UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 32

Docket No. CH-0752-08-0415-I-1

Jeanell M. Brown,

Appellant,

v.

Department of Defense,

Agency.

March 12, 2009

Addison L. Chapman, Swansea, Illinois, for the appellant.

James E. Brown, Belleville, Illinois, for the appellant.

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

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

Chairman McPhie issues a separate opinion.
Vice Chairman Rose issues a separate opinion.

ORDER

¶1 This case is before the Board by petition for review of the initial decision which sustained the appellant's removal. The two Board members cannot agree on the disposition of the petition for review. Therefore, the initial decision now becomes the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1200.3(b) (5 C.F.R. § 1200.3(b)). This decision shall

not be considered as precedent by the Board in any other case. 5 C.F.R. § 1200.3(d).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's

"Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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

SEPARATE OPINION OF NEIL A. G. MCPHIE

in

Jeanell M. Brown v. Department of Defense

MSPB Docket No. CH-0752-08-0415-I-1

¶1 I would issue a Final Order because there is no new, previously unavailable, evidence and the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d).

BACKGROUND

¶2 The appellant occupied a position that was designated non-critical sensitive by the agency pursuant to 5 C.F.R. § 732.201(a). After providing the appellant with an opportunity to respond to a tentative decision, the Consolidated Adjudication Facility of the agency's Washington Headquarters Services (CAF WHS) issued a memorandum advising the appellant that her "eligibility for access to classified information and/or occupancy of a sensitive position" had been denied. The agency then proposed and decided to remove the appellant, based on "revocation/denial of your Department of Defense Eligibility to occupy a Position of Trust . . . based solely on your inability to maintain eligibility to occupy a sensitive position." The appellant filed a timely appeal challenging her removal.

¶3 The AJ held that *Department of the Navy v. Egan*, 484 U.S. 518 (1988), governed the case. According to the AJ, *Egan* stands for the proposition that an individual does not have a property right or liberty interest in obtaining or retaining a security clearance, and that the Board is therefore without authority to review the merits of an agency's decision to deny a security clearance to an employee. Per *Egan*, when an employee is removed for failure to maintain a security clearance, Board review is limited to determining whether the agency can meet its burden of proving (1) the appellant's position required a security clearance; (2) her security clearance was denied or revoked; (3) transfer to a

nonsensitive position was not feasible; and (4) the agency followed the procedural requirements of 5 U.S.C. § 7513 in processing the removal action. ID at 5, *citing Egan*, 484 U.S. at 530.

¶4 The AJ acknowledged that the appellant had not been denied a "security clearance" per se, and that the agency had conceded that the appellant's position does not require a "security clearance." Nonetheless, the AJ found that an agency decision to deny an individual eligibility to occupy a position designated sensitive under 5 C.F.R. § 732.201(a) is "virtually identical" to the "security clearance" determination considered by the Supreme Court in *Egan*. In particular, the AJ carefully examined the Supreme Court's reasoning in *Egan* and concluded that it was equally applicable to the circumstances of appellant's case. ID at 3-5. Accordingly, the AJ considered the appeal under the limited standard of review prescribed by *Egan* and affirmed the agency's removal decision. ID at 5-8.

ANALYSIS

¶5 The issue in this case is whether the *Egan* rule limiting the scope of Board review of a removal decision based on the revocation of a security clearance also applies to a removal from a "non-critical sensitive" position due to the employee's having been "denied eligibility for access to classified information and/or occupancy to a sensitive position." An understanding of the Supreme Court's holding and rationale in *Egan* is therefore an essential starting point. The respondent in *Egan* was hired into a position that had been classified as "sensitive" by the agency, with a condition precedent to his employment being his "satisfactory completion of security and medical reports." 484 U.S. at 520. Following procedural safeguards deemed adequate, the respondent was denied a security clearance. Without a security clearance, the respondent was ineligible for the position and he was removed for that reason. *Id* at 521-22. The respondent sought review by the Merit Systems Protection Board pursuant to 5

U.S.C. § 7513(d), and the case ultimately reached the Supreme Court on the question of whether the Board had authority to review the merits of the agency's decision to deny the respondent a security clearance.

¶6 The Court held that the Board does not have such authority, reasoning that the unique role played by the Executive Branch to protect national security precluded the inference without clear direction that Congress granted the Board the authority to review security clearance decisions. The Court explained:

> [The President's] authority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information flows primarily from this constitutional investment of power in the President that exists quite apart from any explicit congressional grant.

Id. at 527. The President, in turn, has delegated to the heads of agencies the responsibility to "protect sensitive information and to ensure proper classification throughout the Executive Branch." Thus, agency heads have authority to classify positions "in three categories: critical sensitive, noncritical sensitive, and nonsensitive. Different types and levels of clearance are required, depending upon the positions sought. A Government appointment is expressly made subject to a background investigation that varies according to the degree of adverse effect the appointment could have on the national security." *Id* at 528.

¶7 Whether to grant a particular employee access to classified information requires a predictive judgment regarding a person's potential future actions. And per the Supreme Court:

> Predictive judgment of this kind must be made by those with the necessary expertise in protecting classified information. . . . [t]he protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it. Certainly, it is not reasonably possible for an outside nonexpert body to review the substance of such a judgment and to decide whether the agency should have been able to make the necessary affirmative prediction

> with confidence. Nor can such a body determine what constitutes an acceptable margin of error in assessing the potential risk. . . . [W]ith respect to employees in sensitive positions "there is a reasonable basis for the view that an 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."

Id. at 529, *quoting*, *Cole v. Young*, 351 U.S. 356, 546 (1956).

¶8 In the instant case, the appellant's position was classified by the agency as non-critical sensitive pursuant to 5 C.F.R. § 732.201(a). Appeal File, Tab 4k, page 1, block 12 of position description. That section directs the head of each agency to designate:

> any position within the department or agency the occupant of which could bring about by virtue of the nature of the position, a material adverse effect on the national security as a sensitive position at one of three sensitivity levels: Special-Sensitive, Critical-Sensitive, or Noncritical-Sensitive.

5 C.F.R. § 732.201(a). The "investigative requirements" for each sensitivity level are provided in OPM issuances. 5 C.F.R. § 732.201(b).

¶9 Consistent with *Egan* and the language and structure of the regulation, it is well settled that the Board does not have authority to review the merits of an agency's designation of a position as a "sensitive position" at one of the three levels. *See Skees v. Department of the Navy*, 864 F.2d 1576, 1578 (Fed. Cir. 1989) (reasoning that if, under *Egan*, "the Board cannot review the employee's loss of security clearance, it is even further beyond question that it cannot review the Navy's judgment that the position itself requires the clearance"); *Bolden v. Department of the Navy*, 62 M.S.P.R. 151, 154 (1994) (holding that "Board is without authority to review the agency's reasons for imposing the security access requirement"); *Brady v. Department of the Navy*, 50 M.S.P.R. 133, 138 (1991) (holding that the Board has no authority to review an agency's decision to classify a position as non-critical sensitive).

¶10 By designating the appellant's position as non-critical sensitive under 5 C.F.R. § 732.201(a), the agency made the unreviewable judgment that "the occupant could bring about, by virtue of the nature of the position, a material adverse effect on the national security." Accordingly, pursuant to 5 C.F.R. § 732.201(b), the agency imposed an appropriate investigative requirement to ensure that the appellant's background did not create, in its judgment, an undue risk to national security. As a result of that investigation, the CAF WHS, an independent branch of the agency, determined that the appellant was ineligible for occupancy in a sensitive position.

¶11 Under these facts, there is no meaningful distinction that would warrant treating the determination that the appellant is ineligible to occupy a sensitive position any different from a determination denying or revoking an employee's security clearance. In *Egan*, the Supreme Court clearly described the precise authority under which the agency here designated appellant's position as sensitive,[1] and went on to include an employee's eligibility to hold such a position as the type of discretionary judgment that is not reviewable by the Board because executive agency heads have authority to classify and control access to information consistent with national security.

---

[1] The Supreme Court cited Executive Order No. 10450, § 3, 3 CFR 937 (1949-1953 Comp.). 484 U.S. at 528. The regulations authorizing agency heads to designate positions as "sensitive" and authorizing OPM to establish investigative requirements for each sensitivity level – 5 C.F.R. §§ 732.201(a) and 732.201(b) -- had not been codified at the time *Egan* was decided. However, Executive Order No. 10450 is the authority for the regulations and their requirements are drawn from the Executive Order. Thus, the Supreme Court clearly had in mind the language now contained in those two regulations when it described the authority of agency heads to classify positions "in three categories: critical sensitive, noncritical sensitive, and nonsensitive. Different types and levels of clearance are required, depending upon the positions sought. A Government appointment is expressly made subject to a background investigation that varies according to the degree of adverse effect the appointment could have on the national security." 484 U.S. at 528.

¶12 The instant case cannot be distinguished from *Egan* on the grounds that "[n]othing in the record . . . suggests that the duties of the position held by the appellant involve access to classified information or to areas restricted to personnel with security clearances." Separate Opinion of Vice Chairman Mary M. Rose ("Rose Opinion"), ¶ 4. Indeed, the Board's judgment as to whether the position involves access to classified information or otherwise implicates national security is irrelevant. Under *Egan*, *Skees* and *Brady*, the Board has no authority to review the agency's decision to designate the appellant's position as noncritical sensitive. Although a reasonable argument could be made that there *should* be some limitation upon or review of an agency's discretion to designate positions under 5 C.F.R. §732(a), that fact does not bear upon whether *the Board* has such authority. *Cf. Hesse v. Department of State*, 217 F.3d 1372, 1380 (Fed. Cir. 2000), *cert. denied*, 531 U.S. 1154 (2001) (in response to argument that an employee who is denied WPA appeal rights to challenge as retaliatory the revocation of his security clearance would have no other recourse, the court observed that "employees typically have internal appeal procedures within their agencies through which to object to adverse decisions on security clearance issues").

¶13 It is also not relevant that the appellant's position did not require a security clearance. As the foregoing discussion shows, *Egan* is not limited to security clearances, *per se*. Its reasoning applies to any access eligibility standard that an agency, in its discretion, chooses to impose on candidates for a position that the agency has designated as sensitive because in the agency's judgment, the occupant of the position could materially, adversely affect national security. Moreover, the term "security clearance" should not be viewed as a term of art, but merely as a semantic device to describe - in the Supreme Court's words - any "background investigation" an employee must undergo and pass before being placed in a position deemed a national security risk. For instance, in *Romero v. Department of Defense*, 527 F.3d 1324 (Fed. Cir. 2008), the court rejected the

argument that the appellant's security clearance was not revoked, on the grounds that "the WHS-CAF's statement that his eligibility 'for access to classified information and to occupy a sensitive position has been revoked' shows that his clearance was revoked." 527 F.3d at 1330 n.2. Notably, this is the precise language used by the agency to describe appellant's loss of eligibility to occupy her "sensitive" position. *See also*, *Tchakmakjian v. Department of Defense*, 57 F. App'x 438, 439-40 (Fed. Cir. 2003) (applying *Egan* standard of review to removal of employee who occupied a position that was designated non-critical sensitive and who was removed when the agency revoked his "security clearance and eligibility to occupy a sensitive position"); *Bolden*, 62 M.S.P.R. at 152, 154 (holding that the Board did not have authority to review the agency's reasons for imposing a "security access requirement or to review the merits of the security access determination" when reviewing the appeal of an employee holding a position that was designated non-critical sensitive and who was indefinitely suspended when his "access to classified information and areas was revoked"); *Brown v. Department of the Navy*, 49 M.S.P.R. 277, 278 (1991) (applying *Egan* standard of review to removal of employee who occupied position that was designated non-critical sensitive and who was removed when his access to "sensitive duties or classified information" was revoked).

¶14 Tellingly, the Vice Chairman's Separate Opinion fails to address how an AJ would weigh the merits of the agency's decision to deny the appellant "eligibility for access to classified information and/or occupancy to a sensitive position." In *Egan* the AJ that originally heard the case held that the Board could review the merits of the security clearance denial, and imposed on the agency the burden to (1) specify the precise criteria used in its security-clearance decision; (2) show that those criteria are rationally related to national security; and (3) prove by a preponderance of the evidence that the acts precipitating the denial of his clearance actually occurred, and that the alleged misconduct has an actual or potentially detrimental effect on national security interests. 484 U.S. at 523.

These standards would obviously require the AJ to make the very determinations that the Supreme Court deemed in *Egan* to be beyond the expertise of the Board. As the Supreme Court explained, "it is not reasonably possible for an outside nonexpert body to review the substance of such a judgment [to deny a security clearance] and to decide whether the agency should have been able to make the necessary affirmative prediction [that the employee did not pose a national security threat] with confidence." 484 U.S. at 529. The absence of an alternative standard that would satisfy *Egan* further demonstrates that Board review of the agency's determination in this case would be incompatible with that controlling Supreme Court precedent.[2]

_____

Neil A. G. McPhie
Chairman

---

[2] Vice Chairman Rose's Separate Opinion lists a number of decisions showing that the Board has exercised authority to review determinations underlying an adverse action notwithstanding *Egan*. Even on the face of the parentheticals accompanying the citations, it is apparent that all but one of these cases did not involve agency decisions implicating national security issues generally, let alone the specific "sensitive" position designation at issue in both *Egan* and the instant case. Rose Opinion, ¶ 6. The one ambiguous parenthetical is for *Adams v. Department of the Army*, 105 M.S.P.R. 50, ¶6, 9-12 (2007), *aff'd*, 273 F. App'x 947 (Fed. Cir. 2008). In *Adams*, the agency removed the appellant after conducting a background check that resulted in the suspension of his access to a computer that was essential to the performance of his job functions. However, the agency conceded that "the information [to which the employee would have access through the computer system] is not classified and has indicated that it does not consider access to that information to be equivalent to possession of a security clearance." 105 M.S.P.R. 50, ¶12. Nor had the position been designated as "sensitive" by the agency. Consequently, the Board found that the appeal did not "involve the national security considerations presented in *Egan*." *Id.* The case is therefore inapposite.

SEPARATE OPINION OF MARY M. ROSE

in

Jeanell M. Brown v. Department of Defense

MSPB Docket No. CH-0752-08-0415-I-1

¶1 I would grant the appellant's petition for review, and would find that the Board has the authority to review the merits of the agency determination on which the appellant's removal is based.

¶2 The appellant was employed in the position of commissary contractor monitor, GS-05, a position the agency had designated "noncritical sensitive." Appeal File, Tab 5, Subtab 4a; *id.*, Subtab 4k at 1. After deciding to deny the appellant "eligibility for access to classified information and/or occupancy of a sensitive position," it removed her based on that decision. Agency Exhibit 3 at 1-3, Appeal File, Tab 18; Appeal File, Tab 5, Subtabs 4c, 4d, 4h. A Board administrative judge sustained the action on appeal after finding that, under *Department of the Navy v. Egan*, 484 U.S. 518, 530-31 (1988), he had no authority to review the agency's reasons for finding the appellant ineligible to hold a sensitive position. Appeal File, Tab 15 at 1-2; Initial Decision at 1, 5-16, Appeal File, Tab 19.

¶3 In *Egan*, 484 U.S. at 530-31, the Supreme Court held that the Board did not have the authority, in an appeal of an adverse action based on the revocation or denial of a security clearance, to review the substance of the security clearance determination, or to require the agency to support the revocation or denial by preponderant evidence, as it would be required to do in other adverse action appeals. In reaching this conclusion, the Court referred to the Executive Branch's "efforts to protect national security information by means of a classification system . . .," *Egan*, 484 U.S. at 527; to the need to commit "the protection of classified information . . . to the broad discretion of the agency responsible," *id.* at 529; and to the '"reasonable basis [it had found] for the view

that an 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,'" *id.* (quoting *Cole v. Young*, 351 U.S. 536, 546 (1956)).

¶4 Clearly, the Court's decision in *Egan* is based on agencies' special responsibilities for safeguarding classified information, and on their consequent need to exercise discretion in deciding which of their employees should be granted access to that information, i.e., in deciding which of their employees should be granted security clearances. Nothing in the record of the present appeal, however, suggests that the duties of the position held by the appellant involve access to classified information or to areas restricted to personnel with security clearances. *Cf.* PFR at 5 (the appellant's statement that she has "never . . . worked with classified information"). In fact, despite the designation of her position as "noncritical sensitive," and despite the suggestion in an agency instruction that incumbents of such positions generally are investigated for security clearances, the agency acknowledges that the appellant's position did not require a security clearance. *See* Appeal File, Tab 13 (order summarizing prehearing telephone conference) at 2.[1]

---

[1] The Washington Headquarters Services Administrative Instruction No. 23, "Personnel Security Program and Civilian Personnel Suitability Investigation Program" (Dec. 20, 2006), http://www.dtic.mil/whs/directives/corres/pdf/a023.pdf, provides, in paragraph 5.1.2.2., that "[n]ominees for Noncritical-Sensitive positions shall be required to submit the forms for the completion of an Access [National Agency Check With Inquiries]," and that "[f]avorable adjudication shall result in the issuance of a SECRET clearance or CONFIDENTIAL eligibility." Neither this instruction nor any other authority of which I am aware, however, provides that positions designated "noncritical sensitive" may be held only by persons holding security clearances.

I note further that the employee in *Egan* held a position that, like that of the appellant in the present case, was designated as "noncritical sensitive." *See Egan*, 484 U.S. at 521. The Supreme Court's findings regarding the limited nature of the Board's review in that case were based on the requirement that the employee hold a security clearance, however, and, as I have noted above, on the government's need to protect the classified national security information to which the employee had access. *See id.* at 527-30.

¶5 The *Egan* exception for security clearance determinations is not the only one limiting the Board's review of underlying reasons for adverse actions. The Board has noted that the military system is separate from the civilian system, with separate rules, regulations, procedures, and other considerations. *See Siegert v. Department of the Army*, 38 M.S.P.R. 684, 690 (1988). For this reason, it has held that it lacks the authority to review "wholly military determinations." *Id.* For example, in a case in which an employee's removal is based on his loss of membership in the active military reserve, it does not consider the merits of military personnel decisions resulting in that membership loss. *See, e.g., Buriani v. Department of the Air Force*, 777 F.2d 674, 675-77 (Fed. Cir. 1985); *Butler v. Department of the Air Force*, 73 M.S.P.R. 313, 318 (1997); *Schaffer v. Department of the Air Force*, 9 M.S.P.R. 305, 309 (1981), *aff'd*, 694 F.2d 281 (D.C. Cir. 1982) (Table). It also has held that it lacks the authority to look behind certain determinations made by authorities outside the employing agency. For example, it does not reexamine the reasons behind a criminal conviction in order to determine the innocence or guilt of an appellant whose adverse action was based on such a conviction, and it does not examine the reasons for bar decertification when such an action was the basis for an appellant's removal. *Egan v. Department of the Navy*, 28 M.S.P.R. 509, 517-18 (1985) (citing *Crofoot v. United States Government Printing Office*, 21 M.S.P.R. 248, 252 (1984), *rev'd on other grounds*, 761 F.2d 661, 665 (Fed. Cir. 1985),[2] and *McGean v. National Labor Relations Board*, 15 M.S.P.R. 49 (1983)), *aff'd*, 868 F.2d 1277 (Fed. Cir. 1988) (Table).

Nothing in *Egan* indicates that the designation itself was sufficient to preclude Board review of the merits of the determination underlying the employee's removal.

[2] The Board subsequently overruled *Crofoot* to the extent that that decision limited the collateral estoppel effect of crimes for which employees were convicted pursuant to an *Alford* plea. *Loveland v. United States Air Force*, 34 M.S.P.R. 484, 490 n.6 (1987). Nothing in the decision overruling *Crofoot* indicates that the holdings cited above are not applicable here. *See id.* at 488-90 & n.6.

¶6 Exceptions such as those described above, however, are limited. The general rule is that the Board's review of the merits of an adverse action includes a review of any determination underlying that action. *See Egan*, 28 M.S.P.R. at 517 n.5. For example, the Board has held that, despite *Egan*, it has the authority to review the decision of an agency credentials committee to revoke an employee's clinical privileges, when that revocation was the basis for the employee's removal. *Siegert*, 38 M.S.P.R. at 687-91; *see also Cosby v. Federal Aviation Administration*, 30 M.S.P.R. 16, 18-19 (1986) (the Board had the authority to review the validity of a medical determination underlying the removal of an air traffic control specialist). It also has held that *Egan* does not preclude its review, in an appeal of a removal for "failure to maintain access to the Command Computer system," of the propriety of the agency's denial of access to sensitive personnel information, *Adams v. Department of the Army*, 105 M.S.P.R. 50, ¶¶ 6, 9-12 (2007), *aff'd*, 273 F. App'x 947 (Fed. Cir. 2008); that it has the authority to review a security guard's disqualification from the Chemical Personnel Reliability Program based on his alleged verbal assault on a security officer, *Jacobs v. Department of the Army*, 62 M.S.P.R. 688, 689 (1994); and that it has the authority to review an employee's disqualification under the agency's Personnel Reliability Program based on his allegedly negligent conduct, *Dodson v. Department of the Army*, 35 M.S.P.R. 562, 564 (1987).

¶7 The eligibility determination on which the removal at issue here was based is no more analogous to the denial of a security clearance than are the determinations the Board found, in the cases cited in the preceding paragraph, it had the authority to review. I note, in connection with this matter, that the agency presented hearing testimony that the appellant worked at the commissary at times when it was closed to the public, and that she was responsible for ensuring that doors were locked and that only authorized personnel were permitted to enter the facility. *See* Hearing Tape 1, Sides A, B. The record indicates, however, that agency officials regarded these responsibilities as

sensitive because of the need to protect the store's valuable inventory, and not for any national security reasons. *See id.*, Side A. The appellant's duties with respect to store security appear to be similar to those of security guards, police officers, and others entrusted with the responsibility of safeguarding agency property and personnel. The Board routinely reviews agency determinations underlying removals of such employees. *See, e.g.*, *Jacobs*, 62 M.S.P.R. at 689; *Crawford v. Department of the Treasury*, 56 M.S.P.R. 224, 226, 230-32 (1993) (removal of a supervisory police officer for failing to file tax returns, a failure that violated the agency's minimum standards of conduct).

¶8 The agency also presented testimony that the appellant had access to a computer and could "potentially gain access to numerous computer programs." Hearing Tape 1, Side A. The appellant's access appears to have presented security concerns only because of potential financial losses or privacy issues, however, and not because of any threat the access might pose to national security. The only computer programs mentioned in this testimony were those related to "the personnel program, the pricing, billing, inventory, ordering." *Id.* A decision to deny the appellant computer access therefore would appear to be similar to underlying determinations the Board has reviewed in other cases. *See, e.g.*, *Adams*, 105 M.S.P.R. 50, ¶¶ 13-17.

¶9 In addition, an agency witness testified that the commissary was located on a military installation, and that the incumbent of the appellant's position "could have some knowledge of troop movements, certainly of troop levels, especially if a product was sharply increased or decreased, it may give some indication of troop levels on the base."[3] Hearing Tape 1, Side A. The agency does not require

[3] Under 5 C.F.R. § 732.102(a), the term "national security position" includes positions that require regular use of or access to classified information, and those "that involve activities of the Government that are concerned with the protection of the nation from foreign aggression or espionage . . . ." While the agency indicated in its prehearing brief that issues in the case included whether the "appellant's position [was] designated as a sensitive national security position consistent with 5 CFR 732.201 and Executive

the incumbent of that position to hold a security clearance, however, as we have noted above; and there evidently are positions at the commissary where the appellant was employed that the agency does not regard as sensitive. *See* Hearing Tape 1, Sides A, B. Moreover, the testimony that the appellant might gain knowledge of troop levels on the base from the amounts of products the commissary purchased or sold seems speculative at best. A casual observer of traffic near the base would appear likely to gain equivalent information. Nothing in the record supports the proposition that the information to which the appellant had access in her position was similar to classified information.

¶10 For the reasons stated above, I do not believe *Egan* supports a finding that the Board lacks the authority to review the determination underlying the appellant's removal. I also see no other basis for concluding that the Board is precluded from reviewing the merits of that underlying agency determination. Obviously, the determination was made by the agency itself, rather than by an outside authority. It therefore is not analogous to a criminal conviction or a bar decertification. In addition, it is not a "wholly military determination." Instead, it was made under a system and procedures that are applicable to civilian federal employees. *See, e.g.*, Agency Exhibit 2 (policy establishing procedures for denials of eligibility), Appeal File, Tab 12.

¶11 I do not question the authority of the agency to determine the sensitivity level of its positions, to investigate its own personnel, and to make determinations concerning their eligibility for their positions. As I have indicated above, however, employees who are entitled to appeal their removals to the Board are entitled to a review of the reasons for those actions and, with limited exceptions, to a review of the merits of the determinations underlying those

---

Order 10450," Appeal File, Tab 12 at 2, it does not appear to have argued specifically that the position was a "national security position" as that term is defined in that section.

reasons. Because the determination underlying the removal at issue here does not fall within any of those limited exceptions, I would find that the administrative judge erred in declining to review the merits of that determination.

¶12 For the reasons stated above, I would vacate the part of the initial decision in which the administrative judge sustained the charge against the appellant, and I would remand the appeal for further adjudication. *See Siegert*, 38 M.S.P.R. at 690 (in finding that it had the authority to review the merits of a decision revoking an employee's clinical privileges, the Board noted that an agency could not, through its own action, take away the Board's jurisdiction under 5 U.S.C. chapter 75).[4]

_____
Mary M. Rose
Vice Chairman

[4] I would find no error in the appellant's due process claims, and would affirm the initial decision as it concerns those claims.