

United States of America
Merit Systems Protection Board

Rhonda K. Conyers,
Appellant,

Docket Number
CH-0752-09-0925-I-1

v.

Department of Defense,
Agency.

May 13, 2010

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CLERK OF THE BOARD

Agency Response to Office of Personnel Management's
Advisory Opinion and Briefs Amicus

Introduction

The Defense Finance and Accounting Service (DFAS or Agency) is an agency of the United States Department of Defense (DoD). 32 C.F.R. § 352a.1. It employs over 10,000 people across the United States and at other locations throughout the world. The Agency performs accounting work and payment functions for the Department of Defense (DoD), its soldiers and civilian employees and payment functions for the employees of several other Executive Branch agencies. Within DoD, DFAS employees provide finance and accounting services to the Office of the Secretary of Defense; the Military Departments; the Chairman, Joint Chiefs of Staff and Joint Staff; the Unified and Specified Commands; the Inspector General of the Department of Defense; other Defense Agencies; and DoD Field Activities. 32 C.F.R. § 352a.4(c)(2).

In accordance with the DoD Personnel Security Program, DoD Regulation 5200.2-R, all civilian positions are categorized (with respect to security sensitivity) as either critical-sensitive,

noncritical-sensitive (NCS), or nonsensitive. 32 C.F.R. § 154.13(b). The position at issue in this appeal is designated NCS.¹

Statement of Facts

Appellant was an accounting technician, GS-525-05, assigned to an NCS position at DFAS Columbus. On June 27, 2007, Appellant received a Statement of Reasons to Deny Eligibility for Access to Classified Information and/or Occupancy of a Sensitive Position (SOR), which was issued by the Washington Headquarters Services (WHS) Consolidated Adjudications Facility (CAF). The SOR explained that a tentative determination had been made to deny Appellant eligibility for access to classified information and/or occupancy of a sensitive position ("eligibility"). Information from an investigation of Appellant's personal history, her security background questionnaire, and an Equifax credit bureau report had led to security concerns and had raised questions about her trustworthiness, reliability, and judgment. Appellant was advised that she would not be eligible for occupancy of a sensitive position if the tentative determination later became final and that she could challenge the tentative determination.

Appellant acknowledged that she received the SOR and challenged the tentative determination by submitting a response through her Agency Security Director.²

On February 18, 2009, the CAF denied Appellant's eligibility. On February 26, 2009, Appellant acknowledged that she had received a Letter of Denial (LOD) of her eligibility. She appealed the CAF determination to the WHS Clearance Appeals Board (CAB) and requested an appearance before an Defense Office of Hearings and Appeals administrative judge.

¹ The Director of DFAS was delegated authority to designate any DFAS position as a "sensitive" position. See 32 C.F.R. Part 352a Appendix.

² Her response included an explanation as to why she had omitted some debts from Item 22b in the Questionnaire for Public Trust.

Based upon the CAF determination, the Agency issued a "Notice of Proposed Indefinite Suspension" (Proposal) on April 13, 2009, advising the Appellant of the Agency's intent to suspend her without pay from her position as an accounting technician, GS-0525-05, not earlier than 30 calendar days from the date that Appellant received the Proposal. The reason stated for the proposed suspension was that Appellant was occupying an NCS position, and the CAF had denied her eligibility:

Because your official position as a GS-525-5 Accounting Technician requires that you have access to sensitive or classified information and the CAF denied your access to such information, you no longer meet a qualification requirement for your position and we may not permit you to perform your regularly assigned duties.

Because the Appellant was not authorized to access sensitive information, she was unable to perform the duties of her accounting technician position. There was no vacant nonsensitive position to which the Agency could temporarily detail or assign Appellant pending her appeal. The Agency proposed to place Appellant on an indefinite suspension without pay until such time the Appellant exhausted her administrative due process concerning the determination of eligibility and the Agency could take any necessary follow-on administrative actions related to the determination of eligibility. The Agency advised Appellant that she had the right to submit a written and/or verbal reply to the Proposal within 15 days, that she had the right to submit documentary evidence, and that she had the right to be represented by an attorney or other personal representative. In as much as the Appellant was no longer qualified to occupy her NCS position, and because there were no vacant nonsensitive positions available, the Agency temporarily assigned Appellant to a nonsensitive set of duties until a decision could be made concerning the proposed suspension action. Although Appellant had the right to reply to the Proposal in writing, she did not do so; she did meet briefly with the deciding official.

On September 3, 2009, the deciding official issued the Notice of Decision (Decision), which advised Appellant that she would be suspended from duty without pay from her position as an accounting technician for an indefinite period of time. Her suspension was effective September 11, 2009. This appeal followed.³

Issue Presented

The Board has asked whether the rule in Department of the Navy v. Egan, 484 U.S. 518 (1988), which limits the scope of MSPB review of an adverse action based upon the revocation of a security clearance, also limits Board review of an adverse action based upon denial of continued eligibility to occupy a national security sensitive position.

Argument

For the reasons described below, we respectfully suggest that the Board hold that Egan precludes review of an agency's decision to revoke or deny eligibility to occupy a national security sensitive position, that the Appellant was determined not to be eligible to occupy a national security sensitive position, and that review of the case be limited to determination of the issue of whether the Appellant received appropriate procedural due process.

I. The Board Should Hold That Egan Precludes Review Of An Agency's Decision To Deny Or Revoke Eligibility To Occupy A National Security Sensitive Position

The Board should hold that, in cases involving an adverse action based upon the revocation or denial of eligibility to occupy a sensitive position, the Board does not possess authority to review the merits of the underlying national security determination.⁴ In Egan, the

³ In this appeal, Appellant appealed her indefinite suspension. Subsequently, Appellant was removed from Federal service.

⁴ Sensitive positions are divided into three categories depending upon the potential of the occupant to damage the national security – noncritical sensitive, special sensitive, and critical sensitive. 5 C.F.R. § 372.201(a). Although the Board specifically has asked whether the rule in Egan applies to “non-critical sensitive” positions, the particular level of sensitivity is not

Supreme Court explained that, “[f]or ‘reasons . . . too obvious to call for enlarged discussion,’” the question whether to grant a security clearance to a particular employee is “a sensitive and inherently discretionary judgment call . . . committed by law to the appropriate agency of the Executive Branch.” 484 U.S. at 526-27. As the Supreme Court further explained, the President’s authority to classify and control access to national security information “flows primarily from [the] constitutional investment of power in the President and exists quite apart from any explicit congressional grant.” *Id.* at 527. Although Mr. Egan’s position required a security clearance – a fact that is not present in Conyers – this factual distinction is not determinative of the outcome in these matters. Rather, the important Constitutional principles at issue in Egan govern. Because those principles apply equally to sensitive positions, Egan limits review of an agency’s determination whether an individual employee is eligible to occupy a national security sensitive position.⁵

Like the authority to classify a position as one requiring a security clearance, which the President has delegated to agency heads in a series of Executive Orders, Egan, 484 U.S. at 528, the authority to designate a position as sensitive comes directly from the President’s Constitutional authority in the national security arena. Executive Order 10,450 requires agencies

determinative here. Rather, a position’s sensitivity level determines the scope of the required background check and the authority responsible for determining an employee’s eligibility to occupy a sensitive position. See E.O. 10,450 § 3; 5 C.F.R. § 732.201(b). Of course, if a sensitive position also requires a security clearance, then it is undisputed that Egan applies.

⁵ The Equal Employment Opportunity Commission (“EEOC”) appears to confuse security clearance requirements with eligibility to occupy a sensitive position when it suggests 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.” See EEOC Br. at 8. Although the need for “regular use of, or access to, classified information” is one factor that could lead an agency to designate a position as sensitive, 5 C.F.R. § 732.102(a)(2), the determinations whether to grant an individual a security clearance and whether an individual is eligible to occupy a national security sensitive position are separate inquiries.

to designate as sensitive any position the occupant of which “could bring about, by virtue of the nature of the position, a material adverse effect on the national security. . . .” E.O. 10,450 § 3(b), Security Requirements for Government Employees, 18 Fed. Reg. 2489 (1953). Recognizing these Constitutional underpinnings, amici acknowledge that position designations are not subject to review by the Board or courts.⁶ National Employment Lawyers Association (“NELA”) Br. at 3; see also National Treasury Employees Union (“NTEU”) Br. at 10; Government Accountability Project (“GAP”) Br. at 4.

Section 2 of Executive Order 10,450, which applies to *both* classified and sensitive positions, further directs agency heads to insure that the employment and retention of any employee “is clearly consistent with the interests of the national security.” Id. § 2; Egan, 484 U.S. at 528. That determination, the Supreme Court explained in Egan, requires “an affirmative act of discretion on the part of the granting official.” Egan, 484 U.S. at 528. As the Board observed in its February 4, 2010 letter to OPM in these matters, national security sensitive positions include those “that are concerned with the protection of the nation from foreign aggression or espionage, including the development of defense plans or policies, intelligence or counterintelligence activities, and related activities concerned with the preservation of the military strength of the United States.” 5 C.F.R. § 732.102(a)(1); see also 32 C.F.R. § 154.13 (Department of Defense regulation). The determination who may occupy such positions is not

⁶ Accordingly, the Board should decline the Government Accountability Project’s invitation to consider any differences between agencies in the types of positions they designate as national security sensitive. See GAP Br. at 6. Indeed, variation between agencies is to be expected. For example, employees holding seemingly similar positions at the Department of Defense and the Department of Education might have different position designations. This is a reflection of the fact that only agency heads – to whom the President has delegated his Constitutional authority to designate positions – possess the unique knowledge and expertise necessary to assess which of their positions pose a national security risk.

akin to the type of general “fitness” determinations reviewed by the Board. See NTEU Br. at 5, 7. Rather, eligibility to occupy a national security sensitive position can be determined only by personnel who are familiar with the nature and duties of a particular position, its degree of sensitivity, the reasons why and ways in which its occupant could damage to the national security, the range of factors that may lead a particular individual to act in a way that would damage the national security, and the acceptable margin for error in a given case.

The President has vested agency heads with the authority to make these judgment calls, and it is those agency heads who bear the responsibility should the occupant of a sensitive position damage the national security. Cf. Egan, 484 U.S. at 529 (“[A]n agency head who must bear the responsibility for the protection of classified information committed to his custody should have the final say in deciding whether to repose his trust in an employee who has access to such information.” (quoting Cole v. Young, 351 U.S. 536, 546 (1956))). Allowing nonexpert civilians to second-guess these determinations creates an irreconcilable conflict with Egan.

Further, like the determination to revoke or deny a security clearance, which is not a covered “action” as defined by 5 U.S.C. § 7512, Egan, 484 U.S. at 530, the determination to revoke or deny eligibility to occupy a national security sensitive position is not itself a covered “action” subject to Board review. Rather, like a clearance determination, which is subject to its own review process, Executive Order 12,968 § 5.2 (1995), a determination regarding eligibility to occupy a national security sensitive position is subject to its own review process. Pursuant to 5 C.F.R. § 732.301, titled “Due Process,” agencies must provide the subject of any unfavorable sensitivity determination with notice of the specific reasons for the decision, an opportunity to respond, and notice of appeal rights. And the Department of Defense makes its internal appeal process, which affords employees six levels of review, equally available to employees in

classified and national security sensitive positions. To prevent national security decisions (which can include matters such as an employee's financial responsibility and personal relationships) from invading upon the employee-supervisor relationship, Federal supervisors often do not know why an employee's security clearance or eligibility to occupy a sensitive position has been revoked or denied. All the supervisor knows is that the employee, who occupies a national security position, no longer meets the requirements of that position.

Against this procedural scheme, the Supreme Court determined that, when reviewing an adverse employment action pursuant to section 7513, the MSPB and courts must stop short of examining the merits of a security clearance determination; that is, they may review only the fact of denial, the position's requirement of a security clearance, and the satisfactory provision of the requisite procedural protections. Egan, 484 U.S. at 526-30. These same limitations upon review must apply in national security sensitive cases. Any holding to the contrary would intrude upon the ability of the Executive to make sensitive and inherently discretionary judgment calls about which employees are trustworthy enough to occupy national security positions. The inevitable result is that the Board would second-guess security professionals' determinations, contravening the important limitations the Supreme Court recognized in Egan.

A decision by the Board to reverse an agency's removal action in these cases would place the agency in an impossible position. The Board possesses authority to reinstate an employee, but does not possess authority to order an agency to restore an employee's eligibility to occupy a national security sensitive position. Compare 5 U.S.C. § 1204(a) (authority to issue orders in matters within the Board's jurisdiction), with 5 U.S.C. § 7512 (defining covered "actions" within the Board's jurisdiction). Thus, any decision by the Board ordering reinstatement of an employee the agency has found is ineligible to occupy a sensitive position leaves the agency with

two options – violate the decision of the agency head and allow an employee who presents a national security risk to occupy a sensitive position, or violate a Board order. This is not merely an inconvenience; it demonstrates why the separation of powers concerns present in Egan must apply equally in these cases.

These concerns are not present in the cases to which amici attempt to compare the pending matters. As an initial matter, the majority of the cases cited are obviously distinguishable as they do not involve national security matters.⁷ However, even the cases that arguably have some connection to national security, including Adams v. Department of the Army and Jacobs v. Department of the Army, are distinguishable.⁸ Even assuming, without conceding, that both Adams and Jacobs were correctly decided, neither case presented the question at issue here. Mr. Jacobs held a security clearance, and neither the initial nor the final decision in Adams reveals whether Mr. Adams held a national security sensitive position. Jacobs, 62 M.S.P.R. 688, 695 (1994); see Adams, 105 M.S.P.R. 50 (2007); Adams, 2006 WL 1816464 (May 25, 2006). Moreover, in neither case did the Board directly review a determination entrusted by the Constitution to the Executive, as the appellants and amici would have the Board do here. Adams involved eligibility to access a computer system pursuant to the agency's "information assurance" policy, and Jacobs involved eligibility under the agency's

⁷ See, e.g., NELA Br. at 5 (citing Laycock v. Dep't of the Army, 97 M.S.P.R. 597 (2004) (attorney qualifications); Boulineau v. Dep't of the Army, 57 M.S.P.R. 244 (1993) (medical qualification of helicopter flight instructor); Graham v. Dep't of the Air Force, 46 M.S.P.R. 227 (1990) (agency medical credentials); Siegert v. Dep't of the Army, 38 M.S.P.R. 684, 687-91 (1988) (medical clinical privileges); Cosby v. Federal Aviation Admin., 30 M.S.P.R. 16, 18-19 (1986) (medical qualifications of air traffic control specialist)).

⁸ Amici NTEU and NELA also cite Dodson v. Dep't of the Army, 35 M.S.P.R. 562 (1987), which involved eligibility under the agency's Personnel Reliability Program. NTEU Br. at 6; NELA Br. at 5. However, Dodson provides no guidance here because it predates Egan.

Chemical Personnel Reliability Program. Adams, 105 M.S.P.R. 50 at 57; Jacobs, 62 M.S.P.R. at 689. Neither Adams nor Jacobs suggests that the Board can review an agency's determination regarding an employee's eligibility to occupy a sensitive position, when the President has directed agency heads to make such determinations.

Finally, the application of Egan in these cases will not result in the alarmist scenario suggested by amici. As an initial matter, agencies have treated national security sensitive cases as Egan matters for years and the Board's administrative judges have affirmed that approach. See, e.g., Tammy E. Hanson v. Dep't of Defense, No. CH-0752-08-0540-I-1, 2008 WL 4923475 (Sept. 16, 2008); Debbie L. Walker v. Dep't of Defense, No. AT-0752-04-0093-I-1, 2004 WL 331304 (Feb. 10, 2004). While this issue may have reached the Board only recently, there certainly has been no momentous change in the law or sudden contraction of employee rights.

More importantly, employees in national security sensitive positions retain numerous protections under Egan. Contrary to the suggestion by GAP, it is not the case that national security sensitive employees lack due process protections. See GAP Br. at 5-7. As described above, 5 C.F.R. § 732.301 requires agencies to provide the subject of any unfavorable sensitivity determination with notice of the specific reasons for the decision, an opportunity to respond, and notice of appeal rights. And, except for eligibility determinations, national security sensitive employees otherwise retain their full MSPB appeal rights. Employees holding sensitive positions can, and routinely do, appeal to the Board in adverse actions under Chapters 75, performance-based actions under Chapter 43, and other matters falling within the Board's jurisdiction. And, even under Egan, employees may obtain review of the questions whether constitutional violations occurred in the process of revoking eligibility to occupy a national security sensitive position, see El-Ganayni v. Dep't of Energy, 591 F.3d 176 (3rd Cir. 2009);

whether an agency has complied with its own procedures for revoking eligibility, see Makky v. Chertoff, 541 F.3d 205 (3rd Cir. 2008) and Romero v. Dep't of Defense, 527 F.3d 1324 (Fed. Cir. 2008); and whether an agency has provided sufficient notice of the reasons for an eligibility determination when that determination results in an adverse employment action, Cheney v. Dep't of Justice, 479 F.3d 1343 (Fed. Cir. 2007).

The Board cannot assume that agencies will act in bad faith and somehow attempt to portray every otherwise reviewable employment decision as a determination that an employee is ineligible to occupy a national security sensitive position. To the extent there may be a concern in a given case that an employee's eligibility to occupy a national security position has been revoked for a discriminatory reason or in retaliation for making a protected disclosure, as amici fear, that concern provides no basis to distinguish such positions from those requiring a security clearance. An allegation of discrimination or retaliation does nothing to change the underlying Constitutional basis for national security sensitive determinations. Cf. Hesse v. Dep't of State, 217 F.3d 1372, 1377 (Fed. Cir. 2000) (explaining the presence of a claim under the Whistleblower Protection Act "does not call for a different result" than in Egan because "the dispositive question . . . is the same: whether the [MSPB] is authorized to review security clearance determinations and require that employees' security clearances be granted or reinstated"). Rather, review of the employee's allegations would proceed under the rules established in other Egan cases. See, e.g., see El-Ganayni v. Dep't of Energy, 591 F.3d 176 (3rd Cir. 2009)

Nor does application of Egan in national security sensitive cases threaten further expansion to suitability determinations. See GAP Br. at 11-12. Suitability for Federal employment and eligibility to occupy a sensitive position involve different inquiries and fall

under the authority of different agencies. Suitability, which falls within OPM's authority, refers to "determinations based on a person's character or conduct that may have an impact on the integrity or efficiency of the service." 5 C.F.R. §§ 732.101(a), 731.103. Eligibility to occupy a sensitive position, which falls within the President's authority, refers to determinations that employment of an individual is "clearly consistent with the interests of national security." E.O. 10,450 § 2. To occupy a national security sensitive position, an employee must be found both suitable for Federal employment and eligible to occupy a national security position. Applying Egan to eligibility determinations has no bearing on suitability determinations, which remain subject to Board review. See 5 C.F.R. § 731.501.

As the NTEU explains in its brief, "[t]he Board's authority to review the merits of a removal case presumptively includes a review of the merits of any determination underlying that removal." NTEU Br. at 3 (citing Egan v. Dep't of the Navy, 28 M.S.P.R. 509, 517 n.5 (1986)). However, as the Supreme Court made clear, "[t]his proposition is not without limit, and it runs aground when it encounters concerns of national security, as in this case, where the grant of a security clearance to a particular employee, a sensitive and inherently discretionary judgment call, is committed by law to the appropriate agency of the Executive Branch." Egan, 484 U.S. at 527. Because they implicate the same concerns of national security, involve the same inherently discretionary judgment calls, and flow from the same Constitutional commitment of Presidential authority, the Board should apply Egan to limit review of an agency's determination regarding an individual's eligibility to occupy a national security sensitive position.

II. The Board Should Hold That Agency Acted Properly To Suspend Appellant After The CAF Determined Appellant Was Not Eligible To Occupy A Sensitive Position.

The Agency determined that the accounting technician position, GS-525-05, which Appellant occupied, was a NCS position. The CAF denied her eligibility for occupancy of a

sensitive position. The Agency properly acted to remove Appellant from the NCS position and had no nonsensitive position available. The Agency properly suspended Appellant from her position. Tamburello v. Department of Defense, 2006 MSPB Lexis 5279 (Sept. 5, 2006).

III. The Appellant Received Appropriate Procedural Due Process With Respect To The Eligibility To Occupy A NCS Position And With Respect To The Administrative Suspension Action.

The Board can determine: (1) whether the position required NCS eligibility; (2) whether the employee lost or was denied the eligibility; and (3) whether the employee was given minimal due process rights. C.f. Egan. In determining minimal due process, the MSPB should conduct a review of whether the due process procedures of 5 U.S.C § 7513 were met. That statute entitles a Federal employee to (1) 15 days written notice with the reasons for the proposed action; (2) a reasonable time period to respond; (3) representation; and (4) a written decision. Hesse v. Department of State, 217 F.3d 1372 (Fed. Cir. 2000); Norrup v. Department of the Navy, 87 M.S.P.R. 444, 446 (2001).

Appellant was given the appropriate due process with respect to the determination of her eligibility to occupy a NCS position: written notice in the SOR of DoD's intent to deny her eligibility, the opportunity to respond (and thirty days to do so), notice of her appeal rights, and the opportunity to appeal to the CAB.

She was also given appropriate due process during the administrative action to suspend her: clear notice of the reason for the proposed indefinite suspension, appropriate time to respond, the opportunity to seek representation, and the opportunity to respond. Since her eligibility had not been reinstated, her indefinite suspension was warranted. Appellant was given a written decision that indefinitely suspended her from her position.

IV. Appellant's Indefinite Suspension Promoted The Efficiency Of The Service.

Absent a statute or regulation requiring reassignment to a nonsensitive position, it is within the Agency's discretion whether or not to reassign an employee. The Agency is not required to find other suitable employment for an employee in Appellant's situation. Instead, the Agency may do whatever is in the best interests of the Government. Kriner v. Department of the Navy, 61 M.S.P.R 526 (1994). Federal courts have concluded that, absent a regulatory or statutory requirement, Egan did not impose on an agency the obligation to transfer employees. Griffin v. Defense Mapping Agency, 864 F.2d 1579, 1580 (Fed. Cir. 1989); Jamil v. Secretary, Department of Defense, 910 F.2d 1203, 1209 (4th Cir. 1990).

In Appellant's case, no statute or regulation required the Agency to transfer Appellant to another position. Furthermore, reassignment was not an option; the Agency did not have any vacant non-NCS positions available for the Appellant. Appellant's suspension promoted the efficiency of the Federal service because it allowed the Agency to replace her with someone who met all the qualifications of the GS-525-05 position, including the requirement that the occupant be eligible to occupy a sensitive position. Tamburello, supra.

Conclusion

The requirements of Egan should apply equally to appeals involving NCS positions and those involving security clearances. The same essential authorities, rights, principles, and expertise apply. Access eligibility requires determinations of individuals' potential risk to the security of the DoD or the public based upon an assessment of their loyalty, trustworthiness, reliability, and judgment. As the Supreme Court pointed out in Egan, absent specific authority to the contrary, the judgment involving the nature of the information to be protected and the eligibility of people to access that information must be committed to the broad discretion mission

of the agency responsible to protect it and those with the necessary expertise in protecting it. No such authority or responsibility has been vested in the Board.

Board review of the suspension of an employee because she can no longer have access to sensitive information should be limited to the determination of: (1) whether the position required access to sensitive information; (2) whether the employee lost or was denied eligibility to access sensitive information; and (3) whether the employee was given minimal due process rights with respect to the suspension.

For the above reasons, the Agency requests that the Board dismiss this appeal.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that the attached **Agency Response to Office of Personnel Management's Advisory Opinion and Briefs Amicus** was sent on this 13th day of May, 2010 by United States Postal Service as indicated below to each of the following:

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