

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

KATHERINE ARRINGTON

Plaintiff,

v.

DEPARTMENT OF DEFENSE et al.

Defendants.

* * * * *

Civil Action No. 21-2669 (JEB)

FIRST AMENDED COMPLAINT

This is an action under the Administrative Procedure Act (“APA”), 5 U.S.C. § 702 et seq., and the First and Fifth Amendments to the U.S. Constitution to compel Defendants to procedurally comply with their own regulations and governing Executive Orders. This litigation is necessary to ensure the Plaintiff receives all available lawful due process to which she is legally entitled, to include providing access to relevant classified information to her and her legal counsel who is appropriately cleared.

JURISDICTION

1. This Court has subject matter jurisdiction over this action, as well as personal jurisdiction over the Defendants, pursuant to 5 U.S.C. § 702 and 28 U.S.C. § 1331.

VENUE

2. Venue is appropriate under 5 U.S.C. § 703 and 28 U.S.C. § 1391.

PARTIES

3. Plaintiff Katherine Arrington is a U.S. citizen, and a resident of the State of South Carolina. She joined the Department of Defense in 2019, as a highly qualified expert and has been serving as a civilian employee in the Senior Executive Service since 2020 as the Chief Information Security Officer for Acquisition and Sustainment to the Under Secretary of Defense

for Acquisition and Sustainment. She previously served as a State Representative in South Carolina, where she had been endorsed by President Donald J. Trump in an unsuccessful 2018 congressional election.

4. Defendant Department of Defense (“DoD”) is an agency within the meaning of 5 U.S.C. § 702. DoD controls – and consequently serves as the proper party defendant for litigation purposes for – the Defense Counterintelligence and Security Agency (“DCSA”) and the Consolidated Adjudications Facility (“CAF”).

5. Defendant National Security Agency (“NSA”) is an agency within the meaning of 5 U.S.C. § 702 and controls access to or ownership of the equities of some or all of the classified information involved in this matter, as well as initiated the original adverse action.

FACTS

6. On Friday, May 7, 2021, at approximately 9:00 AM EST, the Plaintiff was telephoned and notified that NSA had revoked her access to a certain level of classified information. Later that same day, at approximately 5:00 PM EST, the Plaintiff was notified she was being placed on administrative leave effective immediately. No other details were provided at that time.

7. By Memorandum dated May 11, 2021, the Plaintiff was formally notified by a security officer within the Office of the Under Secretary of Defense for Acquisition and Management that her security clearance for access to classified information was suspended. It was noted that this “action is being taken as a result of a reported Unauthorized Disclosure of Classified Information and subsequent removal of access” by the NSA. It also warned the Plaintiff that her actions might have constituted a federal crime.

8. By Memorandum dated May 12, 2021, the Plaintiff was notified by Deputy Assistant Secretary for Industrial Policy, Jesse Salazar, a political appointee of President Joseph R. Biden’s

Administration, in the Office of the Under Secretary of Defense for Acquisition and Management, that she was now in a paid, non-duty status in light of her clearance access suspension.

9. Despite repeated requests to DoD, NSA and DCSA for any information pertaining to NSA's actions and the reasoning for the clearance access suspension, no substantive information has been provided. Nor have the Defendants authorized Plaintiff's lead counsel, notwithstanding that he holds the appropriate security clearance eligibility, to be informed of the substantive allegations underlying the actions taken against the Plaintiff.

10. Upon information and belief, and for informational background purposes, the NSA's action to allege the Plaintiff committed any type of security violation is baseless or exaggerated and normally would not serve as the grounds to immediately suspend an individual's clearance access. The decision was designed to interfere with the cyber security activities that Plaintiff was running through DoD, which NSA did not support. Nor did certain high-ranking DoD officials want the Plaintiff serving in a senior position within the Biden Administration due to her close previous ties with President Trump and they are using the NSA's decision as a pretext to remove her.

11. In fact, there was no reason for DoD to suspend Plaintiff's Top Secret security clearance simply because NSA had removed her access to a small subset of information that was not needed for her to continue her daily work. Upon information and belief, the decision to unnecessarily suspend her DoD security clearance was for the reasons stated above. Of course, regardless of the motives of the Defendants, the Plaintiff will appropriately respond to any and all security clearance allegations through a lawful administrative process that provides appropriate procedural and substantive due process as required by Executive Orders and the Defendants' regulations.

12. Since the suspension action of May 11, 2021, unknown individuals within DoD have improperly, and possibly illegally, leaked privacy protected information concerning Plaintiff to unauthorized third parties for the purpose of further causing her harm. Some of the leaked information has, in fact, been completely false and defamatory, such as assertions that her security clearance had been revoked and that she had been fired. Neither of these events ever occurred.

13. By Memorandum dated October 28, 2021, the DoD CAF issued a Statement of Reasons (“SOR”) proposing revocation of the Plaintiff’s eligibility for access to classified information based on Adjudicative Guideline K: Handling Protected Information. The SOR cited to four legal references that control the procedural and substantive process by which this security action is governed, one or more of which were violated by the Defendants.

14. While the SOR noted that the Air Force Office of Special Investigations (“AFOSI”) reviewed the details of the incident and concluded on May 13, 2021, that it “could not identify any nefarious intent which would warrant a criminal or counterintelligence investigation at this time,” no substantive facts were provided – in violation of the governing laws and regulations that bind the Defendants – that meaningfully permit the Plaintiff to respond to the SOR.

15. For example, the Plaintiff was not informed of the type or nature of the information, which was identified only as “Top Secret”, that was disclosed. Nor was the Plaintiff even told the date upon which the alleged incident occurred or provided specific identification of the person or entity to whom the Plaintiff allegedly released this classified information. In fact, not one additional substantive fact was provided beyond what was stated in the initial suspension memorandum dated May 11, 2021. No reference was made in the SOR that this information

could not be provided, or that available binding due process procedures were not available, due to classification concerns.

16. Additionally, the SOR also alleged that the Plaintiff failed to personally report the alleged security violation, “as required”, but no supporting citation was identified to demonstrate what requirement was violated. The most basic facts underlying the SOR were completely withheld from the Plaintiff in contravention of numerous applicable laws.

17. Section 5.2(a)(1) of Executive Order 12968 requires the Defendants to provide “as comprehensive and detailed a written explanation of the basis for that conclusion as the national security interests of the United States and other applicable law permit.” Intelligence Community Policy Guidance 704-3 (D)(1)(a) requires the Defendants to provide a “comprehensive written explanation of the basis” of the revocation as the “national security interests of the United States and other applicable laws permit.”

18. Subject to the same caveat regarding the interests of the United States, Paragraph 10.2 of DoDM 5200.02 further articulates that the written explanation must be both “comprehensive” and “detailed”. Paragraph 10.4 further articulates that a “summary of the security concerns and supporting adverse information” must accompany the SOR. In fact, Paragraph 10.4(2) requires that the “SOR must explain each security concern, state the specific facts that trigger each security concern, identify the applicable adjudicative guideline(s) for each concern, and provide the disqualifying conditions and mitigating conditions for each adjudicative guideline cited.” The SOR fundamentally fails to meet these, and other, legal standards in violation of binding law.

19. Although the circumstances surrounding the allegations against Plaintiff occurred in May 2021, and while the AFOSI was able to sufficiently review the situation in just a matter of days

in order to determine that no criminal or counterintelligence investigation was warranted, the Defendants have suspiciously refused to conduct even a routine substantive investigation of the allegations. Not even the Plaintiff herself was interviewed, much less asked. Indeed, upon information and belief, the entire matter could have been easily resolved within a week or two through a handful of interviews of key witnesses, all of whom are known to the Defendants.

20. At this stage all the Plaintiff wants is a fair opportunity to substantively respond to the allegations through the standard administrative process and clear her good name. The Defendants, however, have taken or failed to take actions to prohibit that from occurring in violation of regulatory and constitutional law.

COUNT ONE (APA)

21. The Plaintiff repeats and realleges paragraphs 5 through 20 above, inclusive.

22. Defendant DoD, through actions of the NSA, DCSA and CAF, failed to conduct any substantive investigation into the alleged actions involving the Plaintiff's alleged disclosure of classified information.

23. The SOR dated October 28, 2021, fails to provide any meaningful factual information that would enable Plaintiff to provide a substantive response to address the allegations and clear her name. The Defendants failed to abide by the requirements imposed through binding regulations and Executive Orders to include, but not limited to, Executive Order 12968, Intelligence Community Policy Guidance 704-3 and DoDM 5200.02. Each of these, and other, legally binding provisions require comprehensive and detailed explanations to be provided to the Plaintiff as part of the SOR. This the Defendants failed to do.

24. As a result, the Plaintiff has been deprived of procedural and substantive due process, and has suffered and continues to suffer adverse and harmful professional and financial effects.

COUNT TWO
(FIFTH AMENDMENT – LIBERTY INTEREST/NAME CLEARING HEARING)

25. The Plaintiff repeats and realleges the allegations contained in paragraph 5 through 20 above, inclusive.

26. The Defendant DoD issued written documentation indicating that the Plaintiff may have committed a federal crime notwithstanding the absence of any investigation having been undertaken. The documentation memorializing that defamatory assertion is now available within the Plaintiff's security files and available for dissemination throughout the federal system. Additionally, one or more persons within the Defendants improperly, and possibly illegally, leaked information to unauthorized persons from the Plaintiff's files thereby "defaming" her and negatively impacting her reputation.

27. The Defendants are not authorized to operate in a manner whereby an individual can be denied "Liberty" without "due process of law" in contravention of the Fifth Amendment. The lack of due process rights accorded to the Plaintiff deprives her of the ability to properly challenge the accuracy of the allegations.

28. The Defendants' actions have excluded the Plaintiff from participating in her chosen profession. Even at this early stage of the process, the Defendants' decisions have and will continue to have an unfavorable professional impact upon the Plaintiff, regardless of the ultimate outcome. The improper, and perhaps illegal, dissemination of Plaintiff's information to unauthorized persons also negatively impacted her reputation. As a result, the Defendants have effectively stigmatized the Plaintiff's reputation and imparted a "status change" upon her that has implicated her liberty interests.

29. The Defendants are not permitted, notwithstanding any regulatory language to the contrary, to violate the Plaintiff's rights, as set forth by the Constitution of the United States.

30. No appropriate, effective or meaningful opportunity has been provided to the Plaintiff, as required by law, for an opportunity to refute the allegations made against her or clear her name.

31. The actions, or inactions, taken by the Defendants improperly, unlawfully and unconstitutionally are causing harm to the Plaintiff.

32. The Defendants are not authorized to take actions whereby an individual can be denied liberty without due process of law required by the Fifth Amendment. Therefore, the Plaintiff is entitled to an appropriate meaningful name-clearing hearing and a written decision arising therefrom.

COUNT THREE
(FIRST AMENDMENT/DECLARATORY JUDGMENT –
LEGAL COUNSELS’ ACCESS TO CLASSIFIED INFORMATION)

33. The Plaintiff repeats and realleges the allegations contained in paragraphs 5 through 20 above, inclusive.

34. In order to be able to fully protect the Plaintiff’s rights her legal counsel will require access to any alleged classified information the Defendants maintain underly the security clearance allegations against her. Upon information and belief, the Plaintiff’s primary undersigned legal counsel holds a valid and current security clearance eligibility that would permit a review of the relevant information.

35. The Plaintiff has a First Amendment right to cleared counsel and to present all arguments to the Defendants for their consideration as part of the administrative process. The Plaintiff’s constitutional rights extend to counsel with the appropriate level of security clearance eligibility.

WHEREFORE, Katherine Arrington prays that this Court:

(1) Permanently and immediately enjoin the Defendants from withholding relevant factual information that would enable the Plaintiff to properly substantively respond to the Statement of Reasons dated October 28, 2021;

(2) Orders the Defendants to provide the Plaintiff with appropriate procedural and substantive due process;

(3) Orders the Defendants to provide the Plaintiff with a name-clearing-hearing;

(4) Orders the Defendants that Plaintiff's legal counsel has a "need-to-know" any relevant information concerning these actions;

(5) Award reasonable costs and attorney's fees as provided in 28 U.S.C. § 2412 (d) and any other applicable law;

(6) expedite this action in every way pursuant to 28 U.S.C. § 1657 (a); and,

(7) grant such other relief as the Court may deem just and proper.

Date: November 11, 2021

Respectfully submitted,

/s/ Mark S. Zaid

Mark S. Zaid, Esq.
D.C. Bar #440532
Bradley P. Moss, Esq.
D.C. Bar #975905
Mark S. Zaid, P.C.
1250 Connecticut Avenue, N.W.
Suite 700
Washington, D.C. 20036
(202) 454-2809
(202) 330-5610 fax
Mark@MarkZaid.com
Brad@MarkZaid.com

Attorneys for the Plaintiff