

DEVON HAUGHTON NORTHOVER v. DEPARTMENT OF DEFENSE

Docket # AT-0752-10-0184-I-1

Supplemental Agency Narrative Response

Summary Page

Case Title : DEVON HAUGHTON NORTHOVER v. DEPARTMENT OF DEFENSE

Docket Number : AT-0752-10-0184-I-1

Pleading Title : Supplemental Agency Narrative Response

Filer's Name : Stacey Turner Caldwell, Esq.

Filer's Pleading Role : Agency Representative

Details about the supporting documentation

N/A

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DEVON HAUGHTON NORTHOVER v. DEPARTMENT OF DEFENSE
Docket # AT-0752-10-0184-I-1
Supplemental Agency Narrative Response
Online Interview

1. Would you like to enter the text online or upload a file containing the pleading?

See attached pleading text document

2. Does your pleading assert facts that you know from your personal knowledge?

Yes

3. Do you declare, under penalty of perjury, that the facts stated in this pleading are true and correct?

Yes

1 UNITED STATES OF AMERICA
2 MERIT SYSTEMS PROTECTION BOARD
3 ATLANTA REGIONAL OFFICE
4

5 DEVON HAUGHTON NORTHOVER,

6 Appellant,

7 v.

8 DEPARTMENT OF DEFENSE,

9 DEFENSE COMMISSARY AGENCY,

10 Agency.
11
12

} DOCKET NUMBER

} AT-0752-10-0184-I-1

} January 27, 2010

13 SUPPLEMENTAL AGENCY NARRATIVE RESPONSE

14 Now comes the Department of Defense, Defense Commissary Agency (agency), through
15 counsel, and files the following Supplemental Agency Narrative Response in the appeal brought
16 by Devon Haughton Northover (appellant), in order to apprise the Judge and appellant of legal
17 developments since the filing of the Agency Response File, which included the original Agency
18 Narrative Response, on December 23, 2009.

19 Agency Position

20 In the Agency's Narrative Response filed in this matter on December 23, 2009, the Agency
21 asserted its position that the limited scope of review set forth in *Department of the Navy v. Egan*,
22 484 U.S. 518 (1988), should apply to this appeal which concerns appellant's demotion from a
23 non-critical sensitive position to a nonsensitive position based on his denial of eligibility for
24 access to classified information and/or occupancy of a sensitive position. The Agency cited the
25 Board's Final Decision in *Stella Crumpler v. Dep't of Defense*, DC-0752-09-0033-I-1, 2009
26 MSPB 224 (Nov. 2, 2009), which applied the *Egan* rule limiting the scope of Board review to an
27 appeal concerning an eligibility for occupancy of a sensitive position determination, in support of
28 its position.
29

1 After the Agency's filing of the Agency Response File, the Agency received notice that the
2 Board had entered a new decision in the *Crumpler* case, vacating the November 2, 2009 Board
3 decision and reopening that appeal. See *Stella Crumpler v. Dep't of Defense*, 109 LRP 78623
4 (Dec. 18, 2009) (reopening and vacating the Board's previous Final Decision entered Nov. 2,
5 2009)). In vacating and reopening *Crumpler*, the Board determined that it would seek and
6 consider an advisory opinion from the Office of Personnel Management before deciding this
7 significant issue of law.

8 Since the earlier *Crumpler* decision was the only actual Board-level MSPB decision which
9 applied the *Egan* rule to a security determination case involving a denial of eligibility for
10 occupancy of a sensitive position, as opposed to a denial of a security clearance for access to
11 classified information itself, and it has now been vacated, the Agency is updating its legal
12 position to represent the current status of the *Crumpler* appeal. However, the Agency continues
13 to take the position that the *Egan* rule should apply to security determinations concerning
14 eligibility for occupancy of a sensitive position denials as well as those concerning security
15 clearance for access to classified information denials. MSPB Administrative Judges have
16 consistently applied the Supreme Court's *Egan* ruling in their initial decision's on security
17 determination cases involving positions which are designated as sensitive, but which do not
18 require a security clearance for access to classified information. See, e.g., *Eustace A. Prince v.*
19 *Dep't of Defense*, DE-0752-08-0238-I-1, 2008 WL 4501659 (July 23, 2008) (Administrative
20 Judge Patricia M. Miller); *Jonelle D. Michael v. Dep't of Justice*, NY-0752-09-0022-I-1, 2008
21 WL 5552881 (Dec. 23, 2008) (Administrative Judge Maria M. Dominguez); *Tammy E. Hanson*
22 *v. Dep't of Defense*, CH-0752-08-0540-I-1, 2008 WL 4923475 (Sept. 16, 2008) (Administrative
23 Judge Scott D. Cooper); *Arnold E. Dean v. Dep't of Defense*, PH-0752-08-0411-I-1, 2008 WL
24 4115653 (Jul. 3, 2008) (Administrative Judge Wilhelmina Douglas Stevenson); *Debbie L.*
25 *Walker v. Dep't of Defense*, No. AT-0752-04-0093-I-1, 2004 WL 331304 (Feb. 10, 2004)
26 (Administrative Judge Joseph E. Clancy).

27 The Agency recognizes that the Board's pending decision in *Crumpler* regarding the
28 appropriate standard review in cases such as this involving a certificate of eligibility for
29 occupancy of a sensitive position may impact how and when your Honor proceeds forward with

1 the instant case. Of further significance, the Agency also notes that another denial of eligibility
2 for occupancy of a sensitive position case, *Jeanell M. Brown v. Dep't of Defense*, CH-0752-08-
3 0415-I-1, 108 LRP 49268 (July 9, 2008) (Administrative Judge Howard Ansonge)(Initial
4 Decision applying *Egan*),109 LRP 14317 (March 12, 2009)(split decision by Board on Petition
5 for Review, thereby rendering Initial Decision final), is now on appeal to the Federal Circuit.

6 Respectfully submitted this 27th day of January 2010:

7
8 **/s/ Stacey Turner Caldwell**

9 Stacey Turner Caldwell
10 Agency Representative
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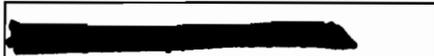
Certificate Of Service

e-Appeal has handled service of the assembled pleading to MSPB and the following Parties.

Name & Address	Documents	Method of Service
MSPB: Atlanta Regional office	Supplemental Agency Narrative Response	e-Appeal / e-Mail
Rosa V. Timmons Appellant Representative	Supplemental Agency Narrative Response	e-Appeal / e-Mail

I agree to send a printed copy of the electronic pleading with attachments to non-filers by the end of next business day, as follows:

Name & Address	Documents	Method of Service
Devon Haughton Northover Appellant 	Supplemental Agency Narrative Response	US Postal Mail

 USA		
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