U.S. MERIT SYSTEMS PROTECTION BOARD
Office of the Clerk
1615 M Street, N.W.
Washington, D.C. 20419

February 4, 2010

Honorable John Berry
Director
Office of Personnel Management
1900 E Street, N.W.
Washington, D.C. 20415

Re: *Rhonda K. Conyers v. Department of Defense*,
MSPB Docket No. CH-0752-09-0925-I-1, and
Devon Haughton Northover v. Department of Defense,
MSPB Docket No. AT-0752-10-0184-I-1

Dear Director Berry:

Pursuant to 5 U.S.C. § 1204(e)(1)(A), the Merit Systems Protection Board (Board) respectfully requests that you provide an advisory opinion concerning the interpretation of regulations promulgated by the Office of Personnel Management (OPM).

Background:

Devon Haughton Northover was a GS-7 Commissary Management Specialist with the Defense Commissary Agency. He occupied a position that was designated non-critical sensitive by that agency pursuant to 5 C.F.R. § 732.201(a). That agency demoted him to a non-sensitive position based on its decision to deny him eligibility for access to classified information and/or occupancy of a sensitive position. Mr. Northover contends that he was never required to hold a security clearance or to access classified information.

Rhonda Conyers is a GS-5 Accounting Technician with the Defense Finance and Accounting Service in Columbus, Ohio. She occupies a position that was designated non-critical sensitive by that agency pursuant to 5 C.F.R. § 732.201(a). That agency has indefinitely suspended Ms. Conyers based upon a

determination to deny her eligibility for access to classified or sensitive information. Ms. Conyers has filed an appeal of her indefinite suspension with the Board.

Both cases involve the question of whether an adverse action based on the denial or revocation of a security clearance is sufficiently analogous to an adverse action due to revocation of an employee's ability to occupy a sensitive position that case law applicable to adverse actions based on security clearance denials, such as *Department of the Navy v. Egan*, 484 U.S. 518, 530-31 (1988), should apply in these matters. Pursuant to *Egan*, in an appeal under 5 U.S.C. § 7513 based on the denial or revocation of a security clearance, the Board does not have authority to review the substance of the underlying security clearance determination. *Egan*, 484 U.S. at 530-31. Rather, the Board may only decide whether the employee's position required a security clearance, whether the security clearance was denied, whether transfer to a non-sensitive position was feasible, and whether the agency followed the procedural requirements of 5 U.S.C. § 7513. *Id.* We anticipate that the parties will be asked to submit oral argument in these cases, and procedures for that process will follow.

Question to be resolved:

Both *Conyers* and *Northover* raise the question of whether, pursuant to 5 C.F.R., Part 732, National Security Positions, the rule in *Egan* 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. As set forth above, *Egan*, 484 U.S. at 530-31, holds that the scope of Board review of an adverse action based on the revocation of a security clearance is limited.

The Board requests that you provide an advisory opinion on this question and, in doing so, address the particular issues presented in these cases, as well as any other issues you deem pertinent. We note that while we are seeking OPM's interpretation of the regulations it has promulgated, ultimately, these cases present a question of Board jurisdiction that will be determined by the Board.

Policy considerations:

National security positions include those that involve Government activities "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). By designating a position as sensitive under 5 C.F.R. § 732.201(a), an agency has made a judgment that "the . . . occupant could bring about, by virtue of the nature of the position, a material adverse effect on national

security." Therefore, an agency's determination that an individual is not eligible to hold a sensitive position is a serious matter.

Conversely, to construe OPM's National Security Position regulations as meaning that an employee occupying a sensitive position can only obtain limited Board review of an adverse action taken against him based on an agency's determination to deny him continued eligibility for employment in a sensitive position would place a major restriction on the basic procedural rights of untold numbers of employees in the Department of Defense, Department of Homeland Security, and elsewhere in the Federal workforce whose work does not involve access to classified information. It appears that at the Department of Defense, for example, the "sensitive" position designation is not specific to a certain level or type of position, which is why the impact of limiting Board review in this manner could be so far-reaching. *See Crumpler v. Department of Defense*, 2009 MSPR 224, ¶ 2 (the appellant in a case with the same legal issue was removed from a GS-4 Store Associate position); *Brown v. Department of Defense*, 110 M.S.P.R. 593, Separate Opinion of Mary M. Rose, ¶ 1 (2009) (the appellant in a case with the same legal issue was removed from a GS-5 Commissary Contractor Monitor position).

Request for an advisory opinion:

The Board therefore requests that you please provide an advisory opinion to the Clerk of the Board by April 5, 2010 regarding the correct application of the National Security Position regulations, and the propriety of the actions taken by the agency toward the appellants in these matters. The Board further requests that you please serve the parties listed below with a copy of your advisory opinion as well. The parties may file any comments on OPM's advisory opinion with the Clerk of the Board no later than May 5, 2010.

Sincerely,

William D. Spencer
Clerk of the Board

cc: Rhonda K. Conyers
2855 Fairwood Avenue
Columbus, OH 43207

Cynthia Cummings
Department of Defense
Senior Associate Counsel
DFAS - Office of General Counsel
P.O. Box 182317
Building 21 - Room 7812
Columbus, OH 43218-2317

Devon Haughton Northover
1824 Gillespie Drive
Montgomery, AL 36106

Rosa V. Timmons
3302 Ridgefield Drive
Montgomery, AL 36106

Stacey Turner Caldwell
Department of Defense
Defense Commissary Agency
Office of General Counsel
1300 E Avenue
Fort Lee, VA 23801-1800