

United States of America  
Merit Systems Protection Board  
Central Regional Office

Rhonda K. Conyers,  
Appellant,

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

v.

Nina Puglia  
Administrative Judge

Department of Defense,  
Agency.

October 13, 2009

Agency Response

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. Among other things, 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 the 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, or nonsensitive. 32 C.F.R. §

154.13(b). The position at issue in this appeal has been designated "non-critical sensitive."<sup>1</sup> Tab 4a.

Statement of Facts

The pertinent facts of this matter are not in dispute.

Appellant is an Accounting Technician, GS-525-05, for DFAS Columbus. On June 27, 2007, Appellant received a Statement of Reasons (SOR) to Deny Eligibility for Access to Classified Information and/or Occupancy of a Sensitive Position, which was issued by the Washington Headquarters Services (WHS) Consolidated Adjudications Facility (CAF). Tab 4b. Among other things, 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. Information from an investigation of Appellant's personal history, her Questionnaire for Public Trust Positions, [REDACTED] bureau report had led to security concerns and had raised questions about her trustworthiness, reliability, and judgment. Id. Appellant was advised that if the tentative determination later became final, she would not be eligible for access to classified information and/or occupancy of a sensitive position. Appellant was further advised that she could challenge the tentative determination.

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

Appellant acknowledged that she received the SOR. Tab 4c. She chose to challenge the tentative determination by submitting a response through her Agency Security Director. Id.<sup>2</sup>

On February 18, 2009, the CAF denied Appellant's eligibility for access to classified information and/or occupancy of a sensitive position. Tab 4e. On February 26, 2009, Appellant acknowledged that she had received a Letter of Denial of her eligibility for access to classified information and/or occupancy of a sensitive position. Tab 4f. She also requested an appearance before an administrative judge with the Defense Office of Hearings and Appeals (DOHA). Id.

On April 13, 2009, the Agency issued a "Notice of Proposed Indefinite Suspension" (Proposal) to suspend Appellant 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 notice. Tab 4g. The reason for this Proposal was that Appellant was occupying a "non-critical sensitive" position, and the CAF had denied her eligibility for access to sensitive or classified information and/or occupancy of a sensitive position:

Because your official position as a GS-525-5 Accounting Technician requires that you have access to

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<sup>2</sup> Her response included an explanation as to why she had omitted some debts from Item 22b in the Questionnaire for Public Trust. Tab 4d.

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.

Id. There were no vacant nonsensitive positions to which the Agency could temporarily detail or reassign Appellant while her DOHA appeal was pending. Id. Appellant was unable to perform the duties of her Accounting Technician position. Therefore, the Agency proposed to place Appellant on an indefinite suspension without pay until such time as DOHA issued a decision and the Agency could take any necessary follow-on administrative actions related to that decision. Id. Among other things, the Agency advised Appellant that she had the right to submit a written and/or verbal reply to the Notice 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. Id. Because Appellant was no longer qualified to occupy her non-critical sensitive position, the Agency temporarily detailed Appellant to a nonsensitive set of duties. Id.

Although Appellant had the right to reply to the Proposal in writing, she did not do so. Instead, she met briefly with the deciding official, Cassandra McDuff. Tab 4h. Appellant did not indicate to Ms. McDuff that her security clearance had been reinstated.

On September 3, 2009, the Agency 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, GS-0525-5, for an indefinite period of time. Tab 4i. Her suspension was effective September 11, 2009. Tab 4j.

#### Argument

- I. Since the MSPB lacks jurisdiction to review a security clearance, Appellant cannot challenge the Agency's decision to suspend her indefinitely.

In Department of the Navy v. Egan, 484 U.S. 518 (1988), the issue before the court was whether the Merit Systems Protection Board (MSPB or Board) had authority to review the substance of an underlying decision to deny or revoke a security clearance in the course of reviewing a removal action. In Egan, a new laborer at a Navy submarine facility was denied a required security clearance and ultimately removed from his position. He appealed his removal to the MSPB. The MSPB determined that it did not have jurisdiction over an action where the underlying decision involved the granting of a security clearance. Egan v. Department of the Navy, 28 M.S.P.R. 509 (1986). Egan appealed. The Court of Appeals reversed, finding that the MSPB had jurisdiction. Egan v. Department of the Navy, 802 F.2d 1563 (Fed. Cir. 1986).

The Supreme Court agreed with the initial determination that the MSPB made: in an adverse action over which the MSPB has jurisdiction and which is based substantially on the agency's revocation or denial of a security clearance, the MSPB has no authority to review the agency's stated reasons for the security clearance determination.

Accordingly, the MSPB does not have jurisdiction to hear an action challenging the denial, revocation, or suspension of a security clearance. Therefore, the MSPB cannot review the merits of the CAF's decision that denied Appellant's eligibility for assess to sensitive or classified information and/or occupancy of a sensitive position. Egan.

II. Since Appellant's position as an Accounting Technician, GS-525-05 required her to assess sensitive or classified information and the CAF's decision denied Appellant access to sensitive or classified information, the Agency properly suspended Appellant indefinitely.

The Agency determined that the Accounting Technician position, GS-525-05, which Appellant occupied, required a non-critical "sensitive" security clearance. Tab 4a. The CAF had denied her eligibility for assess to sensitive or classified information and/or occupancy of a sensitive position. Tab 4e. Therefore, the Agency properly indefinitely suspended Appellant from her position. Tamburello v. Department of Defense, 2006 MSPB Lexis 5279 (Sept. 5, 2006).

III. Since the Agency provided Appellant with procedural due process, her indefinite suspension was proper.

When an appellant challenges an agency action that is based on the suspension or revocation of a security clearance, the MSPB's authority is limited. Tamburello. The Board can determine: (1) whether the position required a security clearance; (2) whether the employee lost or was denied the security clearance; and (3) whether the employee was given minimal due process rights. Egan. In determining minimal due process, the MSPB is only entitled to 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); Norrap v. Department of the Navy, 87 M.S.P.R. 444, 446 (2001).

Appellant was given the appropriate due process protections when she lost her security clearance. Tabs 4b and 4e. Appellant was given written notice in the SOR of DoD's intent to deny her eligibility for access to classified information and/or occupancy of a sensitive position. Tab 4b. Appellant was given thirty days for her opportunity to respond. Id. When the WHS denied her eligibility for access to classified material and/or

occupancy of a sensitive position, Appellant was given a further opportunity to appeal to the CAB with all pertinent information. Tab 4e.

When Appellant was given the "Notice of Proposed Indefinite Suspension," which outlined the basis for her indefinite suspension, Appellant was given another opportunity to respond orally and/or in writing, and seek legal representation. Tab 4g. However, her security clearance had not been reinstated; therefore, her indefinite suspension was still warranted. Tab 4i. Appellant was given a written decision that indefinitely suspended her from her position. Id. Therefore, the Agency satisfied the procedural requirements.

IV. Since the Agency did not have work available for Appellant to perform without a security clearance, her removal promoted the efficiency of the service because it allowed her superior to replace her with someone who met all the qualifications of the GS-525-4 position.

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 who has lost her security clearance. 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 Egan did not impose on an agency the "obligation, independent of statute or regulation, to transfer

employees who lose their security clearance." Griffin v. Defense Mapping Agency, 864 F.2d 1579, 1580 (Fed. Cir. 1989); Jamil v. Secretary, Department of Defense, 910 F.2d 1203, 1209 (4<sup>th</sup> Cir. 1990).

In the case at bar, no statute or regulation required the Agency to transfer Appellant to another position. Furthermore, the Agency did not have any work available that Appellant could perform without a security clearance. Tab 4c. Therefore, reassignment was not an option. Appellant's removal promoted the efficiency of the Federal service because her removal allowed her supervisor to replace her with someone who met all the qualifications of the GS-525-05 position, including the requirement that the occupant have a non-critical sensitive security clearance, eligibility for access to sensitive or classified information and/or occupancy of a sensitive position. Tamburello.

#### Conclusion

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

Respectfully submitted,

  
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