UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RHONDA K. CONYERS, Petitioner, v. DEPARTMENT OF DEFENSE, Respondent.	Docket Number: CH-0752-09-0925-I-1
DEVON HAUGHTON NORTHOVER, Petitioner, v. DEPARTMENT OF DEFENSE, Respondent.	Docket Number: AT-0752-10-0184-I-1

AMICUS BRIEF OF THE NATIONAL TREASURY EMPLOYEES UNION IN SUPPORT OF CONYERS AND NORTHOVER

Pursuant to a Federal Register notice published on February 10, 2010 (75 Fed. Reg. 6728), the Merit Systems Protection Board seeks comments on whether the Supreme Court's decision in Department of the Navy v. Egan, 484 U.S. 518 (1988), limits the scope of Board review of a removal from a "non-critical sensitive" position even when the employee does not have access to classified information. The National Treasury Employees Union (NTEU) is a federal sector labor organization that represents many thousands of employees who, like petitioners, occupy sensitive positions but do not hold security clearances. It files this brief to demonstrate the inapplicability of Egan, as well as to describe the potential damage to the basic procedural rights of federal employees that will result, if the

scope of the Board's review in this context were to be as limited as it is in the context of a denial of a security clearance.

SUMMARY OF ARGUMENT

The Department of Defense argues for an expansive application of Egan, limiting the Board to a procedural review in all cases involving employees designated as "sensitive," even where the employee has no access to classified information. Such a reading of Egan misapprehends the Supreme Court's overriding concern: that the Board, as an "outside nonexpert body," simply does not have the "necessary expertise" regarding the protection of classified information to evaluate the underlying merits of a security clearance determination. That same concern is not present in circumstances where the employee does not have a security clearance. Thus, there is no "compelling interest" present to justify stripping the Board of its broad jurisdiction over these adverse action appeals.

Moreover, to apply Egan's rationale to cases that do not involve access to classified information would mean that many thousands, or even hundreds of thousands, of employees would no longer be entitled to full Board review should they be removed due to a finding by their agency that they are "ineligible" to serve in their "sensitive" positions. Nothing in the statute or in the "national security" regulations promulgated by the Office

of Personnel Management suggests that this is the intended or desired outcome. Certainly nothing indicates that Congress intended such a dramatic reduction of Board jurisdiction.

ARGUMENT

THE BOARD HAS THE AUTHORITY, IN THE COURSE OF REVIEWING AN ADVERSE ACTION, TO EXAMINE THE MERITS OF AN UNDERLYING DECISION TO DENY AN EMPLOYEE ELIGIBILITY TO OCCUPY A "SENSITIVE" POSITION IF THE ADVERSE ACTION WAS BASED ON THE EMPLOYEE'S INELIGIBILITY AND NOT A SECURITY CLEARANCE DETERMINATION.

A. The MSPB Has Broad Statutory Jurisdiction To Review the Merits of a Decision Underlying an Employee's Removal Under Section 7513.

1. It is undisputed that the Board has statutory jurisdiction over all removals taken by a federal agency pursuant to 5 U.S.C. 7513, and regulatory jurisdiction under 5 C.F.R. Part 752. Egan v. Dep't of the Navy, 28 M.S.P.R. 509, 514 (1986). Moreover, by 5 U.S.C. 1205, the Board is mandated to adjudicate all matters within its jurisdiction. Id. Employees are given the right to invoke the Board's jurisdiction over any appealable action by virtue of 5 U.S.C. 7701. Id. The Board's authority to review the merits of a removal case presumptively includes a review of the merits of any determination underlying that removal. Id. at 517 n.5. See also Adams v. Dep't of the Army, 105 M.S.P.R. 50, 55 (2007), aff'd 273 Fed. Appx. 947 (Fed. Cir. 2008).

At issue in this case is the applicability of one of the few narrow exceptions to the scope of that statutory jurisdiction: the limited scope of Board review in cases involving security clearance determinations. In Department of the Navy v. Egan, 484 U.S. 518 (1988), the Supreme Court held that the Board did not have the authority to examine the substance of a security clearance determination, or to require the agency to support its decision to revoke or deny a security clearance by a preponderance of the evidence, in an appeal of a removal based on the revocation or denial of that clearance. Id. at 530-31.

The Egan Court made clear, however, that it was addressing only the "narrow question" of whether the Board could review the substance of an underlying decision to deny a security clearance. Id. at 520. In ruling on that narrow question, the Court took great care to stress its concerns about interfering with the President's vital ability to protect the Nation's secrets. Id. at 527 (recognizing the Government's "'compelling interest' in withholding national security information from unauthorized persons in the course of executive business."). It showed great deference to the President's role as Commander in Chief, which, the Court believed, entailed the right to determine whether an employee should have access to classified information. Id. According to the Egan Court, the making of

such a critical decision should be made only by those with the "necessary expertise" regarding the protection of classified information--a role assigned to the executive agency responsible for the information. Id. at 529.

The Court thus concluded that the Board did not have jurisdiction to review an agency's security clearance determination in the context of an adverse action appeal. In declining to grant the Board the right to review such determinations, the Court noted that "an agency head who must bear the responsibility for the protection of classified information committed to his custody should have the final say in deciding whether to repose his trust in an employee who has access to such information." Id., quoting Cole v. Young, 351 U.S. 536, 546 (1956).

2. By contrast, the Board has long held that it has jurisdiction to review the merits of agency determinations regarding employee fitness that do not involve security clearance determinations. Indeed, it has so held in instances where the agency withdrew or revoked its certification or other approval of the employee's qualifications to hold a position that implicates important security concerns. For example, the Board asserted jurisdiction to review the merits of an agency determination that an employee should not have access to a command computer system with sensitive (but unclassified)

information because the employee's background investigation revealed unpaid debts. Adams v. Dep't of the Army, 105 M.S.P.R. 50 (2007). It similarly reviewed the merits of an agency disqualification of a security guard from its Chemical Personnel Reliability Program (a program "designed to ensure the safety, security, and reliability of chemical agents and weapons in the custody of the U.S. Army") where the agency claimed an alleged verbal assault by the guard demonstrated poor judgment, contempt for authority, and an unprofessional attitude. Jacobs v. Dep't of the Army, 62 M.S.P.R. 688 (1994). See also Thompson v. Dep't of the Air Force, 2007 MSPB LEXIS 8504 (Oct. 24, 2007) (AJ Decision) (civilian employee of Air Force removed from position for failure to maintain an Air Traffic Control Specialist certificate); Dodson v. Dep't of the Army, 35 M.S.P.R. 562 (1987) (Quality Assurance Specialist (Ammunition) disqualified from Army's Personnel Reliability Program).

In Adams, Jacobs, and Thompson, the Board considered, and rejected, the contention that its review should be limited consistent with Egan. The Board read Egan as narrow in scope and specifically limited to removals based on the denial of a security clearance. See Adams, 50 M.S.P.R. at 55; Jacobs, 62 M.S.P.R. at 695. The Board refused to expand Egan to situations where the government is assessing the dependability, stability, social adjustment, or judgment of the incumbents. As it pointed

out in Jacobs, there are countless government jobs that require such qualities. In order to guard its role as "protector of the government's merit systems," the Board declined to expand the scope of Egan to "divest federal employees whose positions do not require a security clearance of basic protections against non-meritorious agency actions"--even, the Board held, when the position involved the protection of a national chemical weapons program. Jacobs, 62 M.S.P.R. at 695.

3. The reasoning in those cases applies with equal force in the instant context. Just as the Board exercised its authority to review agency determinations that an employee was "unfit" for reasons such as financial problems or incidents that suggested poor judgment, so too can it review the underlying basis for a determination that the employee is "ineligible" to hold a sensitive position. Indeed, the Board's experience in these fitness cases demonstrates that it possesses the necessary expertise to evaluate the evidence and the interests at stake. As illustrated in Adams and Dodson, the Board is appropriately attentive to the agency's security concerns and findings that the employee's alleged misconduct reflects adversely on the employee's integrity and responsibility. At the same time, the employee is assured of a neutral third party review of the underlying factual allegations.

There is simply no reason to conclude that the mere fact that petitioners' positions are designated "non-critical sensitive" demonstrates a "compelling interest" that justifies stripping the Board of its normal jurisdiction regarding removals. The granting of a clearance clearly and directly involves "compelling" national security interests because that action gives access to the Nation's secrets. And it is this tightly controlled access to classified information, coupled with the Executive's special role in protecting that information, which led the Egan Court to create a narrow exception restricting the normal scope of the Board's jurisdiction.

4. Extending Egan to instances that do not involve security clearance determinations would have a profound impact on the statutory scheme crafted by Congress for review of adverse actions. Although NTEU does not know precisely how many federal employees without security clearances are classified as "sensitive," it has reason to believe that they could easily include half of the federal workforce or more.[1]

By Office of Personnel Management (OPM) regulation, each agency is required to designate any position as "sensitive" if

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[1] NTEU respectfully suggests that the Board would find it useful if OPM were to provide information concerning the number of federal employees who hold "sensitive" designations but who do not hold security clearances.

the occupant could have "a material adverse effect on the national security." 5 C.F.R. 732.201(a). While many employees government-wide are designated "non-sensitive," the trend is to classify increasing numbers as "sensitive" to some degree: either non-critical sensitive, critical-sensitive, or special-sensitive. At U.S. Customs and Border Protection (CBP), for example, every single position within the agency is designated as at least "non-critical sensitive," although very few positions require a security clearance. As a consequence, the approximately 24,000 CBP employees represented by NTEU (and an unknown number of non-bargaining unit employees) would be subject to removal for "ineligibility to hold a sensitive position" with only minimal MSPB review, should Egan be extended to this context.

At the Department of Defense, employees can apparently be classified as "non-critical sensitive" based on their fiduciary responsibilities. Petitioner Northover was a GS-07 Commissary Management Specialist at a military commissary who had no access to classified information and, accordingly, no security clearance.[2] He is thus closely analogous to Jeanell Brown, the appellant in Brown v. Dep't of Defense, who was a GS-05 Commissary Contractor Monitor. A representative of the

[2] It is NTEU's understanding that petitioner Conyers was a GS-05 Accounting Technician. 2010 MSPB LEXIS 264 (Jan. 13, 2010).

Department of Defense cited the need to protect the commissary's valuable inventory in support of Brown's "non-critical sensitive" status. He pointed out that Brown worked at the commissary when it was closed to the public and was responsible for ensuring that the doors were locked and that only authorized personnel were permitted to enter. 110 M.S.P.R. 593 (Mar. 12, 2009).

A decision limiting Board review of ineligibility determinations would permit agencies to remove large numbers of employees virtually at will, merely by declaring that they are "ineligible" to hold a "sensitive" position. The sensitivity rating process is shrouded in mystery, although it is obviously broad and elastic. We are aware of no public guidance explaining how agencies are to interpret and apply the definition of "national security position" in 5 C.F.R. 732.102. There is also no public guidance on how agencies are to determine which positions are "non-critical sensitive," as opposed to "critical sensitive" or "special sensitive." Moreover, the "investigative requirements" for each sensitivity level are contained in "OPM issuances" that are not made public. See 5 C.F.R. 732.201(b).

Not only is there no transparency in the sensitivity designation process, but the resulting designations are also immune from Board review. Skees v. Dep't of the Navy, 864 F.2d

1576, 1578 (Fed. Cir. 1998). Consequently, if the expansive application of Egan proposed by the Department of Defense is accepted by the Board, there is a very real possibility that agencies would evade the substantive adverse action protections specified by statute through "sensitivity" designations.

Indeed, NTEU has seen first-hand an attempt by an agency to circumvent the adverse action appeal process using this method. We currently represent an employee who, after successfully challenging his removal before an arbitrator, is now subject to a second proposed removal for his alleged failure to satisfy the investigative requirements associated with his "national security position." Tellingly, the employee's alleged "ineligibility" is based on the very same evidence that the arbitrator rejected as not warranting the employee's initial removal. Under the Department of Defense's rationale, because the employee occupies a "sensitive" position, the agency gets a second bite at the apple, and this time the agency's determination is, in essence, non-reviewable. That result cannot be consistent with Congress' intent when it granted the Board broad authority to review adverse actions.

B. Nothing in 5 C.F.R. Part 732 (National Security Positions) Limits the Scope of Board Review.

As discussed above, there is no statutory basis for extending Egan's limited appeal rights to cover employees who do

not have access to classified information. Contrary to the views of then-Chairman McPhie in Brown v. Dep't of Defense, 110 M.S.P.R. 593 (2009), there is nothing in 5 C.F.R. Part 732 that demands a different conclusion.

Part 732 does not even speak to the appeal rights of an employee removed from a "national security position." A denial of substantive appeal rights can hardly be inferred through silence. But, even if the regulation did attempt to spell out only a limited form of MSPB review, that regulation would be contrary to the statutory provisions cited above outlining the Board's jurisdiction.

Moreover, OPM is not authorized to promulgate regulations that limit the Board's jurisdiction. See Siegert v. Dep't of the Army, 38 M.S.P.R. 684, 691 (1988) ("an agency cannot through its own action confer or take away Board jurisdiction."). (Internal citations omitted.) In fact, the Board recently questioned OPM's characterization of a removal action as a "suitability action" subject to limited Board review, instead of as an adverse action under Chapter 75, based on its concern for protecting its statutory jurisdiction under 5 U.S.C. 7513(d). Aguzie v. OPM, 112 M.S.P.R. 276 (Sept. 3, 2009). As the Board further stated, "To the extent that § 731.203(f) may purport to carve out an exception to the Board's statutory jurisdiction under 5 U.S.C. § 7513(d), the validity of the regulation is in

doubt." Id. at 279. A similar concern should animate the Board's analysis in this case.

In any event, OPM has traditionally construed "national security positions," in, for example, the context of background investigations, to cover only those employees who have access to classified information. This is consistent with OPM's long-standing recognition of the critical distinction among employees who occupy "sensitive" positions--namely, a distinction between those who have access to classified information and hold a security clearance and those who do not. Since at least 1991, OPM has carefully limited "national security" background investigations to the former group. See 56 Fed. Reg. 18650 (Apr. 23, 1991). Thus, it has directed agencies to use the Standard Form (SF) 86 (Questionnaire for National Security Positions) as the basis for any background investigation involving employees needing access to classified information. See, e.g., SF 86 (revised Sept. 1995)(form "used primarily as the basis for investigation for access to classified information or special nuclear information or material;" to be completed after offer made "for a position requiring a security clearance.").[3] Conversely, OPM instructs agencies to use a

[3] A new SF 86 was adopted in July 2008. According to the instructions on that form, it should be completed by persons in "national security positions as defined in 5 C.F.R. Part 732 and for positions requiring access to classified information." We

separate form, the SF 85P (Questionnaire for Public Trust Positions), for employees who are in "sensitive" positions that do not require such access. See 59 Fed. Reg. 59260 (Nov. 16, 1994).[4]

OPM's suitability regulations at 5 C.F.R. Part 731 underline this distinction. Section 731.106 describes the designation of "public trust" positions, or those positions that involve a range of duties demanding "a significant degree of public trust" or "access to or operation or control of financial records, with a significant risk for causing damage or realizing public gain." Those regulations further specify that all positions designated as high or moderate risk public trust positions "must also receive a [national security] sensitivity designation of Special-Sensitive, Critical-Sensitive, or Noncritical Sensitive, as appropriate." 5 C.F.R. 731.106(c)(2) (emphasis added). Notwithstanding their concurrent sensitivity designation, at least some of these employees remain subject to the SF 85P and the other investigative requirements appropriate for public trust employees. If OPM intended all employees

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are not aware, however, that OPM has changed its practice of requiring that form only of employees with current or potential access to classified information.

[4] Illustrating this practice, Crumpler completed the SF 85P notwithstanding her status as "noncritical sensitive." Crumpler v. Dep't of Defense, Docket No. DC-0752-09-0033-I-1, Amended Agency Prehearing Submission (Dec. 5, 2008).

occupying "sensitive" national security positions to be subject to the same burdensome investigation requirements, using the SF 86, and due process restrictions, then there would be no need for the "public trust" designation and a separate SF 85P. Accordingly, by instructing agencies to use the SF 86 only for employees who have (or need) access to classified information, OPM has traditionally interpreted narrowly the designation of "national security position" for purposes of 5 C.F.R. Part 732.

CONCLUSION

For the foregoing reasons, NTEU urges the Board to conclude that it has jurisdiction to review the merits of an eligibility determination when reviewing an employee removal from a "sensitive" position that does not involve access to classified information.

Respectfully submitted,

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