In the Matter of:

DONALD VAN WINKLE, **ARB CASE NO. 09-035**

COMPLAINANT, **ALJ CASE NO. 2006-ERA-024**

v. **DATE: February 17, 2011**

BLUE GRASS CHEMICAL ACTIVITY/
BLUE GRASS ARMY DEPOT,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Paula Dinerstein, Esq., and Adam Draper, Esq., *Public Employees for Environmental Responsibility*, Washington, District of Columbia

For the Respondent:
W. Clay Caldwell, Esq., *Chemical Materials Agency*, Edgewood, Maryland

BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge*, Luis A. Corchado, *Administrative Appeals Judge*, and Joanne Royce, *Administrative Appeals Judge*.

FINAL DECISION AND ORDER OF REMAND

Donald Van Winkle filed a complaint alleging that the Blue Grass Chemical Activity (BGCA) violated the whistleblower protection provisions of the Clean Air Act (CAA)[1] and the Solid Waste Disposal Act, as amended by the Resource Conservation and

[1] 42 U.S.C.A. § 7622 (Thomson/West 2003).

Recovery Act of 1976 (SWDA).[2] Van Winkle alleges that the BGCA revoked his certification in the Department of the Army's Chemical Personnel Reliability Program (CPRP), subjected him to a hostile work environment, and constructively discharged him because he complained about environmental hazards. The Administrative Law Judge (ALJ) determined that he did not have the authority to review the merits of any alleged retaliatory reasons for revoking a CPRP certification as such revocation is a matter of national security and accordingly, he dismissed Van Winkle's complaint. For the following reasons, we reverse the ALJ's determination and remand the case for consideration of Van Winkle's complaint on its merits.

BACKGROUND

Van Winkle was a civilian employee of the U.S. Army's BGCA in Richmond, Kentucky.[3] The BGCA is a tenant at the Blue Grass Army Depot and is responsible for the safe and secure storage of chemical weapons stockpiles.[4] In August 2003, Van Winkle began working as a Monitoring Systems Operator Mechanic (MSOM).[5] Part of Van Winkle's job entailed operating a chemical gas detection device containing a "V to G pad," which monitored the air for any chemical leakage from "igloos" or underground bunkers containing stockpiled chemical weapons.[6] Van Winkle was required to have both a security clearance and a CPRP certification to work as a MSOM. CPRP certification is required for employees to have access to and work with chemical agents.[7]

In February 2005, Van Winkle and other BGCA employees attended a training course that the manufacturer of the chemical gas detection device offered. There they

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[2] 42 U.S.C.A. § 6971 (Thomson/West 2003). Apparently, the Office of Administrative Law Judges (OALJ) originally considered this case as filed pursuant to the whistleblower protection provisions of the Energy Reorganization Act (ERA), 42 U.S.C.A. § 5851 (West 2007). Thus, the OALJ assigned it the case number of ALJ No. 2006-ERA-024. But the Occupational Safety and Health Administration (OSHA) investigation of this complaint determined that the case arises pursuant to the whistleblower protection provisions of the CAA and the SWDA. Administrative Law Judge Exhibit (ALJX) 2.

[3] Hearing Transcript (HT) at 31-32; Joint Exhibit (JX) 60; Recommended Decision and Order (R. D. & O.) at 4.

[4] R. D. & O. at 4, n. 5. The BGCA is a subordinate command of the U.S. Chemical Materials Agency, located at the Aberdeen Proving Ground in Edgewood, Maryland. Respondent's Reply Brief at 1.

[5] HT at 31-32; JX 60; R. D. & O. at 4.

[6] HT at 33, 53, 711; JX 110 at 5; R. D. & O. at 5.

[7] JX 1 at 3; 60; R. D. & O. at 5.

learned that the "V to G pad" should be placed within the igloos as opposed to outside the igloos where the BGCA had been placing the pad. The BGCA's failure to follow the manufacturer's instructions concerned some employees because they feared that possible exposure to chemical agents may have gone undetected.[8] Van Winkle and the other employees raised the concern with their respective supervisors.[9] Consequently, the BGCA ultimately ordered the "V to G pad" to be placed as the manufacturer recommended in October 2005.[10]

In July 2005, however, Van Winkle sought advice from the Public Employees for Environmental Responsibility (PEER) about filing a lawsuit against the BGCA based on the possible exposure to chemical agents from the incorrect placement of the "V to G pads" outside the igloos.[11] PEER requested that Van Winkle substantiate his concern in writing and gather support from his co-workers before it determined whether it would represent him in any lawsuit.[12] Thus, Van Winkle wrote a statement about his meetings with his supervisors regarding the placement of the "V to G pads" and asked other co-workers to sign the statement.[13]

Van Winkle's co-workers refused to sign his statement and some informed their superiors of Van Winkle's actions.[14] Consequently, BGAC officials investigated Van Winkle's actions and temporarily suspended his CPRP certification in August 2005.[15]

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[8] HT at 34-39, 78, 825-826; JX 63; Complainant's Exhibit (CX) 6A at 33-35; R. D. & O. at 5.

[9] HT at 59-62, 309, 342-343; R. D. & O. at 5. Van Winkle also raised other issues with his supervisors, including that monitoring procedures were not followed, his concern about the life span of the "V to G pads," improper monitoring of contaminated employee protective suits, incompetent management, improper maintenance of monitoring equipment, insufficient staffing, unsafe drinking water and improper use of non-disclosure or "gag" orders. Furthermore, Van Winkle complained to the Kentucky Department for Environmental Protection-Division of Waste Management, the Department of the Army Inspector General Surety, and the Army Material Command Surety Inspector. HT at 127, 139-140, 156-160, 163-166, 180, 182-184, 186-187, 589, 616-617; JX 9, 71 75, 90-93, 95-96; CX 6A at 33; CX 11; R. D. & O. at 1 n.6, 16 n.13, 17.

[10] HT at 717-72, 121-122; JX 28; R. D. & O. at 5.

[11] HT at 131-134.

[12] HT at 134-135.

[13] HT at 135-136, 138; CX 13; R. D. & O. at 6.

[14] *Id*.

[15] JX 8; R. D. & O. at 7-8.

Van Winkle was given other duties that did not require CPRP certification, but he retained his security clearance.[16]

In September 2005, Van Winkle filed his whistleblower complaint with OSHA.[17] OSHA investigated the complaint and found it to have no merit. Van Winkle requested a hearing before a DOL Administrative Law Judge. In the meantime, the BGCA permanently revoked Van Winkle's CPRP certification in March 2006.[18]

The ALJ determined that he did not have the authority to review the merits of any alleged retaliatory reasons for revoking a CPRP certification as such revocation is a matter of national security and recommended that Van Winkle's complaint be dismissed. Van Winkle filed a timely appeal with the Board. The Board issued a Notice of Appeal and Order Establishing Briefing Schedule, and both parties filed briefs in response.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Administrative Review Board (ARB) to review DOL ALJ initial recommended decisions under the environmental whistleblower statutes, including the CAA and the SWDA, and to issue the final agency decision.[19] Under the Administrative Procedure Act, the ARB, as the

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[16] HT at 231; R. D. & O. at 8.

[17] ALJX 2. In addition to alleging that the BGCA revoked his CPRP certification because he complained about environmental hazards, Van Winkle also alleges that the BGCA subjected him to a hostile work environment, including denying him promotions and training and overtime opportunities, verbally abusing him, and giving him lowered performance evaluations and faulty equipment to work with. HT at 128-129, 213; JX 9; ALJX 2; R. D. & O. at 10. Moreover, Van Winkle alleges that the BGCA constructively discharged him when he was forced to take permanent medical disability or otherwise lose his job and ultimately resigned in October 2006. HT at 228-229, 232-238, 244, 264-266, 443-446, 513, 700.

[18] JX 16.

[19] 29 C.F.R. §§ 24.110, 1981.110 (2010). *See also* Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the statutes listed at 29 C.F.R. § 24.100(a)).

In regard to the Board's jurisdiction and authority over a Federal Government entity, such as the Department of the Army's BGCA, under the CAA and the SWDA, the Board held in *Berkman v. U.S. Coast Guard Acad.*, ARB No. 98-056, ALJ No. 1997-CAA-002, slip op. at 12-14 (Feb. 29, 2000):

Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision under the environmental whistleblower statutes.[20] We review the ALJ's conclusions of law de novo.[21]

> As an entity of the United States government, [a Federal Government entity] cannot be held liable unless the United States has waived its sovereign immunity under the statutory provisions at issue. Any waiver of the government's sovereign immunity must be "unequivocal." *United States Dep't of Energy v. State of Ohio*, 503 U.S. 607, 615 (1992). We examine whether the United States has waived its sovereign immunity concerning the … whistleblower provisions under which [the complainant] brought his complaints. This examination is important because the remedies available under the different environmental statutes are not uniform.

Noting that the CAA has a Federal facilities provision at 42 U.S.C. §7418(a) (1994), the Board found that the CAA's legislative history indicates that the CAA whistleblower provision applies to facilities of the United States: "This section is applicable, of course, to Federal . . . employees to the same extent as any employee of a private employer." H.R. Rep. No. 294, 95th Cong., 1st Sess. 326, *reprinted in* 1977 U.S. Code Cong. & Admin. News 1405. *See Jenkins v. U.S. Envtl Prot. Agency*, No. 1992-CAA-006, slip op. at 5 (Sec'y May 18, 1994).

Regarding the SWDA, the Board found that the SWDA's Federal facilities provision applies to any Federal agency "having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste." 42 U.S.C.A. § 6961. The Board noted that the Secretary has found that the SWDA whistleblower provision applies to all entities of the United States government by means of the Federal facilities provision. *Jenkins*, slip op. at 7. *See, e.g., Schafermeyer v. Blue Grass Army Depot*, ARB No. 07-082, ALJ No. 2007-CAA-001 (ARB Sept. 30, 2008); *Yarbrough v. U.S. Dep't. of the Army, Chem. Agent Munitions Disposal Sys.*, ARB No. 05-117, ALJ No. 2004-SDW-003 (ARB Aug. 30, 2007); *Hall v. U. S. Army Dugway Proving Ground*, ARB Nos. 02-108, 03-013; ALJ No. 1997-SDW-005 (ARB Dec. 30, 2004), *aff'd Hall v. Dep't of Labor*, 476 F.3d 847 (10th Cir. 2007).

[20] *See* 5 U.S.C.A. § 557(b) (West 1996); 29 C.F.R. § 24.100(a).

[21] 5 U.S.C.A. § 557(b). We note that the regulations implementing the environmental whistleblower statutes have been amended since this complaint was filed regarding the standard of review for findings of fact. 72 Fed. Reg. 44,956 (Aug. 10, 2007), codified at 29 C.F.R. § 24.110(b)(2010). The change is not implicated in this matter, however, in which we address solely conclusions of law.

DISCUSSION

The ALJ's Decision

In a preliminary, pre-hearing order, the ALJ addressed a Motion *In Limine* that the BGCA filed in which they argued that relevant case law established that neither the ALJ nor any court had the authority to review the merits of a decision to revoke a security clearance or, similarly, a CPRP certification as such revocation is a matter of national security.[22] In response, Van Winkle noted that the Merit Systems Protection Board (MSPB) has concluded that it could "review the underlying disqualification of [an] appellant from the CPRP" and that the case law upon which the BGCA relied restricting a court's authority to such review "applied only to security clearance revocations."[23]

The ALJ noted that in *Department of the Navy v. Egan*, 484 U.S. 518, 527-529 (1988), the Supreme Court held that a court (the MSPB in that case), as a "nonexpert body," was not authorized to review security clearance determinations. Instead, the Court held that, absent express statutory authority, national security is an Executive Branch responsibility under the Constitution.[24] Furthermore, the ALJ noted that courts apply *Egan* to cases involving whistleblower anti-discrimination statutes, similar to the environmental whistleblower protection statutes.[25]

Additionally, the ALJ characterized the holdings of the ARB and the Tenth Circuit Court of Appeals in *Hall v. U. S. Army Dugway Proving Ground*, ARB, Nos. 02-108, 03-013; ALJ No. 1997-SDW-005 (Dec. 30, 2004), *aff'd Hall v. Dep't of Labor*, 476 F.3d 847 (10th Cir. 2007) as concluding that CPRP certification "was the equivalent of a security clearance" and, therefore, precluded their review of a "revocation of [a] CPRP certification."[26]

Subsequently, in his R. D. & O. the ALJ reiterated his conclusion that "as with a [security] clearance," a court may not review the merits of "a CPRP certification clearance

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22 *See* Nov. 20, 2007 Order Clarifying Motion In Limine and Determination on the Applicability of *Hall, Et. Al.*

23 *See* Nov. 13, 2007 Complainant's Motion to Reconsider Order Granting In Part Respondent's Motion *In Limine*, *citing Jacobs v. Dep't of the Army*, 62 M.S.P.R 688 (1994).

24 Nov. 20, 2007 Order at 2.

25 *Id.*; *see, e.g.*, *Perez v. FBI*, 71 F.3d 513 (5th Cir. 1995) (Title VII retaliation); *see also Hall*, 476 F.3d at 852-853; *Hall*, ARB Nos. 02-108, 03-013, slip op. at 17 (CAA and SWDA).

26 Nov. 20, 2007 Order at 2.

revocation."[27] Instead, the ALJ held that a court may only "review whether an agency has complied with its procedures for revoking a security clearance."[28]

Thus, regarding the merits of Van Winkle's case, the ALJ initially found that Van Winkle engaged in protected activity when he raised his concern with his supervisor and co-workers that the "V to G pads" were "not correctly installed" and "could have affected the safety and health of both employees of BGCA and the surrounding members of the public."[29] In addition, the ALJ found that Van Winkle suffered adverse personnel actions under the CAA and the SWDA when the BGCA, first temporarily, and then permanently revoked his CPRP certification.[30]

But the ALJ ultimately held that he could not review the merits of whether the BGCA's decision to revoke Van Winkle's CPRP certification was due to retaliation for his protected activity.[31] Instead, the ALJ only determined that the BGCA's revoked Van Winkle's CPRP certification according to the procedures set forth in applicable Army Regulations.[32] Consequently, the ALJ recommended that Van Winkle's complaint be dismissed.

The Parties Arguments on Appeal

On appeal, Van Winkle contends that the ALJ erred in relying on the holdings in *Egan* and *Hall*, which involved security clearance determinations, to conclude that that he could not review the merits of the BGCA's revocation of Van Winkle's CPRP certification. Van Winkle notes that his security clearance giving him access to classified information was never revoked. Instead, Van Winkle points to the MSPB, which concluded in *Jacobs v. Dep't of the Army*, 62 M.S.P.R 688 (1994) that it could review the merits of a CPRP certification revocation, as opposed to a security clearance determination.[33]

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27 R. D. & O. at 23, 32.

28 R. D. & O. at 23-24, *citing Romero v. Dep't of Defense*, 527 F.3d 1324, 1329-1330 (Fed. Cir. 2008) and *Hall*, 476 F.3d at 853.

29 R. D. & O. at 25.

30 *Id.* at 28.

31 *Id.* at 23; 32-33.

32 *Id.* at 33.

33 *See Jacobs*, 62 M.S.P.R. at 694-695.

In response, the BGCA asserts that just like a security clearance determination, a CPRP certification determination involves matters of national security. Indeed, the BGCA argues that access to chemical weapons with a CPRP certification is more important to national security than access to classified information. Thus, it contends that a CPRP certification determination should be considered equal to a security clearance determination for the purposes of applying *Egan*'s rationale and holding restricting a court's authority to review such determinations, regardless of how the MSPB has ruled.

The Merits of CPRP Certification Determinations Are Reviewable

Initially, we agree that the ALJ did mischaracterize the holdings of the ARB and the Tenth Circuit in *Hall* as holding that CPRP certification is the equivalent of a security clearance. Although the complainant in *Hall* had both a security clearance and CPRP certification, the only relevant issue addressed in that case was whether the Board or a court had the authority to review the reasons that the complainant's security clearance was revoked.[34] Both the Board and the Tenth Circuit held that *Egan* prohibited review of the reasons for revoking the complainant's security clearance. But neither the Board nor the Tenth Circuit addressed whether it had the authority to also review the reasons for revoking a CPRP certification.[35]

In contrast, the BGCA has provided no other legal basis, either under any relevant statutory or regulatory authority or case law, to support its assertion that a CPRP certification determination should be considered the equivalent of a security clearance determination for the purposes of applying *Egan*'s rationale and holding.

Alternatively, Van Winkle does point to the MSPB's relevant legal analysis of this issue in *Jacobs*, which concluded that *Egan's* restriction on a court's authority to review was "was narrow in scope and specifically applied only to security clearance" determinations, but not to CPRP certification determinations.[36] Even more recently, we note that the MSPB has just issued decisions in *Conyers v. Dep't of Defense***,** ___

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[34] *Hall*, ARB, Nos. 02-108, 03-013; slip op. at 6, 8-9, 13, 16-18, 24.

[35] While the complainant's CPRP certification was temporarily revoked in *Hall*, his CPRP certification was ultimately restored. *Hall*, AR, Nos. 02-108, 03-013; slip op. at 6, 8. The Board only considered whether the complainant's temporary CPRP certification revocation contributed to a hostile work environment, but found that it had no effect on the complainant's employment status as he was not doing any work requiring CPRP certification and was not even aware of the temporary revocation at the time. *Hall*, ARB Nos. 02-108, 03-01;, slip op. at 24. The Tenth Circuit in *Hall* does not even mention that the complainant had a CPRP certification. *See Hall*, 476 F.3d at 847-861.

[36] *Jacobs*, 62 M.S.P.R at 689-690, 694-695.

M.S.P.R. ___, 2010 WL 5186184, 2010 MSPB 247 (Dec. 22, 2010) and *Northover v. Dep't of Defense*, ___ M.S.P.R. ___, 2010 WL 5186178, 2010 MSPB 248 (Dec. 22, 2010), which, after a joint oral argument with amici participation, present an exhaustive and probative analysis of a court's authority to review security clearance determinations in contrast to other similar determinations.[37] The MSPB again determined that the application of *Egan* was restricted to cases involving security clearance determinations involving access to classified information.[38]

The MSPB held that *Egan's* limitation of a court's authority to review a denial, revocation or suspension of a security clearance "must be viewed narrowly, most obviously because the Court itself so characterized its holding in that case" and "does not, on its face, support [an] agency's effort . . . to expand the restriction on the Board's statutory review to any matter in which the government asserts a national security interest."[39] "Nothing in *Egan* indicates that the Court considered [a non-security clearance] designation alone as sufficient to preclude Board review of the merits of the determination underlying Mr. Egan's removal."[40] Thus, the MSPB held that that the *Egan's* limitation only applies "when an agency has made a determination regarding an employee's access to classified information."[41]

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[37] *Northover* is a near verbatim companion opinion to the MSPB's *Conyers* opinion.

[38] The MSPB noted that *Egan* limits a court's review of an adverse action "only if that action is based upon a denial, revocation or suspension of a 'security clearance,' i.e., involves a denial of access to classified information or eligibility for such access." *Conyers*, slip op. at 4; *Northover*, slip op. at 4. Specifically, the MSPB did not find "any basis upon which to assume that the Court in *Egan* used the term 'security clearance' to mean anything other than eligibility for access to, or access to, classified information" and was "not synonymous with eligibility to occupy a sensitive position." *Conyers*, slip op. at 5; *Northover*, slip op. at 5. In this regard, the MSPB cited the Office of Personnel Management's regulation defining "national security position" to include "[p]ositions that require regular use of, or access to, classified information." *See* 5 C.F.R. § 732.102(a)(2). Thus, the MSPB rejected an "expansive reading" of *Egan*'s limitation as applicable to any "discretionary national security judgments committed to agency heads, regardless of whether the employee . . . needed access to classified information as part of his job." *Conyers*, slip op. at 5 n.13, 13; *Northover*, slip op. at 5 n.11.

[39] *Conyers*, slip op. at 5; *Northover*, slip op. at 4; *see Egan*, 484 U.S. at 527-528.

[40] *Conyers*, slip op. at 5; *Northover*, slip op. at 4.

[41] *Conyers*, slip op. at 5; *Northover*, slip op. at 5. The MSPB noted that the non-security clearance designations at issue in *Conyers* and *Northover* had "no . . . requirement for access to, or eligibility for access to, any classified information." *Conyers*, slip op. at 5 n.12; *Northover*, slip op. at 4 n.10.

Pertinent to the BGCA's argument that access to chemical weapons with a CPRP certification is more important to national security than access to classified information, the MSPB has acknowledged the "'military' nature" of the CPRP program and that CPRP certification is "very important" in protecting access to chemical weapons.[42] Nevertheless, the MSPB concluded that those factors should not, in and of themselves, "divest civilian employees who work in that program of the basic employment protections guaranteed them under law."[43]

The MSPB concluded that: "the . . . argument that *Egan* precludes the Board from reviewing the merits of an agency's adverse action, even when security clearances are not involved, is far-reaching. Accepting the agency's view could, without any Congressional mandate or imprimatur, preclude Board and judicial review of alleged unlawful discrimination [and] whistleblower retaliation."[44] Thus, the MSPB held that an "agency's decision to characterize the appellant's position as a national security position . . . is insufficient to limit the Board's scope of review to that set forth in *Egan*."[45]

Similarly, we find that the BGCA's argument in this case that CPRP qualification is equal to a security clearance because it also involves a matter of national security is also made "without any Congressional mandate or imprimatur."[46] In contrast, we find

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[42] *Jacobs*, 62 M.S.P.R at 694.

[43] *Id*. The MSPB further noted that it "does not consider access to [sensitive] information to be equivalent to possession of a security clearance." *Conyers*, slip op. at 7; *Northover*, slip op. at 7; *citing Adams v. Dep't of the Army*, 105 M.S.P.R. 50 (2007), *aff'd*, 273 F. App'x 947 (Fed. Cir. 2008). Similarly, the MSPB noted that the Supreme Court's decision in *Cole v. Young*, 351 U.S. 536 (1956), supports its determination that review of an adverse action "cannot be preempted by an agency's generalized claim of 'national security.'" *Conyers*, slip op. at 7; *Northover*, slip op. at 7. There, the Court "did not avoid review of the removal [of a preference-eligible veteran employee of the Department of Health, Education, and Welfare] or identify any rule of limited review merely because the Executive Branch of the government alleged that matters of 'national security' were at issue." *Id*. Instead, the MSPB noted that the Court held that a dismissal was unreviewable "only if" the position entailed "having access to classified information." *Id*.; *see Cole*, 351 U.S. at 551, 557 n.19.

[44] *Conyers*, slip op. at 8; *Northover*, slip op. at 7.

[45] *Conyers*, slip op. at 8; *Northover*, slip op. at 8.

[46] We also note that in *Jacobs*, the MSPB stated that "if the work assigned to the appellant was so important and so intimately related to national security that the agency could not tolerate Board review of its disciplinary actions, it could have revoked the appellant's security clearance and avoided review of the merits of a removal based on such a revocation." *Jacobs*, 62 M.S.P.R at 695. In *Conyers* and *Northover*, the MSPB expanded more specifically on this notion.

the MSPB's legal analysis of a court's authority to review security clearance determinations as opposed to other similar determinations to be sound, as well as persuasive. In light of the MSPB's experience in considering such cases involving security clearance determinations and CPRP certification determinations or other similar determinations,[47] the MSPB's opinions on such matters is persuasive authority. Thus, in accord with the MSPB, we conclude that a court has the authority to review the merits of a CPRP certification determination.

Consequently, we reverse the ALJ's determination that he was not authorized to review the merits of any alleged retaliatory reasons for the revocation of Van Winkle's CPRP certification. In addition, we note that whether or not the BGCA revoked Van Winkle's CPRP certification in accordance with the procedures set forth in applicable Army Regulations is beyond the DOL's and the Secretary's subject matter jurisdiction under the CAA and the SWDA. The DOL's and the Secretary's jurisdiction is limited to determining whether any adverse actions Van Winkle suffered were based on protected activities under the CAA and the SWDA, not whether they were unreasonable or erroneous for any other reasons, such as failure to comply with Army regulations or procedures.[48] The CAA and the SWDA simply do not provide any remedy or relief for a failure to comply with Army regulations or procedures when making an adverse personnel action. Thus, we vacate the ALJ's determination that the BGCA's revoked Van Winkle's CPRP certification in accordance with the procedures set forth in applicable Army Regulations as inapposite under the CAA and the SWDA.

Accordingly, we vacate the ALJ's dismissal of Van Winkle's complaint.

The MSPB noted that "agencies may respond to urgent national security issues, even for employees who do not have eligibility for access to, or access to, classified information, by exercising their statutory authority to impose indefinite suspensions and removals through the national security provisions in 5 U.S.C. § 7532." *Conyers*, slip op. at 10; *Northover*, slip op. at 9; *see, e.g., King v. Alston,* 75 F.3d 657, 659 n.2 (Fed. Cir. 1996). Under 5 U.S.C. § 7532: "an agency may take immediate action to suspend an employee without pay if the agency considers the action necessary in the interest of national security. This section also permits an agency to remove a previously suspended employee, but only after the agency follows specific procedures prior to removal." *King*, 75 F.3d at 659 n.2. Thus, just as in *Conyers* and *Northover*, "[i]f the agency believed that a Board appeal would involve delicate national security matters beyond the Board's expertise, or that a Board order might create a conflict with its national security obligations . . . , it could have exercised its authority pursuant to 5 U.S.C. § 7532." *Conyers*, slip op. at 10; *Northover*, slip op. at 9.

47 *See, e.g., Arthur v. Dep't of the Army*, 9 M.S.P.B. 486, 10 M.S.P.R. 239 (1982).

48 *See Miller v. Tenn. Valley Auth.*, ARB No. 98-006, ALJ No. 1997-ERA-002, slip op. at 6 (ARB Sept. 29, 1998); *Abraham v. Lawnwood Reg'l Med. Ctr.*, ARB No. 97-031, ALJ No. 1996-ERA-013, slip op. at 5-6 (ARB Nov. 25, 1997); *see also Kahn v. U.S. Sec'y of Labor*, 64 F.3d 271, 280-81 (7th Cir. 1995).

In regard to determining the merits of Van Winkle's complaint, Van Winkle contends that the ALJ erred in failing to find that he was constructively discharged and failing to consider his allegations that he was subjected to a hostile work environment. So Van Winkle urges the Board to hold that the BGCA revoked his CPRP certification because he complained about environmental hazards.

Because the ALJ concluded that he was not authorized to review the merits of Van Winkle's complaint, he did not review the merits of Van Winkle's allegations that the BGCA took retaliatory actions against him because he complained about environmental hazards. The ALJ did find that Van Winkle engaged in protected activity when he raised his concern that the "V to G pads" were "not correctly installed" and "could have affected the safety and health of both employees of BGCA and the surrounding members of the public."[49] But the ALJ failed to adequately address the numerous other environmental hazard concerns Van Winkle raised with the BGCA's management.[50] Further, though the ALJ held that Van Winkle suffered adverse personnel actions when his CPRP certification was revoked, he only briefly noted Van Winkle's contention that he was subjected to a hostile work environment[51] and ultimately constructively discharged.[52] Because of the ALJ's mistaken determination that he did not have the authority to review the merits of Van Winkle's complaint, the ALJ's consideration of the merits of Van Winkle's complaint and these additional issues were inadequate. Consequently, the only proper remedy is to remand the case for the ALJ to fully consider the merits of entitlement of Van Winkle's complaint under the CAA and the SWDA.

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[49] R. D. & O. at 25.

[50] Other environmental hazard concerns Van Winkle raised with BGCA's management were that monitoring procedures were not followed, his concern about the life span of the "V to G pads," improper monitoring of contaminated employee protective suits, incompetent management, improper maintenance of monitoring equipment, insufficient staffing, and unsafe drinking water. *See* n.9, *supra*; R. D. & O. at 16 n.13.

[51] Van Winkle also alleges that BGCA denied him promotions, training and overtime opportunities; verbally abused him; gave him lowered performance evaluations and faulty equipment to work with, and subjected him to improper non-disclosure or "gag" orders, which he asserts as evidence of a hostile work environment. Additionally, Van Winkle alleges that BGCA constructively discharged him when he was forced to take permanent medical disability or otherwise lose his job and ultimately resigned in October 2006. *See* n.7, *supra*.

[52] *See* R. D. & O. at 13-14.

CONCLUSION AND ORDER

The BGCA has provided no legal basis to support its assertion that a CPRP certification determination should be considered the equivalent of a security clearance determination for the purposes of applying *Egan's* restriction on a court's authority to review a security clearance determination. Thus, the ALJ's determination that he was not authorized to review the merits of Van Winkle's complaint regarding the revocation of his CPRP certification is **REVERSED**. Furthermore, the ALJ's determination that the BGCA revoked Van Winkle's CPRP certification in accordance with the procedures set forth in applicable Army Regulations is **VACATED** as inapposite under the CAA and the SWDA. Accordingly, the ALJ's dismissal of Van Winkle's complaint is **VACATED** and the case is **REMANDED** for the ALJ to fully consider the merits of Van Winkle's complaint under the CAA and the SWDA, consistent with this opinion.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge