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CLERK OF THE BOARD



UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
Washington, DC 20415

Office of the
General Counsel

MAR 31 2010

Honorable William D. Spencer
Clerk of the Board
U.S. Merit Systems Protection Board
1615 M Street, NW
Washington, DC 20419

Re: OPM Advisory Opinion in Conyers v. Department of Defense, No. CH-0752-09-0925-I-1, and Northover v. Department of Defense, No. AT-0752-10-0184-I-1.

Dear Mr. Spencer:

The Merit Systems Protection Board (MSPB or Board) has requested an advisory opinion, pursuant to 5 U.S.C. § 1204(e)(1)(A), concerning the Office of Personnel Management's (OPM's) interpretation of part 732 of Title 5, Code of Federal Regulations, to assist the Board in adjudicating the above-referenced appeals. OPM Director John Berry has asked me to reply on his behalf.

The Board has specifically requested OPM's opinion on "whether, pursuant to 5 C.F.R., Part 732, National Security Positions, the rule in Egan¹ . . . 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." As noted in your letter of February 4, 2010, under Egan "the scope of Board review of an adverse action based on the revocation of a security clearance is limited." The Board has asked whether, under OPM's regulations, the Board's review of an agency's denial of an employee's eligibility to occupy a sensitive position is limited to the same extent as an agency's denial of an employee's eligibility for access to classified information.

As an initial matter, we agree with amicus American Federation of Government Employees that the Conyers and Northover appeals are not ripe for consideration by the full Board. The Office of the Clerk of the Board distributed the case records of both appeals to OPM on March 3, 2010. The record in Northover includes no initial decision, no referral for interlocutory review, and no order joining or consolidating the appeal to any other appeal already before the full Board. In Conyers, which was apparently certified for interlocutory review by the administrative judge sua sponte, it is unclear from the record whether the appellant was in a position requiring eligibility for access to classified information. This is a critical issue for if the appellant did require such access then there would be no question regarding the applicability of Egan. For these reasons it

¹ Department of the Navy v. Egan, 484 U.S. 518, 530-31 (1988).

would be premature for the Board to address the breadth of Egan's rationale in the context of these particular appeals.

If the full Board nonetheless decides to consider these appeals in their current posture, OPM's regulations in 5 C.F.R. 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. The regulations do not independently confer any appeal right or affect any appeal right under law.

OPM's Part 732 regulations have their genesis in Executive Order 10450, as amended (hereinafter E.O. 10450), reprinted in 5 U.S.C. 7311. Section 3(b) of that Order requires each agency head to "designate, or cause to be designated, any position within his department or agency the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security as a sensitive position." The Executive Order delegates to OPM the responsibility to conduct investigations "of persons entering or employed in the competitive service" with a "scope . . . determined in the first instance according to the degree of adverse effect the occupant of the position sought to be filled could bring about, by virtue of the nature of the position, on the national security." E.O. 10450, §§ 3(a), 8(b).

Based on the criteria contained in the E.O., OPM's regulations at 5 C.F.R. § 732.102(a) provide examples of the kinds of duties that might be discharged by persons in national security positions. These examples are not intended to be exhaustive. Rather they are illustrative of the kinds of duties that would support an agency's conclusion that a position is sensitive within the meaning of the Executive Order.

Under the E.O. and OPM regulations, a background investigation must be conducted whenever an appointment is made to a sensitive position, with limited opportunity for waivers and exceptions. See E.O. 10450, §§ 3(a), 3(b); 5 C.F.R. § 732.202. The background investigation for sensitive positions is initiated by the applicant's completion of a Standard Form (SF) 86, Questionnaire for National Security Positions.² OPM's requirement that the SF 86 must be used for investigations for sensitive positions has been in place for over 20 years. See, e.g., 55 Fed. Reg. 45809 (Oct. 31, 1990).

OPM's regulation at 5 C.F.R. § 732.201(a) further requires the agency's sensitivity designation for national security positions to be made "at one of three sensitivity levels: Special-Sensitive, Critical-Sensitive, or Noncritical-Sensitive." The purpose of making

² Every position in the competitive service must also be designated for public trust risk under OPM's suitability regulations in 5 C.F.R. § 731.106. When a position is not designated as "sensitive," but is designated as "low risk," the background investigation is conducted using the SF 85. When the position is not designated as "sensitive," but is designated as a "moderate" or "high risk" public trust position, the background investigation is conducted using the SF 85P. Neither the SF 85, nor the SF 85P are intended to be used for national security positions.

the distinction among the three sensitivity levels is to determine the scope of the background investigation OPM will conduct upon receipt of the SF 86. 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.

OPM's regulations in 5 C.F.R. § 732.301 require agencies making determinations based upon OPM investigations to adequately document their decisions; to comply with applicable procedural requirements under law, rule, and regulation; to provide minimum procedural rights; and to consider all available information in reaching a final decision. These regulations serve to ensure that appropriate use is being made of OPM's reports of investigation, which remain OPM's property even after the investigation has ended under section 9(c) of E.O. 10450. The regulations also help OPM evaluate, under section 14(a) of E.O. 10450, "[d]eficiencies in the department and agency security programs" and "[t]endencies in such programs to deny . . . fair, impartial and equitable treatment at the hands of the Government, or rights under the Constitution and laws of the United States or this order."³

While OPM's regulations at Part 732 address the procedures to be followed by agencies in rendering a decision based on an OPM investigation, they do not address the scope of the Board's review when an agency takes an adverse action against an employee under 5 U.S.C. § 7513(a) following an unfavorable security determination. Likewise, OPM's adverse action regulations in 5 C.F.R. Part 752 do not address any specific appellate procedure to be followed when an adverse action follows an agency's determination that an employee is ineligible to occupy a sensitive position.

In short, the resolution of the issue before the Board regarding the scope of the Egan decision cannot be determined by reference to OPM's regulations. OPM nonetheless appreciates the opportunity to provide this advisory opinion, to ensure that the Board has an accurate understanding of OPM's regulations regarding national security positions to serve as the context for its decision on these appeals.

Respectfully,



Elaine Kaplan
General Counsel

³ Further, the requirement in 5 C.F.R. § 732.301(a) that "the agency must . . . [i]nsure that the records used in making the decision are accurate, relevant, timely, and complete to the extent reasonably necessary to assure fairness to the individual in the determination," is mandated by the Privacy Act of 1974, as amended, 5 U.S.C. § 552a(e)(5).