UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 233

Docket No. DC-0752-09-0033-R-1
DC-0752-09-0033-N-1

Stella Crumpler,

Appellant,

v.

Department of Defense,

Agency.

December 18, 2009

M. Jefferson Euchler, Esquire, Virginia Beach, Virginia, for the appellant.

Darrin W. Gibbons, Esquire, Fort Lee, Virginia, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member
Member Rose did not participate in this adjudication.

OPINION AND ORDER

¶1 The appellant seeks reopening of her case and reconsideration of the Board's November 2, 2009 final decision. She also seeks a stay of the Board's decision. For the reasons set forth below, we REOPEN the appeal and VACATE the Board's November 2, 2009 decision. We DENY the appellant's motion for a stay as moot.

BACKGROUND

¶2 The agency removed the appellant from her GS-4 Store Associate position at Langley Air Force Base Commissary upon determining that she was no longer eligible to hold a non-critical sensitive position. On appeal, the administrative judge affirmed the removal, and in so doing held that *Department of the Navy v. Egan*, 484 U.S. 518, 530-31 (1988), precluded Board review of the reasons underlying the agency's determination. The appellant filed a petition for review in which she argued that *Egan* did not apply because the employee in *Egan* had access to classified information, whereas she did not. Petition for Review File, Tab 1. On November 2, 2009, then-Vice Chairman Rose and then-Chairman McPhie joined in a decision holding that *Egan* precluded the Board from reviewing the reasons underlying an agency's determination to deny continued eligibility for employment in a non-critical sensitive position. *Crumpler v. Department of Defense*, 2009 MSPB 224.

¶3 On December 2, 2009, 30 days after the Board issued its November 2, 2009 final decision, the appellant filed a request for reopening of her appeal and reconsideration of the decision in her case. She also requested a stay of the Board's decision. The agency has responded in opposition to the requests.

ANALYSIS

¶4 The Board is empowered to reopen a case on its own motion after a final decision has been issued and to modify the decision. 5 U.S.C. § 7701(e)(1)(B) (any decision by the Board shall be final unless the Board reopens and reconsiders a case on its own motion); *see Vesser v. Office of Personnel Management*, 67 M.S.P.R. 239, 244 (1995) (the Board's authority to reopen its decisions includes both initial decisions and decisions of the full Board), *aff'd*, 73 F.3d 381 (Fed. Cir. 1995) (Table); *cf. Carson v. Department of Energy*, 109 M.S.P.R. 213, ¶¶ 8, 36-37 (2008) (considering whether to reopen a final Board order set forth in a published Opinion and Order), *aff'd*, 2009 WL 3241396

(Fed. Cir. 2009). Such authority is consistent with the general rule that administrative agencies have the power to reconsider their own decisions as long as proper notice is given to the parties and the right is exercised within a reasonable period, measured in weeks, not years. *Anthony v. Office of Personnel Management*, 70 M.S.P.R. 214, 218-19 (1996). In deciding whether to exercise this discretionary authority, the Board balances the desirability of finality with the public interest in achieving the right result. *Robinson v. Department of Veterans Affairs*, 72 M.S.P.R. 444, 448 (1996).

¶5 The Board has held that reopening may be appropriate when there is clear and material legal error resulting in a conflict between the holding in a decision and controlling precedent or statute. *Anthony*, 70 M.S.P.R. at 219; *Special Counsel v. Sullivan*, 7 M.S.P.R. 357, 360 (1981). However, the Board has recognized other situations warranting its exercise of its discretionary reopening authority. For example, reopening may be appropriate, in the interests of justice, when the evidence is of such weight as to warrant a different outcome. *Anthony*, 70 M.S.P.R. at 219. The Board has also explained that it will exercise its authority to reopen an appeal in "unusual or extraordinary" circumstances. *Id*. Thus, the Board will exercise its discretion to reopen if good cause is shown, such as an intervening event (court, Board, or Office of Workers' Compensation Programs decision), or the discovery of misrepresentation or fraud after the issuance of a decision. *Id*. Moreover, the Board may reopen an appeal to prevent a "manifest injustice" when an error implicates a party's "basic procedural rights." *Metallo v. Department of Defense*, 110 M.S.P.R. 229, ¶ 15 (2008).

¶6 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. While the respondent agency in this case, the Department of Defense, made clear how it interprets *Egan*, the Office of Personnel Management (OPM) was not a party to the case and did not otherwise explain its views. Considering that government-wide rules promulgated by OPM lie at the heart of this case, specifically, 5 C.F.R. Part 732, orderly administration of the federal civil service system demands that OPM's views on the proper interpretation of those rules be solicited before a groundbreaking decision is issued. We therefore find that this case presents unusual or extraordinary circumstances, and that the desirability of finality is outweighed by the public interest in reaching the right result,* which is to permit OPM and other amici, if any, the opportunity to express their views before the Board issues a decision with potentially far-reaching implications across the federal civil service. *Cf. Augustine v. Department of Veterans Affairs*, 88 M.S.P.R. 407, ¶¶ 24, 27 (2001) (providing for notice in the Federal Register that the Board had pending before it a case presenting a challenge to a government-wide program, and allowing interested parties to submit their views before a precedential decision was issued), *vacated on other grounds*, 95 M.S.P.R. 293 (2003) (Table).

ORDER

¶7 For the reasons set forth above, we REOPEN the appeal and VACATE the Board's November 2, 2009 decision, 2009 MSPB 224. The appellant's motion

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* Our determination to reopen this appeal of the Board's November 2, 2009 decision before the 60-day time limit for seeking judicial review has elapsed is consistent with the Board's requirement that any reopening be accomplished within a reasonable period of time measured in weeks, not years, and supports our finding that the desirability of finality is minimal in this case compared with the public interest in achieving the right result.

for a stay is DENIED as moot. By separate order we will establish a mechanism for obtaining the views of OPM, either as an intervenor or by other means. *See* 5 U.S.C. §§ 1204(e)(1)(A) (the Board may request from the Director of OPM "an advisory opinion concerning the interpretation of any rule, regulation, or other policy directive promulgated by [OPM]"), 7701(d)(1) (the Director of OPM "may as a matter of right intervene or otherwise participate" in a proceeding before the Board in which the interpretation or application of a regulation under OPM's jurisdiction "is at issue" and the Director of OPM is of the opinion that an erroneous decision would have a substantial impact on the civil service). We may also establish a mechanism for obtaining the views of other interested parties as amici or in some other capacity.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.