits of security clearance determinations would not be negotiable under *Egan*." Yet it has also held that *Egan* "does not foreclose examination of other issues not related to the merits of an agency's clearance determination[.]" *AFGE, Local 1923,* 39 FLRA 1197, 1205 (1991). Accordingly, in *Puerto Rico Air National Guard, 156th Airlift Wing (AMC), Carolina, P.R.,* 56 FLRA 174 (2000), the Authority held that an agency committed an unfair labor practice when it suspended several employees' security clearances in retaliation for lawful picketing. The Authority reasoned that it was not barred under *Egan* from making such a determination, as the agency had stated unequivocally that it suspended the employees' security clearances because of their picketing. Thus, the Authority said it did not need to examine the substance of the agency's security clearance decision in order to find an unfair labor practice.

Although the PRIs performed by the Respondent's Office of Internal Affairs are not, in and of themselves, security clearance determinations, it is clear from the quoted language of the regulation and the Agency's handbook that a PRI directly involves questions of national security. 5 C.F.R. part 732, on which the classification of the position of Border

Patrol Agent as Critical-Sensitive is based, is entitled "National Security Positions," and by definition an employee holding a Critical-Sensitive position may have "a material adverse effect on the national security[.]" 5 C.F.R. § 732.201(a). The record in our case does not contain any substantive information about the PRI performed on Agent Schofield in the months prior to the hearing, but a determination that he failed the PRI inherently indicates that his "continued employment . . . in a sensitive position is [not] clearly consistent with the interests of the national security." 5 C.F.R. § 732.203. In these respects, and in the limited context of this case, it is difficult to discern any meaningful distinction between the failure to pass a PRI and the revocation of a security clearance. Both Deputy Division Chief Viens and Respondent's Internal Affairs official testified that agents returning to a duty status cannot have access to the Agency's computer and security systems until they have passed a PRI, and as a result they would not be able to perform the duties of their job. Tr. 115, 162. This is not a mere technicality or personnel rule, but an issue that directly involves national security.

The classification system that has been established within the Executive Branch to protect national security, as described by the Supreme Court in *Egan,* 484 U.S. at 527-30, is indistinguishable from the Respondent's system that has been outlined in the present case requiring Border Patrol Agents to pass Periodic Reinvestigations in order to demonstrate the continued ability to perform the duties of their jobs. Accordingly, if the Authority is asked to compel an agency to reinstate an employee to a Critical-Sensitive position, it should not do so if this would require the Authority to evaluate the substance of a PRI determination.

Arbitrator Denaco ordered the Respondent to reinstate Schofield as a Border Patrol Agent. The issue of Schofield's PRI was not raised in that proceeding, because the need to perform a PRI did not arise until Schofield was ordered to be reinstated. Schofield had been in a non-duty status from 2005 to January 2009. The record establishes that Border Patrol Agents who have been "off rolls" and are returning to active duty must pass a PRI before having access to the Agency's computer systems, unless they have a current PRI in their files. Tr. 115, 162. Schofield's last PRI had been performed in 1997, and a lesser form of investigation was performed in 2003. Tr. 162-3. Thus the Agency's normal security procedures required a new PRI to be performed for Schofield, and the Agency followed these procedures in initiating such a PRI in January 2009. Several months later, in approximately September 2009, the PRI was completed, and Schofield did not pass. Tr. 147, 168. As a result, Schofield has not had access to the Agency's computer and security systems, and is unable to perform a significant component of his duties as a Border Patrol Agent. Tr. 115, 168.

In order for the Respondent to reinstate Schofield fully as a Border Patrol Agent in January 2009, and to comply with the Award, it would have had to override or violate the procedures requiring PRIs. It would have had to give access to the Agency's automated systems (and all the sensitive information that might be contained therein) to a person whose "continued employment" has been determined not to be "consistent with the interests of the national security." 5 C.F.R. § 732.203. As the *Egan* court stated with regard to security clearances, the process is "an attempt to predict his possible future behavior and to assess whether . . . he might compromise sensitive information. . . . Predictive judgment of this kind must be made by those with the necessary expertise in protecting classified

information." 484 U.S. at 528-29. Needless to say, neither I, nor the Authority, possess the expertise necessary to decide whether Schofield should be allowed access to the Agency's sensitive information. Placing Schofield in his former position as a Border Patrol Agent, and affording him all the career opportunities to which an agent is entitled, would require the Agency to assume a national security risk that its Office of Internal Affairs determined was unacceptable. Such an order would not merely review the substance of the PRI determination, but override the PRI entirely.

On the basis of *Egan* and related Authority and MSPB precedent, I conclude that the Respondent was justified in placing Schofield on administrative leave until he passed a PRI. Although Internal Affairs had not yet begun its PRI on Schofield when he was reinstated on January 5, 2009, Agency officials checked and learned that Schofield was due to have a PRI in order to return to full duty status, and the PRI was initiated later that month. Tr. 114, 118, 134, 147, 161. In these circumstances, I find that the Respondent had compelling and overriding reasons to keep Schofield off active duty until he passed his PRI. Since he subsequently failed the PRI, the Respondent was justified in keeping him off active duty.

Contrary to the assertion of the General Counsel, Respondent's actions in this case do not represent a collateral attack on the Award. Respondent has not disputed here either the factual or legal conclusions of the arbitrator, but rather it has based its actions on additional facts that did not exist at the time of the arbitration hearing: Schofield's failure to pass his PRI and his consequent inability to perform the duties of a Border Patrol Agent. The MSPB made a similar analysis in *Blagaich, supra,* 90 MSPR at 623-24, and in a somewhat different context in *Marcotrigiano, supra,* 95 MSPR at 203-05. I believe the reasoning is applicable here as well. The arbitration addressed the proposed removal of Schofield based on his conduct in 2005; Respondent's action placing him on administrative leave in 2009 was based on Schofield's inability to perform the duties of his job until he passed a PRI. This is a separate and independent basis for taking action against Schofield, and this distinguishes it from cases such as *U.S. Dep't of Transportation, Fed. Aviation Admin.,* 54 FLRA 480 (1998). Respondent is not claiming that Arbitrator Denaco's Award is contrary to law or regulation. Rather, it is arguing that once Schofield became eligible for reinstatement in January 2009, a basic requirement of his position was passing a PRI. Until he passed the PRI, he could not perform the duties of his job because he did not have access to basic information necessary for his work; after he failed the PRI, his inability to work as a Border Patrol Agent was further established. As in *Blagaich* and *Marcotrigiano,* Respondent's actions concerning Schofield in 2009 were based on facts and events separate from those decided by Arbitrator Denaco.

This does not mean that Agent Schofield is without recourse in seeking to regain his job. There may be internal Agency procedures for him to appeal the outcome of his PRI; moreover, the Agency will have to institute an adverse action against him if it wishes to change his status as an employee on administrative leave and to remove him permanently from his position, thereby entitling him to statutory appeal procedures. This case also does not address whether there are other jobs that Schofield can perform or whether the Agency is

required to find such a position for him. The current decision simply means that the FLRA is not the appropriate forum for overturning the determination of an employee's national security-based periodic reinvestigation.

For all of these reasons, I conclude that the Respondent did not commit an unfair labor practice when it removed Schofield from active duty in January 2009. Accordingly, I recommend that the Authority issue the following Order:

ORDER

It is ordered that the complaint be, and hereby is, dismissed.

Issued, Washington, DC, September 29, 2010.

RICHARD A. PEARSON
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION**, issued by RICHARD A. PEARSON, Administrative Law Judge, in Case No. BN-CA-09-0171, were sent to the following parties:

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Dated: September 29, 2010
Washington, D.C