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Re: Amicus Brief in Conyers v. DOD and Northover v. DOD

Notes:

TO: Clerk of the Board

Please find attached for filing the amicus brief of the National Employment Lawyers Association and Metropolitan Washington Employment Lawyers Association in the cases Conyers v. DOD, No. CH-0752-09-0925-I-1, and Northover v. DOD, No. AT-0752-10-0184-I-1.

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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

Conyers,	*	
	*	
Appellant	*	
	*	
v.	*	**Docket No. CH-0752-09-0925-I-1**
	*	
Department of Defense,	*	
	*	
Agency.	*	
	*	

and

Northover,	*	
	*	
Appellant	*	
	*	
v.	*	**Docket No. AT-0752-10-0184-I-1**
	*	
Department of Defense,	*	
	*	
Agency.	*	
	*	

BRIEF OF AMICI CURIAE
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION
AND
METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

Introduction

I. Statement of Amici Curiae.

The National Employment Lawyers Association (NELA) is a professional membership organization comprised of lawyers who represent workers in labor, employment, and civil rights disputes. NELA and its 68 state and local affiliates have a membership of more than 3,000 lawyers throughout the country who represent workers in employment disputes, including federal

employees with appeals before the MSPB. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA is thus well positioned as an organization to address the legal issues raised in the cases at bar.

The Metropolitan Washington Employment Lawyers Association ("MWELA") is a local affiliate of NELA. MWELA is comprised of over 250 members who represent plaintiffs in employment and civil rights litigation in the Washington, D.C. metropolitan area, including litigation within the MSPB. MWELA's purpose is to bring into close association plaintiffs' employment lawyers in order to promote the efficiency of the legal system, elevate the practice of employment law, and promote fair and equal treatment under the law.

Both NELA and MWELA have filed amici briefs with appellate courts around the country regarding the proper interpretation of the federal, state, and local laws that protect employees.

II. Summary of Argument.

The Merit Systems Protection Board, in reviewing the removal of an employee occupying a non-critical sensitive position for failure to maintain their access to sensitive information, has the authority to review the merits of the agency determination to deny eligibility for access to sensitive information, and to set aside that determination.

III. Argument.

A. A "sensitive" position need not require access to classified information.

The two instant cases involve employees who were removed from "noncritical sensitive" positions due to having been denied continued eligibility for employment in sensitive positions.

75 *Fed. Reg.* 6,728-6,729 (Feb. 10, 2010). Agency heads have authority to classify positions "in three categories: critical sensitive, noncritical sensitive, and nonsensitive." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). This is derived from the President's delegation of authority to heads of agencies to "protect sensitive information and to ensure proper classification throughout the Executive Branch." *Id.* While the Board does not have authority to review the merits of an agency's designation of a position as a "sensitive position" at one of the three levels, *Skees v. Department of the Navy*, 864 F.2d 1576, 1578 (Fed. Cir. 1989); *Brady v. Department of the Navy*, 50 M.S.P.R. 133, 138 (1991) (holding that the Board has no authority to review an agency's decision to classify a position as non-critical sensitive), the Board does have the authority to review the merits of an agency's determination to deny continued eligibility for employment in a non-sensitive position where the employee's security clearance was revoked.

A "sensitive" position is defined as one in which the "occupant could bring about a material adverse effect on national security." 5 C.F.R. § 732.201(a). However, occupying a non-critical sensitive position does not necessarily require that the individual hold a security clearance. In *Brown v. Department of Defense*, 110 M.S.P.R. 593 (2009), for example, the employee occupied a non-critical sensitive position, but the agency did not require the incumbent of that position to hold a security clearance. Similarly, in *Crumpler v. Department of Defense*, 112 M.S.P.R. 636 (2009), *vacated for rehearing*, 2009 M.S.P.B. 233, 2009 WL 5248887 (M.S.P.B. Dec. 18, 2009), the appellant was a GS-4 Store Associate at an Air Force base commissary, a position that similarly did not require a security clearance. Nevertheless, in both *Brown* and *Crumpler*, the appellants were denied reinstatement even though their positions did not require any security clearance, so that the lack of a security clearance should not have been

used as a criterion in denying reinstatement. In contrast, in *Egan*, the agency could not reassign the employee "to a non-sensitive position at the facility ... because there was no nonsensitive position there," *Egan*, 484 U.S. at 522, which would be a legitimate basis for denying reassignment.

B. Egan applies only to positions requiring access to classified information

Amici respectfully submit that the two cases at bar, as well as *Brown, supra,* and *Crumpler, supra*, were wrongly decided, because *Egan* counsels Board deference only to positions requiring access to classified information.[1/] Pursuant to 5 U.S.C. § 7513, employees who may appeal their removals to the Board are entitled to a review of the reasons for those actions, and a review of the merits of the determinations underlying those reasons. Adjudication of a removal appeal requires the Board to determine whether the agency has proven the charge or charges upon which the removal is based.

In *Egan*, the U.S. Supreme Court held that the Board did not have the authority, in an appeal of an adverse action based on the revocation or denial of a security clearance, to review the substance of the security clearance determination, or to require the agency to support the revocation or denial by a preponderance of the evidence, as it would be required to do in other adverse action appeals. In reaching its conclusion, the Supreme Court emphasized the Executive Branch's need to commit "the protection of classified information . . . to the broad discretion of the agency responsible," *Egan*, 484 U.S. at 529; and that "an agency head who must bear the responsibility for the protection of classified information committed to his custody should have

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[1/] The appellant in *Brown* noticed an appeal to the U.S. Court of Appeals for the Federal Circuit, No. 2009-3176. However, that court's docket shows that the appellant filed a motion to remand on January 13, 2010, which had not yet been decided as of February 26, 2010.

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)).

In contrast, the Board has always retained jurisdiction to scrutinize a range of agency decisions that result in an employee being deemed ineligible to hold a particular position where the revocation or denial of a security clearance is not being challenged. The Board has scrutinized the underlying merits in cases involving, for example, the decision of an agency credentials committee to revoke an employee's medical clinical privileges, *Siegert v. Department of the Army*, 38 M.S.P.R. 684, 687-91 (1988); the validity of a medical determination underlying the removal of an air traffic control specialist, *Cosby v. Federal Aviation Administration*, 30 M.S.P.R. 16, 18-19 (1986); failure to maintain access to a computer system, *Adams v. Department of the Army*, 105 M.S.P.R. 50, ¶¶ 6, 9-12 (2007), *aff'd*, 273 F. App'x 947 (Fed. Cir. 2008); withdrawal of agency approval of employee's qualifications as an attorney, *Laycock v. Department of the Army*, 97 M.S.P.R. 597, ¶¶ 14-18 (2004), *aff'd*, 139 F. App'x 270 (Fed. Cir. 2005); a helicopter flight instructor's disqualification under medical fitness standards, *Boulineau v. Department of the Army*, 57 M.S.P.R. 244, 245, 247-48 & n.6 (1993); a medical officer's failure to maintain agency medical credentials, *Graham v. Department of the Air Force*, 46 M.S.P.R. 227, 229, 233-37 (1990); disqualification of a quality assurance specialist (ammunition) under agency's Personnel Reliability Program, *Dodson v. Department of the Army*, 35 M.S.P.R. 562, 564, 566-67 (1987); removal of a supervisory police officer for failing to file tax returns, a failure that violated the agency's minimum standards of conduct, *Crawford v. Department of the Treasury*, 56 M.S.P.R. 224, 226, 230-32 (1993); and a security guard's disqualification from the Chemical Personnel Reliability Program based on his alleged verbal

assault on a security officer, *Jacobs v. Department of the Army*, 62 M.S.P.R. 688, 689 (1994).

Where the Board has the authority to scrutinize the underlying agency decision, it has done so because that agency decision did not involve the application of any specialized knowledge. In contrast, the Board has held that it lacked the authority to look behind certain determinations, such as "wholly military determinations," *Siegert v. Department of the Army*, 38 M.S.P.R. 684, 690 (1988); removal based on loss of membership in the active military reserve, *Buriani v. Department of the Air Force*, 777 F.2d 674, 675-77 (Fed. Cir. 1985); *Butler v. Department of the Air Force*, 73 M.S.P.R. 313, 318 (1997) (same); *Schaffer v. Department of the Air Force*, 9 M.S.P.R. 305, 309 (1981) (same), *aff'd*, 694 F.2d 281 (D.C. Cir. 1982) (table); a criminal conviction in order to determine the innocence or guilt of an appellant whose adverse action was based on such a conviction, *Crofoot v. United States Government Printing Office*, 21 M.S.P.R. 248, 252 (1984), *rev'd on other grounds*, 761 F.2d 661, 665 (Fed. Cir. 1985).

The two cases at bar are clearly analogous to the cases in which the Board has scrutinized the underlying reasons for the agency action. In *Adams*, *supra*, for example, the vacancy announcement for the position included a statement that a personnel security investigation would be required of selectees, and, after selecting the appellant, the agency arranged to have the appellant's background investigated by the Office of Personnel Management (OPM). *Adams*, 105 M.S.P.R. at 52. The OPM investigative report disclosed that the appellant had failed to pay certain debts and had more than $63,000 "charged off" by his creditors. As a result, the agency questioned the appellant should continue to have computer access. *Id.* at 52-53. The agency stated that it would allow him continued access if he consolidated his debts and made monthly payments; whereas the appellant stated that he intended not to consolidate, but to

pay his debts off one at a time. *Id.* at 53. The Board correctly held that Adams' appeal did not involve the national security considerations presented in *Egan*, because granting access to a computer system is not equivalent to possession of a security clearance. *Id.* at 55-56.

Where the Board erred in *Brown* and *Crumpler*, is in assuming that because the administrative process the agency used to deny an employee eligibility to occupy a sensitive position is the same as the process used to deny an employee a security clearance, that *Egan* necessarily applied in both instances. Thus, in *Crumpler, supra*, the administrative judge found that, although the appellant was not denied a security clearance and her position did not require one, the agency's decision to deny the appellant's eligibility to occupy a position designated as sensitive under 5 C.F.R. § 732.201(a) was "virtually identical" to the "security clearance" determination considered in *Egan*, and that the reasoning in that case was equally applicable to the circumstances of the appellant's case. This fails to recognize that the Supreme Court's decision in *Egan* is based on the special deference due a decision to deny access to classified information, where the employee could not be reassigned to a position that did not require a security clearance. The Board recognized this problem in granting the motion to reopen *Crumpler*, when it stated that:

> The Board's November 2, 2009 decision marked a momentous change in the law. **In the previous 21 years the Board had never interpreted *Egan* as restricting Board review in an appeal brought by an employee who was not required to maintain a security clearance for access to classified information to hold his position.** The Board's November 2, 2009 decision thus announced a major limitation on the "basic procedural rights" of untold numbers of employees in the Department of Defense, Department of Homeland Security, and elsewhere whose work does not involve access to classified information, but whose positions have been designated non-critical sensitive.

Crumpler, 2009 M.S.P.B 233, at ¶ 6, 2009 WL 5248887, at *2 (emphasis supplied). Since the

Crumpler case was subsequently settled, amici respectfully submit that this Board now has the opportunity in *Conyers* and *Northover* to rectify an issue of significant concern to numerous federal employees across the country – that the denial of a security clearance should have no bearing on an employee's ability to hold a position that does not require access to classified information.

Conclusion

Because the determination underlying the removals at issue here are not denials of access to classified information, NELA respectfully submits that the Board has the authority to review the merits of those determinations.

Respectfully submitted,

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