

1 UNITED STATES OF AMERICA
2 MERIT SYSTEMS PROTECTION BOARD
3 ATLANTA REGIONAL OFFICE
4

5 DEVON HAUGHTON NORTHOVER,

6 Appellant,

7 v.

8 DEPARTMENT OF DEFENSE,

9 DEFENSE COMMISSARY AGENCY,

10 Agency.
11
12

} DOCKET NUMBER

} AT-0752-10-0184-I-1

} December 22, 2009

13 AGENCY NARRATIVE RESPONSE

14 Now comes the Department of Defense, Defense Commissary Agency (agency), through
15 counsel, and files the following Agency Narrative Response in the appeal brought by Devon
16 Haughton Northover (appellant).

17 Summary of Material Facts

18 Pursuant to the authority granted to the agency by Executive Order 10450, as amended, and
19 further by 5 C.F.R. Part 732, the agency has designated the position of GS-1144, Commissary
20 Management Specialist as a “moderate risk” national security position with a sensitivity level of
21 “non-critical sensitive.” See 5 C.F.R. § 732.102 and § 732.201; Agency Response File (ARF),
22 Tabs 4o, pp. 2, 7 and 4gg, pp. 3, 34-35. Based on this designation, an employee occupying the
23 position of GS-1144, Commissary Management Specialist is required to undergo a background
24 investigation and maintain eligibility for access to classified information and/or occupancy of a
25 sensitive position. See ARF, Tab 4gg, pp. 3-4, 24. The Department of Defense Washington
26 Headquarters Services Consolidated Adjudication Facility (WHS/CAF) is the security agency
27 responsible for adjudicating individual personnel suitability and security investigations results
28 for the agency for the purpose of granting or denying security clearances and eligibility to
29 occupy sensitive positions. See ARF, Tab 4gg, pp. 2, 13.

1 Appellant was hired as a GS-1144-05 Commissary Management Specialist (also referred to
2 as a "CAO") at the agency's Gunter Air Force Base (AFB) Commissary, effective September 8,
3 2002. *See* ARF, Tab 4ii. Appellant's original position number as a GS-05 CAO was J4M3005-
4 31653. *See* ARF, Tab 4ii, Block 15-18. The sensitivity level of "non-critical sensitive" was
5 specified on Appellant's appointment SF-50. *See* ARF, Tab 4ii, Block 41 (listing the position
6 sensitivity level as "2," which indicates "non-critical sensitive"); *see also* ARF, Tabs 4o, pp. 2, 7;
7 4gg, p. 31. The sensitivity level of "2 - noncritical sensitive" was also indicated in the Position
8 Description for the GS-05, CAO, Position No. J4M3005N, which is filed in appellant's Official
9 Personnel Folder (OPF). *See* ARF, Tab 4hh, Box 12. The sensitivity level of "2," indicating
10 "non-critical sensitive," was specified on every SF-50 for personnel actions concerning
11 appellant's position as a GS-05 CAO. *See* ARF, Tabs 4cc thru 4ff (Block 41 on each form).

12 Appellant was promoted to the position of GS-1144-07 Commissary Management Specialist
13 (CAO) effective September 21, 2003. *See* ARF, Tab 4bb. Appellant's position number as a GS-
14 07 CAO was J4M3007-46953. *See* ARF, Tab 4bb, Block 15-18. The sensitivity level of "2,"
15 indicating "non-critical sensitive," was specified on appellant's promotion SF-50 and on every
16 SF-50 for personnel actions concerning the appellant's position as a GS-07 CAO. *See* ARF,
17 Tab 4bb, Block 41; Tabs 4m and 4q thru 4z (Block 41 on each form).

18 The Agency Position Description in use at the time of appellant's promotion inadvertently
19 listed the sensitivity level for the position of GS-07, CAO, Position No. J4M3007N, as "1 -
20 nonsensitive." *See* ARF, Tab 4jj, Block 12. However, this error in the Position Description did
21 not change the fact that the position was, in actuality, designated as a non-critical sensitive
22 position in the Agency's security directive, dated February 2002. *See* ARF, Tab 4gg, pp. 34-35;
23 *see also* ARF, Tab 4o, pp. 2, 7. Moreover, the error in the Position Description for the GS-7
24 CAO did not prevent the appellant's sensitivity level from being properly designated as level 2,
25 non-critical sensitive, in documentation concerning all of appellant's personnel actions, as
26 referenced above.

27 The GS-07 CAO, No. J4M3007N, Position Description filed in appellant's OPF includes an
28 un-initialed white-out alteration in Block 12, obliterating the "1-nonsensitive" designation and
29 checking the "2-noncritical sensitive." *See* ARF, Tab 4aa, Box 12. The Agency does not know

1 who made this alteration or when the alteration was made. It is possible that an HR staff
2 member may have noticed the error in the sensitivity designation and attempted to correct the
3 error on the form. However, such an alteration in a Position Description is not effective unless
4 initialed by a classifier. Nonetheless, the J4M3005/J4M3007 Position Descriptions for a
5 Commissary Management Specialist (CAO) were reissued with new position numbers of
6 ES07036/WS07036 on or around January 24, 2007.¹ See ARF, Tabs 4o and 4p. The new CAO
7 Position Description correctly designates the position with a sensitivity level of “2 – noncritical
8 sensitive.” See ARF, Tab 4p, Block 12.

9 On February 11, 2008, Washington Headquarters Services, Consolidated Adjudications
10 Facility (WHS/CAF) issued the appellant a Statement of Reasons (SOR) informing the appellant
11 of their tentative unfavorable determination to deny him “eligibility for access to classified
12 information and/or occupancy of a sensitive position.” See ARF, Tab 4j and 4l. On March 3,
13 2008, the appellant acknowledged receipt of the SOR, indicated his intention to respond to the
14 SOR, and requested an extension of time to respond. See ARF, Tab 4l. Appellant was granted an
15 extension until May 2, 2008 to respond to the SOR. *Id.* However, the appellant did not file a
16 timely response to the SOR, nor did appellant submit a timely request for further extension. *Id.*
17 Since the appellant failed to submit a timely response, Susan B. Edenfield, Deputy Chief of the
18 WHS/CAF issued a Letter of Denial (LOD) to the appellant on March 6, 2009, denying his
19 eligibility for access to classified information and/or occupancy of a sensitive position. *Id.*
20 WHS/CAF directed the agency to terminate the appellant’s access to classified information
21 and/or occupancy of a sensitive position. See ARF, Tab 4k.

22 On August 24, 2009, the agency proposed the appellant’s demotion from the position of GS-
23 1144-07, Commissary Management Specialist/CAO to the position of GS-1101-04, Store
24 Associate. See ARF, Tab 4h. The Notice of Proposed Demotion specified that the proposed
25 action was due to appellant’s loss of eligibility for access to classified information and
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27

28 _____
29 ¹ The date of the final signature by the Agency’s Deputy Director on the new Position Description is illegible.
However, the HR Specialist/Classifier signed off on the new Position Description on January 24, 2007. See ARF,
Tab 4p.

1 occupancy of a sensitive position. *Id.*² Appellant, through his representative, responded to the
2 Notice of Proposed Demotion on October 5, 2009. *See* ARF, Tabs 4f and 4g. Appellant asserted
3 that his position of CAO was “nonsensitive,” as indicated in his copy of the Position Description,
4 and that appellant had never been made aware that his position was “non-critical sensitive.” *See*
5 ARF, Tab 4f. The agency demoted appellant to the position of GS-1101-04, Store Associate
6 effective December 6, 2009, “based solely on [his] inability to maintain eligibility to occupy a
7 sensitive position.” *See* ARF, Tabs 4b thru 4e.

8 Agency Position

9 The Merit Systems Protection Board has consistently applied the Supreme Court’s ruling in
10 *Department of the Navy v. Egan*, 484 U.S. 518 (1988), and the applicable burdens of proof
11 referenced therein, to cases such as this where a security clearance or eligibility for such
12 clearance is at issue. *See Stella Crumpler v. DOD*, DC-0752-09-0033-I-1, 2009 MSPB 224
13 (Nov. 2, 2009)(Final Decision applying the *Egan* rule limiting the scope of Board review and
14 affirming the appellant’s removal); *Eustace A. Prince v. DOD*, DE-0752-08-0238-I-1 (July 23,
15 2008) (Affirming the agency’s removal for loss of eligibility to occupy a noncritical-sensitive
16 position, describing the removal as tantamount to a loss of a “security clearance,” and applying
17 the *Egan* standard). In *Egan*, the Supreme Court held that the grant of a “security clearance” to a
18 particular employee is a sensitive and inherently discretionary judgment call that is committed by
19 law to the appropriate agency of the Executive Branch. *See Egan*, 484 U.S. at 527. Similarly,
20 the decision to deny an individual eligibility to occupy a National Security Position in the
21 Department of Defense based on inability to maintain eligibility to occupy a Sensitive position is
22 also a sensitive and inherently discretionary judgment call committed to the appropriate agency

24 ² The Sales Associate position is a new position title created under the Agency’s new Workforce of the Future
25 (WOF) structure. The position generally replaces the older positions of Sales Store Checker and Store Worker. The
26 position is currently officially designated as a non-critical sensitive position. *See* ARF, Tab 4o, p. 5; *see also* ARF,
27 Tab 4a (Position Description for the GS-1101-04, Store Associate, Position No. 99043, indicating in Box 12 that the
28 position is “2 - noncritical sensitive”). However, in July 2009, the Agency conducted an in-depth review and
29 determined to revise its security designations for several positions, including the Store Associate position. *See* ARF,
Tab 4i. The official process of finalizing the new nonsensitive designations for these positions in the Agency’s
security directives is still underway. However, the Agency has begun utilizing the new nonsensitive designations
pending finalization. This has assisted the agency in offering viable alternatives for placement of employees who
are denied eligibility needed for other non-critical sensitive positions, as opposed to removal from employment,
under the Agency’s discretionary policy. *See* ARF, Tab 4n, p. 2.

1 of the Executive Branch. Since an individual does not have a property right or liberty interest in
2 obtaining or retaining a security clearance (*see Egan*, 484 U.S. at 528), an individual would also
3 not appear to have a property right or liberty interest in occupying a position that the head of an
4 agency has designated as sensitive for national security reasons. *See* 5 C.F.R. §§ 732.102(a),
5 732.201(a)(2008).

6 Under *Egan*, the Board is barred from reviewing the merits of an agency's security-
7 clearance/eligibility determination. Therefore, the validity of the decision by WHS/CAF should
8 not be a material issue in this appeal. Rather, in order for the Board to sustain the agency's
9 action, the agency need only prove, with preponderant evidence, the following elements: (1) the
10 employee's position required eligibility to occupy a sensitive position; (2) his eligibility to
11 occupy a sensitive position was revoked; (3) the agency followed the procedural requirements of
12 5 U.S.C. § 7513 in the processing of the action at issue³; and (4) in the case of a removal, that
13 reassignment was not possible (if consideration is required by agency regulations). *See Dept. of*
14 *Navy v. Egan*, 484 U.S. 518 (1998); *Griffin v. DMA*, 864 F.2d 1579 (Fed. Cir. 1989); *Benoist v.*
15 *Dept. of Defense*, 40 MSPR 418 (1989); *Weissberger v. USIA*, 39 MSPR 370 (1988).

16 Here, the appellant challenges whether his position required eligibility to occupy a sensitive
17 position based on the indication that the position is "1-nonsensitive" in the original Position
18 Description that applied to the position of CAO. However, the specification regarding sensitivity
19 in the Position Description is not dispositive. *See Diana R. Houston v. DOD*, 106 LRP 53410,
20 DE-0752-06-0205-I-1 (Aug. 4, 2006)(stating, where the position description contained a
21 "nonsensitive" indication, that "[t]he position description is only one piece of evidence in
22 determining the appellant's actual duties and, thus, her need to possess a security clearance.");
23 *see also Diana L. Tinker v. DOD*, 108 LRP 19392, DC-0752-08-0118-I-1 (March 13,
24 2008)(considering that a later-issued position description specified that the position was non-
25 critical sensitive and that the position was designated as non-critical sensitive in DeCA Directive
26 50-25 in determining that the position required eligibility/a clearance despite the original position
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29 ³ In *Robinson v. Department of Homeland Security*, 498 F.3d 1361, 1364-65 (Fed. Cir. 2007), the United States
Courts of Appeals for the Federal Circuit ruled that security clearance decisions are not reviewable for minimum due
process protection.

1 description's specification of "nonsensitive"). As referenced above in the agency's factual
2 summary, the CAO position is designated as non-critical sensitive in DeCA Directive 50-25 (at
3 Tab 4gg). The CAO position was designated as non-critical sensitive in the appellant's original
4 Position Description for the GS-05 position and in all of the appellant's SF-50 forms, from the
5 time of his initial appointment as a grade 5 through his promotion to a grade 7. Thus, the
6 appellant had notice of the appropriate non-critical sensitive designation. In addition, the agency
7 reissued the position description in 2007 with an indication that the position is non-critical
8 sensitive. The job duties of the CAO position require access to agency systems that contain
9 sensitive information, thereby supporting the non-critical sensitive designation.

10 There is no dispute that appellant's eligibility was revoked in this case. Nor has the appellant
11 raised any argument that the agency failed to follow applicable procedural requirements.⁴ The
12 agency has no policy mandating reassignment; however, the agency exercised its discretion in
13 this case to place appellant in a vacant nonsensitive position as opposed to removing him from
14 employment.

15 Based on the foregoing, the agency submits that it has met its burden under *Egan*, and the
16 Board should sustain the agency's action.

17 Respectfully submitted this 22nd day of December 2009:

18
19 **/s/ Stacey Turner Caldwell**

20 Stacey Turner Caldwell
21 Agency Representative
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27 ⁴ In addition to his assertion that his Position Description indicated that his position was nonsensitive, the appellant
28 raises an allegation of discrimination based on reprisal and/or race and sex in his appeal form. However, appellant
29 offers no further information in support of his allegations of discrimination. Although appellant has filed a
discrimination complaint against the agency, that complaint alleges discrimination on the basis of race and gender
with regard to a different agency decision: appellant's non-selection for a general manager position on or around
January 23, 2009.