American Federation of Government Employees
80 F St NW
Washington, DC 20001-1583
(202) 639-6424
Fax: (202) 639-6441

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COMMENTS: Appellant's Comments to OPM Advisory Opinion
14 pages to follow

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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RHONDA K. CONYERS
Appellant,

v. **Docket No. CH-0752-09-0925-I-1**

DEPARTMENT OF DEFENSE,
Agency.

DEVON HAUGHTON NORTHOVER
Appellant,

v. **Docket No. AT-0752-10-0184-I-1**

DEPARTMENT OF DEFENSE,
Agency.

COMMENTS TO OFFICE OF PERSONNEL MANAGEMENT ADVISORY OPINION BY DEVON HAUGHTON NORTHOVER

Appellant Devon Haughton Northover ("Northover') timely submits the following comments pursuant to the April 20, 2010, order of the United States Merit Systems Protection Board ("Board") that granted the parties until May 13, 2010, to submit their comments to the advisory opinion prepared by the U.S. Office of Personnel Management ("OPM") in the above-captioned cases.

For the reasons that follow, and for the reasons previously discussed by Northover as well as by the amicus curiae who filed briefs supporting the appellants in this matter, the Board should not expand the holding of *Department of the Navy v. Egan*, 484 U.S.

518, 530-31, 108 S.Ct. 818, 98 L. Ed.2d 918 (1988), ("*Egan*") to limit the scope of the Board's review of adverse action appeals arising from an agency's determination that an employee is ineligible to occupy a sensitive position. "Adjudication of a removal appeal requires the Board to determine whether the agency has proven the charge or charges on which the removal is based; and, when the charge consists of the employing agency's withdrawal or revocation of its certification or other approval of the employee's fitness or other qualifications to hold his position, the Board's authority generally extends to a review of the merits of that withdrawal or revocation." *Adams v. Dep't of the Army*, 105 M.S.P.R. 50, 54-55 (2007).

I. BACKGROUND

Following a series of Board opinions that culminated with the Board's now-vacated opinion in *Crumpler v. Department of Defense*, the Board elevated the instant appeals from their respective regional offices to the Board itself for consideration of the appropriate scope of review that the Board should apply to appeals concerning a federal employee's eligibility to occupy a sensitive position. *Crumpler v. Department of Defense*, 112 M.S.P.R. 636, 2009 MSPB 224 (2009), *vacated*, 2009 MSPB 233 (2009). More or less contemporaneous with this elevation, the Board requested that OPM submit an advisory opinion concerning the application of 5 C.F.R., Part 732, ("Part 732") to the scope of review question, and invited interested parties to submit briefs amicus curiae on the question as well. *See* Board Request to OPM (February 4, 2010); *see also* 75 Fed. Reg. 6728 (February 10, 2010) (inviting amicus briefs).

Interested parties, including the American Federation of Government Employees ("AFGE"), the National Employment Lawyers Association, the Metropolitan Washington Lawyers Association, the Government Accountability Project, and the National Treasury Employees Union accepted the Board's invitation and timely filed amicus briefs on March 1, 2010. Amici raised numerous valid arguments against the application of *Egan* to appeals involving sensitive position eligibility determinations; three of which Northover believes to be pertinent here. First, amici argued that nothing in Part 732 compels the application of *Egan* to adverse action appeals involving an employee's eligibility to occupy a sensitive position. Second, amici argued that the Board should not apply *Egan* to limit the scope of its review of appeals involving an employee's eligibility to occupy a sensitive position because the application of *Egan* to such eligibility based appeals would be inconsistent with the rationale underlying the *Egan* decision itself. Three, amici argued that the Board should not apply *Egan* to appeals involving sensitive position eligibility determinations because doing so would deprive vast swathes of the Federal workforce of the fundamental due process protections guaranteed to them by the United States Constitution, and the Civil Service Reform Act of 1978 ("Act"), 5 U.S.C. § 1201 *et seq*.

After submission of the above amicus briefs, OPM prepared its advisory opinion as requested by the Board. Specifically, although the Board requested a single advisory opinion from OPM, OPM submitted two letters in response to the Board's request. OPM's first letter was dated March 31, 2010. OPM's submitted its second letter, dated April 15, 2010 and labeled as a supplementary information letter, in order to correct an error made by the National Treasury Employees Union in their amicus brief. For the

purpose of these comments, however, Northover treats OPM's letters as a single advisory opinion.

As mentioned above, the Board requested that in its opinion OPM address whether, pursuant to Part 732, the rule in *Egan* limiting the scope of the Board's review of an adverse action appeal based on the revocation of a security clearance, "also applies to an adverse action concerning a "non-critical sensitive" position due to the employee having been denied continued eligibility for employment in a sensitive position." Board Request to OPM, p. 2.

II. COMMENTS

Consistent with the arguments raised by amici, Northover submits three comments to OPM's advisory opinion. One, OPM's advisory opinion wholly supports the argument that nothing in Part 732 compels the application of *Egan* to adverse action appeals involving an employee's eligibility to occupy a sensitive position. Two, the rationale underlying *Egan* does not support *Egan's* application to adverse action appeals involving a federal employee's eligibility to occupy a sensitive position. Three, the expansion of *Egan* would deprive federal employees of due process.

A. Part 732 Does Not Compel the Application of *Egan* to Adverse Action Appeals Involving a Federal Employee's Eligibility to Occupy a Sensitive Position

OPM's advisory opinion wholly supports the argument made by amicus American Federation of Government Employees ("AFGE"), and in which Northover concurs, that Part 732 does not compel the application of *Egan* to adverse action appeals involving an employee's eligibility to occupy a sensitive position. *See* AFGE Amicus, p. 3.

Specifically, in its opinion, OPM expressly states that the regulations contained in part 732, "are silent on the scope of an employee's rights to Board review when an agency deems the employee ineligible to occupy a sensitive position." OPM March 31, 2010, letter, p. 2. As a result, "[t]he regulations do not independently confer any appeal right or affect any appeal right under law." *Id.*

Moreover, although OPM distinguished between the particular OPM forms associated with the different levels of employee background investigations conducted by OPM, OPM concluded by advising that, "resolution of the issue before the Board regarding the scope of the Egan decision cannot be determined by reference to OPM's regulations." *Id.* at p. 3; *see also* OPM April 15, 2010, letter (distinguishing between OPM forms SF-85, SF-85P and SF-86). This means that the Board must look to *Egan* itself and the public policies behind that opinion for resolution of its question.

Indeed, Northover respectfully submits that regardless of any confusion as to which OPM form an agency should use to initiate a particular level of background investigation, the scope of the Board's adverse action review should not be determined merely by reference to the investigation form that an employee may have completed in a given case. To allow the substance of the Board's review to be dictated by the form used by an agency to begin an employee's background investigation would be quite literally to elevate form over substance.

Put differently, the Board should not rely on OPM's forms to determine its statutory scope of review because at bottom OPM's forms are nothing more than an administrative convenience adopted to assist OPM and its constituent agencies in carrying out OPM's investigative responsibilities. Using OPM's advisory opinion as a

guide, it seems clear that OPM's forms were simply not intended to address the Board's scope of review. The dispositive factor in determining whether the rule of *Egan* applies to a given appeal should be whether the position at issue requires access to classified national security information. By their nature OPM's forms are far more responsive to the question of whether the particular position occupied by an employee is in fact a sensitive position. Thus, where, as here, an employee has completed either an SF-85 or SF-85P but not an SF-86, then, based on OPM's opinion, the form chosen should raise a presumption that the position at issue is not a sensitive position.[1]

B. The Rationale Underlying *Egan* Does Not Support Application to Adverse Action Appeals Involving a Federal Employee's Eligibility to Occupy a Sensitive Position

Egan premised its limitation of Board review on the indivisible tie between an employee's possession of a security clearance and her access to classified national security information as a result of that clearance. *See Egan,* 484 U.S. at 529 (" . . . the protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it") (emphasis added).

Because eligibility to occupy a sensitive position does not go hand-in-hand with access to classified national security information in the same way as possession of a security clearance, the Board should not expand *Egan* to cover adverse actions arising from sensitive position eligibility determinations. *See Adams*, 105 M.S.P.R. at 55 ("The present appeal does not involve the national security considerations presented in *Egan*. While the agency's computer system provides employees with access to sensitive

[1] Northover continues to contend that he did not occupy a sensitive position. Solely for the sake of these comments, however, he assumes that he did.

information, the agency has acknowledged that the information is not classified and has indicated that it does not consider access to that information to be equivalent to possession of a security clearance."); *see also* Agency answer to Northover interrogatory 12 (admitting that Northover did not access classified information prior to his demotion); and *compare* Department of Defense Personnel Security Program, DoD 5200.2-R, § C3.4.1.1. (limiting the grant of security clearances only to those personnel who require access to classified information) *with* DoD 5200.2-R, § C3.1.2.1.2. (listing **in the disjunctive** 6 criteria that allow the Department of Defense to designate as a position as non-critical sensitive – only one of which pertains to classified information, and another of which simply encompasses any other position so designated by an agency head). The Department of Defense Personnel Security Program is available at http://www.dtic.mil/whs/directives/corres/pdf/520002r.pdf .

Put another way, *Egan* was a limited carve out of the Board's power to review agency adverse action decisions. The Supreme Court did not find an affirmative limitation in the express text of the Board's organic act, related statutes or regulations, or even in the express language of Executive Order 10450 (because, of course, no such express limitation on the Board's power of review resides there). Instead, and despite the Court's claim to the contrary, what the Court did was create the rule of *Egan* from whole cloth as a narrow limitation on federal employees' adverse action appeal rights based upon the fact that the Act was silent with respect to the Board's review of security clearance determinations. *Egan*, 484 U.S. at 530; *see also Egan* at 534 (White, J., dissenting) ("There is nothing in these statutory provisions to suggest that the Board is to scrutinize discharges on national security grounds any less comprehensively than other

discharges for "cause." Nor does the legislative history of these provisions suggest that the Board is foreclosed from examining the reasons underlying the discharges of employees who are alleged to be security threats."). The Court saw its narrow limitation as justified by the Executive's power as Commander in Chief of the nation's armed forces and the compelling need to protect classified national security information.

Under these circumstances, when the *Egan* court was implying a highly proscribed limitation where no such limitation existed in the plain statutory language, and in the absence of any contrary statutory or regulatory mandate since *Egan* was decided, the Board should not voluntarily diminish its scope of review in adverse action appeals that do not involve access to classified national security information. And, again, OPM's advisory opinion amply demonstrates that no limitation on the Board's scope of review of appeals involving an agency's sensitive position eligibility determination lies within Part 732.

C. <u>The Expansion of *Egan* Would Deprive Federal Employees of Due Process</u>

Although the factual record in this matter is less than complete on this question, the availability of the Board's full scope of neutral third party review in appeals involving sensitive position eligibility determinations is especially critical considering the vast number of Federal positions that have been designated as non-critical sensitive despite the fact that their occupants, e.g. Northover, do not access or handle classified national security information. For example, the Defense Finance and Accounting Service has designated 100% of its employees as sensitive. *Cf.* DFAS Memorandum For All DFAS Employees (March 4, 2005), attached to these comments as Exhibit 1. This means that if the Board chooses to expand *Egan*, then agencies such as DFAS may completely evade

the teeth of Board review by couching any type of adverse action in terms of revocation of eligibility to occupy a sensitive position; without even resort to suitability considerations.

As discussed by amicus Government Accountability Project, this is so because an agency decision to designate a position as sensitive is unreviewable, and hence, unlike the revocation of a security clearance, there exists no forum for an employee to challenge the designation of her position as sensitive. GAP Amicus, p. 5; *see also* OPM March 31, 2010, letter, p. 3 ("OPM's regulations do not furnish a procedure for appealing an agency's designation of a position as "sensitive" at one of the three prescribed levels."). Allowing agencies to wholesale avoid substantive Board review would be an absurd result in light of *Egan*. It was surely not the Supreme Court's intention in *Egan* to exclude the entire civilian workforces of federal agencies from the full scope of the protections offered by the Act. Yet this is precisely what would occur if the Board were to limit the scope of its review in adverse action appeals involving agency sensitive position eligibility determinations. Moreover, had it been the Court's intent to craft such a vague and open-ended exclusion from the full scope of Board review, the Court could easily have done so. Instead, the Court used carefully chosen language emphasizing the narrow breadth of the limitation that it was creating, and the limitation's dependence on access to classified national security information.

Further, the Board should not be misled by any argument that a wholesale deprivation of full Board review would somehow be cured by the existence of an agency's internal review procedures. Even the existence of an infinite number of layers of internal non-third party review, layered no doubt like a Thesean labyrinth, would not

serve as a substitute for the independent and neutral review provided by the Board pursuant to its statutory mandate.

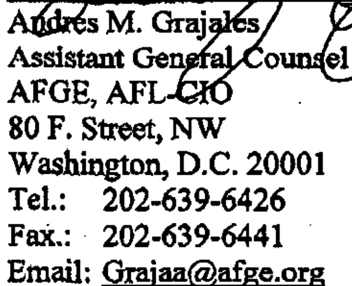
Similarly, the Board should remain conscious that applying the full scope of Board review to agency sensitive position eligibility determinations will not prevent agencies from taking conduct-based Chapter 75 adverse actions or suitability actions in appropriate cases. Likewise, agencies would retain their ability to respond to urgent criminal or national security issues through their ability to administer indefinite suspensions and through the national security provisions contained in 5 U.S.C. § 7532. Thus, the Board should not expand its application of *Egan*.

III. CONCLUSION

Based on all of the foregoing, Northover respectfully submits that the Board should not apply *Egan* to limit its review of adverse action appeals arising from or involving an agency's determination that an employee is ineligible to occupy a sensitive position.

Respectfully submitted,

Mark D. Roth
General Counsel
AFGE, AFL-CIO
80 F Street, NW
Washington, D.C. 20001
Tel.: (202) 639-6424
RothM@afge.org



Andres M. Grajales
Assistant General Counsel
AFGE, AFL-CIO
80 F. Street, NW
Washington, D.C. 20001
Tel.: 202-639-6426
Fax.: 202-639-6441
Email: Grajaa@afge.org

May 13, 2010
Date

CERTIFICATE OF SERVICE

CONYERS AND *NORTHOVER*, COMMENTS BY APPELLANT NORTHOVER

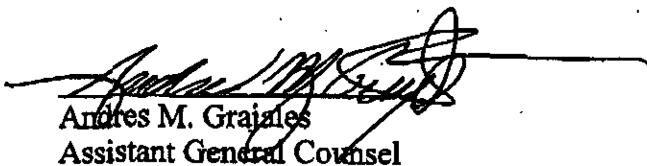
I hereby certify and affirm that on this day, May 13, 2010, I caused complete copies of the Comments by Devon Haughton Northover to OPM's Advisory Opinion in the above-captioned cases to be filed and served as follows:

MSPB
(via fax and U.S. First Class Certified Mail)

William D. Spencer
Clerk of the Board
Office of the Clerk of the Board
U.S. Merit Systems Protection Board
1615 M. Street N.W.
Washington, D.C. 20419
202-653-7130 (fax)

Dep't of Defense
(via fax and U.S. First Class Certified Mail)

Stacy Turner Caldwell
Department of Defense
Defense Commissary Agency
Office of General Counsel
1300 E. Avenue
Fort Lee, VA 13801-1800
804-734-8259 (fax)



Andres M. Grajales
Assistant General Counsel

5/13/10
Date

DEFENSE FINANCE AND ACCOUNTING SERVICE
INDIANAPOLIS
8899 EAST 56TH STREET
INDIANAPOLIS, INDIANA 46249

MEMORANDUM FOR ALL DFAS EMPLOYEES

MAR 4 2005

SUBJECT: Position Sensitivity Level

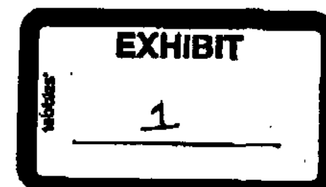
In response to Presidential Decision Directives, PDD-62, Combating Terrorism, and PDD-63, Critical Infrastructure Protection, DFAS formed a team to conduct assessments at each of its sites to identify risks and recommend risk mitigation strategies. The team was called the Safety, Protection, Infrastructure, and Recovery Integration Team or SPIRIT. They looked specifically at programs related to safety, security and emergency planning.

One of the findings in the 2003 SPIRIT report was that many positions in DFAS had routine access to sensitive information and/or access to classified information, yet were erroneously designated as non-sensitive. According to Chapter 3 and Appendix 10 of DOD 5200.2-R, DOD Personnel Security Program, DoD positions that include duties of a sensitive nature (including access to classified information) such that the misconduct or malfeasance of an incumbent in the position could adversely impact national security will be designated as sensitive. Sensitive positions are either non-critical sensitive (NCS) or critical-sensitive (CS). As a result of the SPIRIT report, the agency will be reviewing the position sensitivity designation of all positions. Currently, only about 35% of DFAS positions are non-critical sensitive or critical-sensitive. When the position sensitivity review is completed we expect that about 99% of DFAS positions will be NCS or CS. The review will begin in March 2005 with the Indianapolis site.

What does this mean for you? As positions are re-designated NCS or CS, employees will be required to complete and submit the forms for a NCS or CS background investigation. The background investigation determines your eligibility to occupy a NCS or CS position. If upon review your position is re-designated, you will be asked to complete the appropriate investigation forms.

The Washington Headquarters Services, Consolidated Adjudication Facility (CAF) determines eligibility for DoD employees to occupy a sensitive position and/or have access to classified information. Guidelines for adjudication include, but are not limited to: issues related to financial considerations, foreign preference, alcohol consumption, drug involvement, criminal conduct, and personal conduct. The investigative forms you complete will be forwarded to the CAF for adjudication. The CAF will determine whether you are eligible to occupy a position designated as NCS or CS.

If you are currently or have in the past experienced any of the types of issues identified in the above paragraph it is strongly suggested that you start now to take appropriate steps to resolve your issues. This will better position you to meet the requirements for your position.



A site has been set up on the DFAS eportal to provide further information regarding the types of things the adjudicating facility will consider. This site can be accessed at https://eportal.dfas.mil/portal/communites/community.jsp?CommID=540. Additionally, the site provides you with sources from which you can obtain assistance, i.e. the Employee Assistance Program provides financial and legal assistance.

Please keep in mind that neither the security process nor the criteria for assignment of position sensitivity level designations have changed. Rather, we are appropriately applying the criteria in DOD 5200.2-R, Personnel Security Program and those found in 5 CFR 732.201 along with the recommendations of the SPIRIT. Employees will continue to receive due process during the security adjudication process, and, if appropriate, no administrative action will be taken until such time as a final determination is made regarding the employee's ability to obtain/retainthe necessary eligibility or clearance.

Joyce M. Short
Director, Shared Services Center