UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 248

Docket No. AT-0752-10-0184-I-1

Devon Haughton Northover,

Appellant,

v.

Department of Defense,

Agency.

December 22, 2010

Andres M. Grajales, Esquire, Washington, D.C., for the appellant.

Stacey Turner Caldwell, Esquire, Fort Lee, Virginia, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member
Member Rose issues a dissenting opinion.

OPINION AND ORDER

¶1 This appeal is before the Board on interlocutory appeal from the April 2, 2010 order of the chief administrative judge (CAJ) of the Board's Atlanta Regional Office. The CAJ stayed the proceedings and certified for Board review his ruling that he would apply the limited scope of Board review set forth in *Department of the Navy v. Egan*, 484 U.S. 518, 530-31 (1988), in adjudicating the appellant's reduction in grade. For the reasons discussed below, we REVERSE the CAJ's ruling, VACATE the stay order, and RETURN the appeal to the CAJ for further adjudication consistent with this Opinion and Order.

BACKGROUND[1]

¶2 Effective December 6, 2009, the agency reduced the appellant in grade from the competitive service position of GS-1144-07 Commissary Management Specialist (CAO) to part-time GS-1101-04 Store Associate at the Defense Commissary Agency (DCA).[2] Interlocutory Appeal File (IAF), Tab 4, Subtabs 4b, 4d, 4e. The agency took the action "due to revocation/denial of your Department of Defense eligibility to occupy a sensitive position." *Id.*, Subtab 4e at 1. In its notice of proposed demotion, the agency stated that the appellant was in a position which was "designated as a sensitive position," and that its Washington Headquarters Services (WHS), Consolidated Adjudications Facility (CAF) had denied him "eligibility for access to classified information and/or occupancy of a sensitive position." *Id.*, Subtab 4h at 1.

¶3 The appellant filed a Board appeal of his reduction in grade. IAF, Tab 1. In responding to the appeal, the agency asserted that: (1) Pursuant to Executive Order No. 10,450, as amended, and 5 C.F.R. Part 732, it had designated the Commissary Management Specialist (CAO) position a "moderate risk" national security position with a sensitivity level of "non-critical sensitive" (NCS); (2) under *Egan*, the Board is barred from reviewing the merits of an agency's "security-clearance/eligibility determination;" and (3) the *Egan* limited scope of Board review applies to the decision to deny an individual eligibility to occupy a national security position. *Id.*, Tab 4, Subtab 1 at 1, 4-5.

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[1] In deciding this interlocutory appeal, we have relied on the current evidentiary record, the undisputed allegations of the parties, and the parties' stipulations. Because the record is not fully developed, the CAJ should reopen the record when deciding the appeal. Except for the parties' stipulations, he may reexamine any factual matter mentioned in this Opinion and Order. *See, e.g., Olson v. Department of Veterans Affairs*, 92 M.S.P.R. 169, ¶ 2 n.1 (2002).

[2] The appellant was a permanent employee with a service computation date of September 8, 2002. Interlocutory Appeal File, Tab 4, Subtab 4b.

¶4 On April 2, 2010, the CAJ issued a Ruling on Motions for Clarification of Burdens of Proof and Certification for Interlocutory. IAF, Tab 16. He noted that the agency contended the limited scope of Board review set forth in *Egan* applied to this appeal and that the appellant urged the Board not to apply or expand *Egan*. *Id.* at 1-2. The CAJ ruled that he was bound by the *Egan* limitations and certified his ruling to the Board on his own motion after finding that the regulatory requirement for certifying his ruling had been satisfied. He stayed the proceeding pending the Board's resolution of the certified issue. *Id.* at 3.

¶5 The Board found that this interlocutory appeal presented the same legal issue as that presented by the interlocutory appeal in *Conyers v. Department of Defense*, MSPB Docket Nos. CH-0752-09-0925-I-1 and CH-0752-09-0925–I-2. The Board determined that, before deciding these appeals, it was appropriate to permit the Office of Personnel Management (OPM) and interested amici to express their views on the issue. The Board therefore asked OPM to provide an advisory opinion interpreting its regulations in 5 C.F.R. Part 732, National Security Positions. IAF, Tab 6. In doing so, the Board stated that the appellant occupied a position that the agency had designated NCS pursuant to 5 C.F.R. § 732.201(a), *id.* at 1,[3] and that the appeal "raise[d] 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 [NCS] position due to the employee having been denied continued eligibility for employment in a sensitive position," *id.* at 2. The Board also issued a notice of opportunity to file amicus briefs in these appeals. 75 Fed. Reg. 6728 (Feb. 10, 2010). OPM submitted an advisory

[3] The CAJ found that the agency had classified the Commissary Management Specialist (CAO) position as NCS, IAF, Tab 16 at 2, and the Board repeated this in its request to OPM, *id.*, Tab 6. The appellant asserted, however, that his position was not classified as NCS. *See, e.g.*, IAF, Tab 14 at 1 n.1, Tab 22, Comments at 6 n.1. Because of the interlocutory appeal, the parties were not given an adequate opportunity to address this factual matter below. Therefore, if necessary, the CAJ should address the issue on return of this appeal.

opinion and a supplementary letter, five amici submitted briefs,[4] and the parties submitted additional argument. IAF, Tabs 8-11, 13-15, 21-22.

¶6 On September 21, 2010, the Board held oral argument in *Conyers* and *Northover*.[5] The Board heard argument from the appellants' representative, the agency's representatives, and representatives for the amici from the Government Accountability Project and the National Treasury Employees Union.[6] The Board allowed the parties and amici to submit written closing arguments by October 5, 2010. Tr. at 79; IAF, Tab 44. The parties, the National Treasury Employees Union, and the Government Accountability Project submitted closing arguments. IAF, Tabs 45-46, 48-49. In addition, on October 5, 2010, the Office of the Director of National Intelligence (ODNI), Office of General Counsel requested an opportunity to file an "advisory opinion," *id.*, Tab 47, and the Board granted ODNI an opportunity to submit a statement presenting its position, *id.*, Tab 50. The Board also provided the parties and amici with an opportunity to reply to ODNI's filing. *Id.* ODNI filed a statement and the appellant filed a response to the statement. *Id.*, Tabs 51, 52. The record closed on October 25, 2010. *Id.*, Tab 50. The Board has considered the entire record in ruling on this interlocutory appeal.

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[4] The five amici are the American Federation of Government Employees, which also represents the appellant; the National Treasury Employees Union; the National Employment Lawyers Association/Metropolitan Washington Employment Lawyers Association; the Equal Employment Opportunity Commission; and the Government Accountability Project. IAF, Tab 8-11, 13.

[5] The agency submitted several motions to dismiss the appeal as moot, which were opposed by the appellant. The Board denied these motions on the basis that the agency failed to meet the criteria for finding the appeal moot. IAF, Tabs 28-29, 35-36, 42-44. While continuing to so argue, *id.*, Tab 46, Br. at 1 n.1, the agency has nevertheless failed to demonstrate that this appeal is moot for the reasons the Board explained in its previous orders. If necessary, the CAJ should address the mootness issue on return of this appeal.

[6] OPM declined the Board's invitation to present oral argument. IAF, Tab 31, Transcript (Tr.) at 4.

ANALYSIS

The CAJ properly certified his ruling for review on interlocutory appeal.

¶7 An interlocutory appeal is an appeal to the Board of a ruling made by an administrative judge during a proceeding. An administrative judge may certify an interlocutory appeal if he determines that the issue presented is of such importance to the proceeding that it requires the Board's immediate attention. Either party may make a motion for certification of an interlocutory appeal, or the administrative judge may certify an interlocutory appeal on his own motion. If the appeal is certified, the Board will decide the issue and the administrative judge will act in accordance with the Board's decision. *See* 5 C.F.R. § 1201.91.

¶8 An administrative judge will certify a ruling for review if the record shows that the ruling involves an important question of law or policy about which there is substantial ground for difference of opinion; and an immediate ruling will materially advance the completion of the proceeding, or the denial of an immediate ruling will cause undue harm to a party or the public. *See* 5 C.F.R. § 1201.92. An administrative judge has the authority to stay the hearing while an interlocutory appeal is pending with the Board. 5 C.F.R. § 1201.93(c).

¶9 We find that the requirements for certifying a ruling on interlocutory appeal have been satisfied in this appeal. Previously, in *Crumpler v. Department of Defense*, 113 M.S.P.R. 94 (2009),[7] the Board recognized that the legal issue presented here would have potentially far-reaching implications across the federal civil service. *Id.*, ¶ 6. Thus, the CAJ's ruling involves an important question of law or policy. Moreover, we find that there is substantial ground for difference of opinion concerning the question of whether the limited scope of Board review set forth in *Egan* applies here and that an immediate ruling will materially advance the completion of the proceeding. Therefore, the CAJ properly certified

[7] A settlement agreement was reached in *Crumpler* before the Board had the occasion to address the issue.

his ruling for review on interlocutory appeal. *See, e.g.*, *Fitzgerald v. Department of the Air Force*, 108 M.S.P.R. 620, ¶ 6 (2008).

This appeal does not warrant application of the limited Board review prescribed in *Egan*.

¶10 In creating the Merit Systems Protection Board, Congress expressly mandated that the Board adjudicate all matters within its jurisdiction. 5 U.S.C. § 1204. Congress further provided that an employee, as defined in 5 U.S.C. § 7511, against whom certain adverse actions are taken, has the right to invoke the Board's jurisdiction under 5 U.S.C. § 7701. 5 U.S.C. § 7513(d). Such appealable adverse actions include reductions in grade. 5 U.S.C. § 7512(3). Congress also clearly delineated the scope of our review in non-performance adverse action appeals by requiring that the Board determine whether the agency's decision is supported by preponderant evidence and promotes the efficiency of the service, and whether the agency-imposed penalty is reasonable. *See* 5 U.S.C. §§ 7513(a); 7701(b)(3) and (c)(1);[8] *Gregory v. Department of Education*, 16 M.S.P.R. 144, 146 (1983). More specifically, in appeals such as this, when the charge involves an agency's withdrawal of its certification or approval of an employee's fitness or other qualification for the position, the Board has consistently recognized that its adjudicatory authority extends to a review of the merits of that withdrawal. *See Adams v. Department of the Army*, 105 M.S.P.R. 50, ¶ 10 (2007), *aff'd*, 273 F. App'x 947 (Fed. Cir. 2008).

¶11 The instant appeal falls squarely within our statutory jurisdiction. Specifically, at the time of the action giving rise to this matter, the appellant had been a permanent employee in the competitive service with a service computation date of September 8, 2002. IAF, Tab 4, Subtab 4b. He therefore comes within

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[8] The Board's review may also include assessing whether, when taking the adverse action, an agency has engaged in a prohibited personnel practice such as, e.g., race discrimination, disability discrimination, or reprisal for protected whistleblowing. 5 U.S.C. §§ 7701(c)(2)(B), 2302(b).

the definition of "employee" in 5 U.S.C. §§ 7511(a)(1)(A)(ii), which the agency does not dispute. On December 6, 2009, DCA reduced him in grade from his position of GS-1144-07 Commissary Management Specialist (CAO) to part-time GS-1101-04 Store Associate. *Id.*, Subtabs 4b, 4d, 4e. That reduction in grade constitutes an appealable action under 5 U.S.C. §§ 7512(3), 7513(b).

¶12 The agency contends, however, that because this appeal involves the denial of eligibility to occupy an NCS position, it is subject only to the limited review prescribed by the Supreme Court in *Egan*. IAF, Tab 4, Subtab 1 at 4-5, Tab 5, Resp. at 1-2, Tab 46, Br. at 1-4, 7-10. In *Egan*, the Court limited the scope of Board review in an appeal of an adverse action based on the revocation or denial of a "security clearance." There, the Court held that the Board lacks the authority to review the substance of the security clearance determination, or to require the agency to support the revocation or denial of the security clearance by preponderant evidence, as it would be required to do in other adverse action appeals. Rather, the Court found that the Board has authority to review only whether the employee's position required a security clearance, whether the clearance was denied or revoked, whether the employee was provided with the procedural protections specified in 5 U.S.C. § 7513, and whether transfer to a nonsensitive position was feasible. 484 U.S. at 530-31; *see also Hesse v. Department of State*, 217 F.3d 1372, 1376 (Fed. Cir. 2000).

¶13 During the course of this interlocutory appeal, the parties stipulated[9] as follows concerning security clearances and access to classified information:

> The parties agree that the positions held by appellants Conyers and Northover did not require the incumbents to have a confidential, secret or top secret clearance. The parties also agree that the positions held by appellants Conyers and Northover did not require the incumbents to have access to classified information.

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[9] Parties may stipulate to any matter of fact, and the stipulation will satisfy a party's burden of proving the fact alleged. *See* 5 C.F.R. § 1201.63.

IAF, Tab 27. In other words, the appellant is not required to have a security clearance and he is not required to have access to classified information. Therefore, we conclude that *Egan* does not limit the Board's statutory authority to review the appellant's reduction in grade appeal. We further conclude that *Egan* limits the Board's review of an otherwise appealable adverse action only if that action is based upon a denial, revocation, or suspension of a "security clearance," i.e., involves a denial of access to classified information or eligibility for such access, as we more fully explain below.

¶14 We therefore direct the CAJ, on return of this appeal, to conduct a hearing consistent with the Board's statutory duty to determine whether the appellant's reduction in grade is supported by a preponderance of the evidence, promotes the efficiency of the service and constitutes a reasonable penalty. *See* 5 U.S.C. §§ 7513(a), 7701(b)(3) and (c)(1). As contemplated by the Board's statutory mandate and our precedent, this adjudicatory authority extends to a review of the merits of the agency's denial of the appellant's eligibility to occupy an NCS position. *See Adams*, 105 M.S.P.R. 50, ¶ 10.

¶15 In *Egan*, the Court characterized its decision as addressing the "*narrow question* presented by this case [namely] whether the [Board] has authority by statute to review the substance of an underlying decision to deny or revoke a security clearance in the course of reviewing an adverse action." 484 U.S. at 520 (emphasis added). In holding that it did not, the Court relied primarily on the premise that the President, as Commander in Chief under the Constitution, had authority to classify and control access to information bearing on national security and that such authority exists apart from any explicit Congressional grant. It concluded therefore that "the grant of security clearance to a particular employee . . . is committed by law to the appropriate agency of the Executive Branch." *Id.* at 527. The Court thus found 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)).

¶16 We believe that the *Egan* Court's limitation of the Board's statutory review authority must be viewed narrowly, most obviously because the Court itself so characterized its holding in that case. Moreover, the Court's rationale rested first and foremost on the President's constitutional authority to "classify and control access to information bearing on national security" and does not, on its face, support the agency's effort here to expand the restriction on the Board's statutory review to any matter in which the government asserts a national security interest. *Egan*, 484 U.S. at 527-528. In fact, although Mr. Egan held a position that was designated as NCS, *Egan*, 484 U.S. at 521, the Court's limitation of Board review was based on the requirement that he hold a security clearance and on the government's need to protect the classified information to which he had access. *Id.* at 527-30. Nothing in *Egan* indicates that the Court considered the NCS designation alone as sufficient to preclude Board review of the merits of the determination underlying Mr. Egan's removal.[10]

¶17 Nor is there any basis upon which to assume that the Court in *Egan* used the term "security clearance" to mean anything other than eligibility for access to, or access to, classified information. In that regard, we note that the words "security clearance" historically have been used as a term of art referring to access to classified information, and they are not synonymous with eligibility to occupy a sensitive position. *See, e.g., Jones v. Department of the Navy*, 978 F.2d

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[10] In *Egan*, the Department of the Navy's designation of a position as "noncritical-sensitive" was defined by the applicable Chief of Naval Operations Instruction to include "[a]ccess to Secret or Confidential information." 484 U.S. at 521 n.1. By contrast, here, the agency's designation of the appellant's position as NCS pursuant to OPM regulations includes no such requirement for access to, or eligibility for access to, any classified information. Indeed, the parties stipulated that the appellant is not required to have a security clearance and he has no need for access to any classified information.

1223, 1225 (Fed. Cir. 1992) (quoting *Hill v. Department of the Air Force*, 844 F.2d 1407, 1411 (10th Cir. 1988) and describing a "security clearance [as] merely temporary permission by the Executive for access to national secrets"). The agency's use of the term "security clearance" "in the vernacular" to refer to all background investigations, Tr. at 40-42, and its assertion that "security clearance decisions are but one variety of agency national security determinations," IAF, Tab 46, Br. at 2, does not change the meaning of "security clearance" as determined by the Court in *Egan*.

¶18 Executive Order No. 12,968 (Aug. 2, 1995) ("Access to Classified Information"), although failing to provide an explicit definition of "security clearance," pertinently provides that "[n]o employee shall be granted access to classified information unless that employee has been determined to be eligible in accordance with this order and to possess a need-to-know." *Id.*, Section 1.2 (a). Executive Order No. 12,968 further provides that employees shall not be granted access to classified information unless they have: (1) Been determined "eligible" for access by "agency heads or designated officials" under Section 3.1 "based on a favorable adjudication of an appropriate investigation of the employee's background;" (2) a demonstrated need-to-know; and (3) signed a nondisclosure agreement. *Id.*, Section 1.2(c)(1)-(3). The Department of Defense Personnel Security Program Regulation, consistent with the above, defines "security clearance" as "[a] determination that a person is eligible under the standards of [32 C.F.R. Part 154] for access to classified information." 32 C.F.R. § 154.3(t). We thus conclude that *Egan* limits the Board's statutory review of an appealable adverse action only when such review would require the Board to review the substance of the "sensitive and inherently discretionary judgment call . . . committed by law to the . . . Executive Branch" when an agency has made a determination regarding an employee's access to classified information, i.e., a decision to deny, revoke or suspend access, or eligibility for access to classified

information. *Egan*, 484 U.S. at 527. Our use of the term "security clearance" in this Opinion and Order includes this specific understanding.[11]

¶19 Furthermore, prior to the Board's now vacated decision in *Crumpler v. Department of Defense*, 112 M.S.P.R. 636 (2009), *vacated*, 113 M.S.P.R. 94 (2009), the Board had long considered *Egan*'s restriction on its statutory review as confined to adverse actions based on security clearance revocation and refused to extend the restriction to non-security clearance appeals where the actions arguably implicated national security. *See, e.g., Jacobs v. Department of the Army*, 62 M.S.P.R. 688 (1994); *Adams*, 105 M.S.P.R. 50. In *Jacobs*, the Board held that it had the authority to review a security guard's disqualification from the Chemical Personnel Reliability Program based on his alleged verbal assault of a security officer. 62 M.S.P.R. at 689-90, 694. The Board stated:

> The role of protecting that national chemical weapons program is, without doubt, a very important role. The importance of that role, however, should not divest civilian employees who work in that program of the basic employment protections guaranteed them under law. Neither should the 'military' nature of such employment, nor should the program's requirements for the ability to react to changing situations with dependability, emotional stability, proper social adjustment, sound judgment, and a positive attitude toward program objectives and duly constituted authority.

Id. at 694. The Board explicitly found as follows:

> The Supreme Court's decision in *Egan* was narrow in scope and specifically applied only to security clearance revocations. As the

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[11] Member Rose suggests in dissent that when the *Egan* Court used the term "security clearance," it did not use it as a term of art limited to the grant of access to, or eligibility for access to, classified information. Rather, she suggests that *Egan*, "when read as a whole," shows that the Court was more generally concerned with any "discretionary national security judgments committed to agency heads, regardless of whether the employee … needed access to classified information as part of his job." As we thoroughly explain in our opinion today, such an expansive reading of *Egan* ignores the facts and much of the analysis in *Egan*, numerous decisions of the Federal Circuit and Board interpreting *Egan* over the last 20 years, as well as the definition of security clearance found in the Department of Defense's own regulations.

> protector of the government's merit systems, the Board is not eager to expand the scope of the rationale in *Egan* to divest federal employees whose positions do not require a security clearance of basic protections against non-meritorious agency actions.

Id. at 695.

¶20 In *Jacobs*, the Board further addressed the agency's concern, expressed also in this appeal, IAF, Tab 46, Br. at 3-4, 7, that, as an outside non-expert body, the Board should not second-guess its attempts to predict the appellant's future behavior. The Board found that most of the removal actions taken by agencies are based at least in part on an attempt to predict an employee's future behavior. It noted that, in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981), the Board set forth a range of factors that an agency should consider in making a penalty determination, which included an estimate of the employee's rehabilitation potential. The Board found that the basis of progressive discipline is that an employee who has engaged in repeated misconduct will be likely to do so again in the future. Thus, when an agency acts based on such predictive judgments in imposing a penalty, the Board is required by its statutory mandate to evaluate the propriety of those agency judgments.[12] *Douglas* and *Jacobs* are not isolated cases, as the Board's case law is replete with decisions in which the Board has reviewed an agency's predictions regarding an employee's future conduct and potential for rehabilitation. *Jacob*s, 62 M.S.P.R. at 695.

¶21 Similarly, in *Adams*, the Board found that *Egan* did not preclude its review of the propriety of the agency's denial of access to sensitive personnel information in an appeal of a human resources assistant's removal for "failure to maintain access to the Command computer system." 105 M.S.P.R. 50, ¶¶ 6, 9-12. The Board acknowledged the agency's argument, similar to that made in this appeal, IAF, Tab 46, Br. at 1-4, 7-10, that the suspension of computer access was

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[12] The record before us lacks evidence of any "delicate national security judgments that are beyond [the Board's] expertise" as suggested by the dissent.

not an appealable adverse action, that the federal government had not waived its sovereign immunity from challenges to such actions, and that the Board's authority to review those actions was barred under *Egan*. *Adams*, 105 M.S.P.R. 50, ¶ 9. But the Board found no merit to those arguments. It noted that the agency did not deny that, in 5 U.S.C. § 7513, Congress has authorized the Board to adjudicate removals. As previously noted, it found that adjudication of such an appeal requires the Board to determine whether the agency has proven the charge or charges on which the removal is based; and, when the charge consists of the employing agency's withdrawal or revocation of its certification or other approval of the employee's fitness or other qualifications to hold his position, the Board's authority generally extends to a review of the merits of that withdrawal or revocation. *Id.*, ¶ 10.

¶22 In *Adams*, the Board acknowledged "narrow exceptions" to the Board's authority to review the merits of agency determinations underlying adverse actions, and found that one such exception was addressed in *Egan*. It distinguished *Egan*, however, as follows:

> The present appeal does not involve the national security considerations presented in *Egan*. While the agency's computer system provides employees with access to sensitive information, the agency has acknowledged that the information is not classified and has indicated that it does not consider access to that information to be equivalent to possession of a security clearance. . . . The decision to suspend the appellant's computer access is similar instead to determinations the Board has found it has the authority to review.

Adams, 105 M.S.P.R. 50, ¶ 12.[13]

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[13] In addition to *Jacobs* and *Adams*, 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 v. Department of the Army*, 38 M.S.P.R. 684, 687-91 (1988); and to review the validity of a medical determination underlying the removal of an air traffic control specialist, *Cosby v. Federal Aviation Administration*, 30 M.S.P.R. 16, 18-19 (1986).

¶23 In addition to our longstanding precedent, however, we are guided by the Supreme Court's opinion in *Cole v. Young*, 351 U.S. 536 (1956),[14] cited with approval in *Egan*, 484 U.S. at 529, which provides persuasive and considerable support for viewing *Egan* as narrowly limited to appeals involving security clearances. There, the Court addressed whether the removal of a preference-eligible veteran employee of the Department of Health, Education, and Welfare was authorized under the Act of August 26, 1950 (the Act).[15] In ruling that

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[14] Member Rose sees little value in the Supreme Court's *Cole* decision, in part because it was decided in 1956, "22 years before the Civil Service Reform Act." As we note in our decision, though, *Cole* specifically addressed the "Act of August 26, 1950," the predecessor to 5 U.S.C. § 7532. Further, Executive Order No. 10,450, significantly relied on by the dissent, was promulgated in 1953 to implement the 1950 Act. In addition, the relevant regulations issued by OPM, and relied on by Member Rose to find that the Board lacks authority to review the adverse action at issue, are based on Executive Order No. 10,450, and OPM has advised the Board that the regulations do not create or diminish any employee appeal rights.

[15] The Act was the precursor to 5 U.S.C. § 7532 and gave to the heads of certain government departments and agencies summary suspension and unreviewable dismissal powers over civilian employees when deemed necessary "in the interest of the national security of the United States." This express provision within the Civil Service Reform Act (CSRA) for accommodating national security concerns further undermines the agency's claim that the President's constitutional authority as Commander in Chief preempts our statutory review. The argument is tenuous, at best, insofar as it rests upon the misguided premise that the President alone possesses power in the area of national security. Instead, the Constitution gives Congress the power "to declare war" (Art. 1, sec. 8, cl. 11), "to raise and support Armies" (Art. 1, sec. 8, cl. 12), "to provide and maintain a Navy" (Art. 1, sec. 8, cl. 13), and "to make Rules for the Government and Regulation of the land and naval Forces" (Art. 1, sec. 8, cl. 14), and, thus, plainly establishes that Congress also has authority with regard to ensuring national security. *Cf. U.S. v. North*, 708 F. Supp. 380, 382 (D.D.C. 1988) (in rejecting the plaintiff's constitutional argument that "the asserted primacy of the White House in foreign affairs" precludes prosecution for false Congressional testimony, the court looked to various constitutional provisions in recognizing that "Congress surely has a role to play in aspects of foreign affairs….")

The CSRA is the comprehensive scheme created by Congress governing federal employment. *See U.S. v. Fausto*, 484 U.S. 439, 443 (1988). In 5 U.S.C. § 7532, Congress expressly delineated those areas where Board review is circumscribed due to national security concerns. There is no evidence that Congress intended that the President could unilaterally and broadly expand these exceptions so as to effectively

Executive Order No. 10,450[16] did not trump the employee's statutory veterans' preference rights, the *Cole* Court interpreted "national security" as used in the Act.[17] *Cole*, 351 U.S. at 538. Significantly, in so doing, the *Cole* Court did not avoid review of the removal or identify any rule of limited review merely because the Executive Branch of the government alleged that matters of "national security" were at issue.[18] Moreover, although the Court determined that an employee may be dismissed using the summary procedures and unreviewable dismissal power authorized by the 1950 statute only if he occupied a "sensitive" position, the Court plainly equated having a "sensitive" position with having access to classified information. *Id.* at 551, 557 n.19. The *Cole* decision thus clearly supports the Board's determination that its statutory jurisdiction over an

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eliminate Board and judicial review of the reasons underlying adverse actions taken against federal employees, such as the appellant, whose positions do not require access, or eligibility for access, to classified information. Absent any indication that Congress contemplated and ordained such a result, we believe that *Egan's* exception to the Board's statutory jurisdiction must be read narrowly.

[16] Executive Order No. 10,450 was promulgated in April 1953 to provide uniform standards and procedures for agency heads in exercising the suspension and dismissal powers under the 1950 Act. *Cole*, 351 U.S. at 551. It also extended the Act to other agencies. *See id.* at 542.

[17] The Supreme Court's *Cole* decision and its decision in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), plainly contradict the dissent's bold claim that an agency's decision "that retaining an employee would be inconsistent with the interests of national security has never been subject to third-party review before today." In both cases, the Court subjected agency claims regarding national security to judicial scrutiny. *See also* note 19 *supra.*

[18] The *Cole* Court notably stated that it would not lightly assume that Congress intended to take away the normal dismissal procedures of employees "in the absence of some overriding necessity, such as exists in the case of employees handling defense secrets." 351 U.S. at 546-47.

otherwise appealable action cannot be preempted by an agency's generalized claim of "national security."[19]

¶24 In this regard, we agree with the appellants that the potential impact of the agency's argument that *Egan* precludes the Board from reviewing the merits of an agency's adverse action, even when security clearances are not involved, is far-reaching. Accepting the agency's view could, without any Congressional mandate or imprimatur, preclude Board and judicial review of alleged unlawful discrimination, whistleblower retaliation, and a whole host of other constitutional and statutory violations for multitudes of federal employees subjected to otherwise appealable removals and other adverse actions. *See El-Ganayni v. Department of Energy*, 591 F.3d 176, 184-186 (3d Cir. 2010) (First Amendment claim and Fifth Amendment Equal Protection claim must be dismissed because legal framework would require consideration of the reasons a security clearance was revoked); *Bennett v. Chertoff*, 425 F.3d 999, 1003-04 (D.C. Cir. 2005) (adverse action based on denial or revocation of a security clearance not actionable under Title VII of the Civil Rights Act of 1964); *Hesse*, 217 F.3d at 1377 (*Egan* precludes Board review of Whistleblower Protection Act whistleblower claims in indefinite suspension appeal); *Ryan v. Reno*, 168 F.3d 520, 524 (D.C. Cir. 1999) (adverse action based on denial of a security clearance not actionable under Title VII of the Civil Rights Act of 1964); *Jones*, 978 F.2d at 1225-26 (no employee has a "property" or "liberty" interest in a security

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[19] In fact, even in cases where the Executive Branch has sought to defend its action on the grounds of protecting classified information, the Court has not abstained from subjecting such assertions to searching judicial scrutiny. *See e.g., National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989). There, employees challenged the Customs Service decision to subject whole categories of employees to random drug-testing on the basis of their presumed access to classified information. Deeming the record insufficient to determine whether the agency overreached, the Court remanded to the Fifth Circuit with instructions to "examine the criteria used by the [Customs] Service in determining what materials are classified and in deciding whom to test under this rubric." *Id*. at 678.

clearance or access to classified information and thus no basis for a constitutional right); *Pangarova v. Department of the Army*, 42 M.S.P.R. 319, 322-24 (1989) (*Egan* precludes the Board from reviewing discrimination or reprisal allegations intertwined with the agency's denial of a security clearance).

¶25 Therefore, we find that the Supreme Court's decision in *Egan* does not support the conclusion that the Board lacks the authority to review the determination underlying the agency's reduction in grade here.[20] The Board may exercise its full statutory review authority and review the agency's determination that the appellant is no longer eligible to hold a "sensitive" position, because this appeal does not involve a discretionary agency decision regarding a security clearance.[21]

The agency's decision to characterize the appellant's position as a national security position and to designate it NCS is insufficient to limit the Board's scope of review to that set forth in *Egan*.

¶26 In 5 C.F.R. Part 732, OPM set forth "certain requirements and procedures which each agency shall observe for determining national security positions pursuant to Executive Order No. 10450 – Security Requirements for Government Employment (April 27, 1953), 18 FR 2489, 3 CFR 1949-1953 Comp., p. 936, as

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[20] We are not finding that the Board has the authority to determine whether the agency has properly designated the appellant's position as NCS. *See Skees v. Department of the Navy*, 864 F.2d 1576, 1578 (Fed. Cir. 1989) (Board lacks the authority to review an agency's determination that a position requires a security clearance); *Brady v. Department of the Navy*, 50 M.S.P.R. 133, 138 (1991) (Board lacks the authority to review an agency's determination to designate a position as NCS). We are simply finding that the agency's decision to designate a position as a "national security" position or as a "sensitive" one, standing alone, does not limit the Board's statutory review authority over an appealable adverse action.

[21] We recognize that Congress has specifically excluded groups of employees from having Board appeal rights or from having protection against prohibited personnel practices, such as employees of the Central Intelligence Agency, the Federal Bureau of Investigation, and intelligence components of the Department of Defense. *See* 5 U.S.C. §§ 2303(a)(2)(C), 7511(b)(7), (8). Congress has not similarly excluded the agency in the current appeal.

amended." 5 C.F.R. § 732.101. OPM's regulations state that the term "national security position" includes:

> (1) Those positions that involve activities of the Government that are concerned with the protection of the nation from foreign aggression or espionage, including 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; and
>
> (2) Positions that require regular use of, or access to, classified information.

5 C.F.R. § 732.102(a). The regulations further provide:

> For purposes of this part, the head of each agency shall designate, or cause to be designated, 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 agency argues that, although the appellant's position did not require a security clearance, the Board is nevertheless precluded under *Egan* from reviewing whether he was improperly reduced in grade based upon the agency's determination that he was ineligible to occupy a national security position. IAF, Tab 4, Subtab 1 at 4-5, Tab 5, Resp. at 1-2, Tab 46, Br. at 1-4, 7-10. We disagree.

¶27 OPM's interpretation of its own regulations at 5 C.F.R. Part 732 supports the conclusion that our review of an adverse action is not limited by *Egan* solely based on the agency's designation of the position as a national security position or as "sensitive." In that regard, OPM has not interpreted its regulations to preclude the usual scope of Board review for adverse actions taken against employees based on ineligibility to occupy NCS positions. Rather, OPM concluded that the Board cannot determine the scope of its review by referring to 5 C.F.R. Part 732. IAF, Tab 15, Advisory Op. at 3. OPM stated:

> OPM's regulations in 5 C.F.R. Part 732 are silent on the scope of an employee's rights to Board review when an agency deems the

> employee ineligible to occupy a sensitive position. The regulations do not independently confer any appeal right or affect any appeal right under law.

Id. at 2. It similarly stated concerning its regulations:

> [T]hey do not address the scope of the Board's review when an agency takes an adverse action against an employee under 5 U.S.C. § 7513(a) following an unfavorable security determination. Likewise, OPM's adverse action regulations in 5 C.F.R. Part 752 do not address any specific appellate procedure to be followed when an adverse action follows an agency's determination that an employee is ineligible to occupy a sensitive position.

Id. at 3. Thus, OPM has not interpreted its own regulations as precluding the Board's usual scope of review in these appeals.

¶28 In its October 18, 2010 statement, ODNI refers to Executive Order No. 13,467 (June 30, 2008), in arguing that the limited scope of Board review set forth in *Egan* should apply in this appeal. IAF, Tab 51, Statement at 1. ODNI notes that Executive Order No. 13,467, which is entitled "Reforming Processes Related to Suitability for Government Employment, Fitness for Contractor Employees, and Eligibility for Access to Classified National Security Information," designated the Director of National Intelligence (DNI) as the Security Executive Agent (SEA) for the federal government. *Id.* at 1. It further notes that, in setting forth the SEA's responsibilities relating to overseeing investigations, developing policies and procedures, issuing guidelines and instructions, serving as a final authority, and ensuring reciprocal recognition among agencies, the Executive Order consistently referred to that authority as relating to both determinations of eligibility for access to classified information or eligibility to hold a sensitive position. *Id.* at 1-2. It thus argues that the President has given the DNI "oversight authority over eligibility determinations, whether they entail access to classified information or eligibility to occupy a sensitive position, regardless of sensitivity level." *Id.* at 2.

¶29 ODNI appears to be arguing, as does the agency, that because executive orders refer to both eligibility for access to classified information and eligibility

to occupy a sensitive position -- or because the agency decided to adjudicate determinations involving access to classified information and eligibility to occupy a sensitive position through the same WHS/CAF process -- the same Board review authority must necessarily apply. Neither ODNI nor the agency has shown that such a circular argument provides a basis for limiting the statutory scope of our review in adverse action appeals.

¶30 We therefore find that the Board has the authority to review the merits of the agency's decision to find the appellant ineligible to occupy an NCS position, and that the Board's authority to exercise its statutory review of the appellant's reduction in grade is not limited by *Egan*. Applying the full scope of Board review in appeals such as this will not prevent agencies from taking conduct-based adverse actions or suitability actions in appropriate cases. Likewise, agencies may respond to urgent national security issues, even for employees who do not have eligibility for access to, or access to, classified information, by exercising their statutory authority to impose indefinite suspensions and removals through the national security provisions in 5 U.S.C. § 7532. *See, e.g., King v. Alston*, 75 F.3d 657, 659 n.2 (Fed. Cir. 1996). Here, however, the agency did not choose to act under 5 U.S.C. § 7532, an option the dissent fails to mention. If the agency believed that a Board appeal would involve delicate national security matters beyond the Board's expertise, or that a Board order might create a conflict with its national security obligations pursuant to Executive Order No. 10,450, it could exercise its statutory authority pursuant to 5 U.S.C. § 7532. *See id*.

¶31 Any agency argument that a Board decision to reverse its action would place it in an impossible position, because it must either violate an agency head's decision and allow an employee who presents a national security risk to occupy a sensitive position or violate the Board's order, does not warrant a different outcome. In its motions to dismiss, the agency indicated that it had reinstated the appellant to the Commissary Management Specialist (CAO) position retroactive

to December 6, 2009. IAF, Tabs 28-29, 39, 42. When asked at oral argument why the agency now deemed the appellant eligible to occupy the NCS position, the agency representative stated, "[w]ell, for one thing, litigation." Tr. at 46. The agency representative proceeded to state that the important point was that the head of the agency "determined to grant a waiver of the factors that were represented as risk factors," and that that discretion and responsibility rested solely with him. *Id.*

¶32 However, the record indicates that, in notifying the WHS/CAF Director of his decision overriding its unfavorable security determination and returning the appellant to his position, Acting Director Thomas Milks directed it to act "without delay" "[b]ecause of pending litigation." IAF, Tab 28, Att. 1 at 1. In addition, his determination stated as its first finding that the questions raised concerning the appellant "relate to the grant of access to classified material," and that "no access to classified material is required or permitted in the position to which he is being reassigned." *Id.* at 2. In his second finding, Milks simply summarily stated that "it is unlikely that [the appellant's] assignment to the subject position would result in a material adverse effect on national security." *Id.* Therefore, the agency's own actions do not support any fear of being put in an impossible position by the possibility that the Board might disagree with its decision and order reinstatement.

The interlocutory appeal must be returned to the CAJ for further proceedings.

¶33 Because *Egan*'s limited scope of Board review does not apply in this appeal, Board review of the challenged reduction in grade includes consideration of the underlying merits of the agency's reasons to deny the appellant eligibility to occupy an NCS position. The CAJ should thus adjudicate this appeal under the generally applicable standards the Board applies in adverse action appeals, including the legal principles governing off-duty or on-duty conduct as applicable.

ORDER

¶34 Accordingly, we vacate the stay order issued in this proceeding and return the appeal to the CAJ for further processing and adjudication consistent with this Opinion and Order.

FOR THE BOARD:

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

DISSENTING OPINION OF MARY M. ROSE

in

Devon Haughton Northover v. Department of Defense

MSPB Docket No. AT-0752-10-0184-I-1

¶1 For the reasons fully set forth in my dissenting opinion in *Conyers v. Department of Defense*, MSPB Docket Nos. CH-0752-09-0925-I-1 & CH-0752-09-0925-I-2 (December 22, 2010), I would hold that the Board lacks authority to review the reasons underlying the agency's determination that the appellant is no longer eligible to hold his GS-1144-07 Commissary Management Specialist position, which the agency designated "sensitive" under Executive Order No. 10,450 and 5 C.F.R. § 732.201(a).

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Mary M. Rose
Member