AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

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7y/ConyersNorthover/273470

March 1, 2010

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Re: Amicus Brief, *Conyers* and *Northover*

Dear Mr. Spencer:

Please find enclosed the amicus brief of the American Federation of Government Employees in the *Conyers* and *Northover* cases.

Sincerely,

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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RHONDA K. CONYERS
Appellant,

v. **Docket No. CH-0752-09-0925-I-1**

DEPARTMENT OF DEFENSE,
Agency.

DEVON HAUGHTON NORTHOVER
Appellant,

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

DEPARTMENT OF DEFENSE,
Agency.

AMICUS BRIEF, *CONYERS* AND *NORTHOVER*
BY AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

Pursuant to notice published by the United States Merit Systems Protection Board ("Board") in the Federal Register on February 10, 2010, the American Federation of Government Employees, AFL-CIO, ("AFGE") submits this brief as an amicus curiae in the above-captioned matters. *See* 75 Fed. Reg. 6728 (February 10, 2010). The Board has posed the question of whether, "pursuant to 5 CFR Part 732, National Security Position, the rule in *Department of the Navy v. Egan*, 484 U.S. 518, 530-31 (1988), limiting the scope of MSPB review of an adverse action based on the revocation of a security clearance also applies to an adverse action involving an employee in a "non-critical

sensitive" position due to the employee having been denied continued eligibility for employment in a sensitive position." *Id.*

AFGE thanks the Board for the opportunity to present argument on this important question. The Board's decision regarding the scope of review is likely to impact the continuing viability of adverse action appeal rights for a great number of current and future federal civilian employees. In this regard, AFGE submits that the Board should not apply the rule in *Department of the Navy v. Egan*, 484 U.S. 518 (1988), ("*Egan*") to the review of adverse actions taken against employees occupying "non-critical sensitive" positions that are premised on the denial of continued eligibility for employment in a sensitive position.

AFGE also respectfully suggests, however, that the cases of *Rhonda K. Conyers v. Department of Defense*, docket number CH-0752-09-0952-I-1, ("*Conyers*") and *Devon Haughton Northover v. Department of Defense*, AT-0752-10-0184-I-1, ("*Northover*") may not be ripe for consideration of the question posed by the Board. Although the administrative judge in *Conyers* issued an order declining to limit the scope of her review of the agency's action that she then certified for interlocutory appeal, there has been no hearing in that matter. Likewise, there has been no initial decision in *Northover* nor has there been any other order in that case concerning the scope of review that has been certified to the Board for interlocutory appeal. Indeed, AFGE has recently entered an appearance as appellant's counsel in *Northover,* and in this capacity intends to shortly file an opposition to the agency's assertion that the scope of the Board's authority to review

the agency's action against Northover is limited by *Egan*.[1] *Conyers* and *Northover* therefore present sparse factual records that may form an inadequate base on which to rest the Board's consideration of the scope of review question.

Combined with the fact that the Board has solicited an advisory opinion from the United States Office of Personnel Management ("OPM") regarding the intent of Part 732 that is not returnable until April 5, 2010, and the fact that a motion for remand to the Board remains pending in *Brown v. Department of Defense*, United States Court of Appeals for the Federal Circuit docket number 2009-3176, (which presents essentially the same question as *Conyers* and *Northover*), AFGE respectfully suggests that Board's request for amicus briefing and its consideration of the scope of review issue may be premature.

Nevertheless, in the interest of efficiency and given the importance of the question posed by the Board, AFGE submits this amicus brief opposing the application of *Egan* to adverse action appeals arising out of sensitive position eligibility determinations. Nothing in Part 732 of Title 5 of the United States Code of Federal Regulations (Part 732) compels the application of *Egan* to cases involving eligibility for employment in a sensitive position.

Egan announced a narrow exception to the Board's general authority to review the merits of agency action decisions that was premised on the close relationship between possession of a security clearance and access to classified national security information. Because an employee's eligibility to occupy a sensitive position is not synonymous with an employee's ability to maintain a security clearance, and therefore not an accurate

[1] Accordingly, AFGE reserves the right to supplement the factual record in *Northover* and to present additional argument regarding the scope of the Board's authority to review adverse actions arising out of sensitive position eligibility determinations.

barometer of an employee's access to classified national security information, the application of *Egan* to sensitive position eligibility matters is incompatible with the rationale underlying *Egan*. Further, applying *Egan* to eligibility matters would break with established Board precedent, and would unnecessarily and unfairly diminish the rights of those myriad federal employees who occupy sensitive designated positions but who do not have access to classified national security information.

I. BACKGROUND

In order to provide as full a background as possible, AFGE will discuss the basic facts of *Conyers* and *Northover*, the facts and underlying rationale of *Egan* as well as Board cases subsequent to *Egan*, including: *Adams v. Department of the Army*, 105 M.S.P.R. 50, 2007 MSPB 57 (2007), *aff'd*, 273 F. App'x 947 (Fed. Cir. 2008) ("*Adams*"); *Brown v. Department of Defense*, 110 M.S.P.R. 593, 2009 MSPB 32 (2009), ("*Brown*") and *Crumpler v. Department of Defense*, 112 M.S.P.R. 636, 2009 MSPB 224 (2009), *vacated*, 2009 MSPB 233 (2009). ("*Crumpler*").

A. *Conyers*

Rhonda Conyers is an Accounting Technician, GS-05, with the Defense Finance and Accounting Service ("DFAS") in Columbus Ohio. DFAS indefinitely suspended Conyers from this non-critical sensitive position based on a determination to deny her access to classified or sensitive information. *See Conyers*, Initial Decision (Jan. 13, 2010). Conyers, however, did not hold nor was she required to hold a security clearance in order to occupy her Accounting Technician position.

Conyers appealed her indefinite suspension to the Board. The agency then sought to limit the scope of the Board's review of Conyers' indefinite suspension by arguing that *Egan* prohibited the Board from reviewing the merits of the agency's decision denying Conyers continued eligibility for employment in her non-critical sensitive position. *Id.* On February 17, 2010, following the Board's request for amicus briefs, the administrative judge in Conyers issued an order memorializing her decision not to apply *Egan* to limit the scope of her review of the agency's action, and certifying her decision for interlocutory appeal to the board. *Conyers*, Order Granting Motion For Certification Of Interlocutory Appeal and Staying Proceeding (Feb. 17, 2010).

B. *Northover*

Beginning in 2002, Devon Northover occupied the position of Commissary Management Specialist with the Defense Commissary Agency. In this position, Northover was responsible for, *inter alia*, maintaining adequate inventory at the Gunter Air Force Base Commissary. On or about March 6, 2009, the agency denied Northover eligibility for access to classified information and/or occupancy of a sensitive position. Thereafter, on or about December 6, 2009, the agency demoted Northover from his Management Specialist position to a Store Associate position. The agency took this action based solely on Northover's inability to maintain eligibility to occupy a sensitive position.[2]

Like Conyers, Northover did not hold nor was he required to hold a security clearance in order to occupy his Management Specialist position.

[2] For purposes of this brief, AFGE assumes but does not concede that Northover was demoted from a non-critical sensitive position.

C. *Egan*

The facts of Egan are familiar. Thomas Egan occupied the position of "laborer leader" with the Department of the Navy. In this position, Egan worked on Trident submarines at the agency's Trident Naval Refit Facility in Bremerton, Washington. *Egan*, 484 U.S. at 521. At the time, the Trident was the Navy's premier nuclear submarine and was capable of carrying and launching nuclear weapons. The Trident played a "crucial part in our Nation's defense system." *Id* at 520.

As a result of the Trident's direct and crucial role in national security, Egan was required to hold a security clearance in order to remain in his laborer leader position. *Id* at 522. In approximately 1983, the agency denied Egan a security clearance following a background investigation. The agency then removed Egan for failure to maintain a security clearance as required for his position. *Id.*

When the case arrived at the Supreme Court, the Court framed the question narrowly, asking whether the Board had statutory authority, "to review the substance of an underlying decision to deny or revoke a security clearance in the course of reviewing an adverse action." *Id* at 520. Citing, "the Government's "compelling interest" in withholding national security information from unauthorized persons in the course of executive business," the Court carved out a limited exception to the scope of the Board's review authority under Chapters 75 and 77 of Title V of the United States Code. *Id* at 527. The Court reasoned that deference to the Executive was appropriate when access to classified information, which the Court equated with the formal grant of a security clearance, was at issue. *Id* at 529 (" . . .the 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.")

The Court repeatedly made it clear that access to classified information was the primary consideration in limiting the Board's power to review the merits of an agency's decision to deny or revoke a security clearance. *Id* at 527-29. Thus, the Court did not address application of its holding to instances where access to classified information was not present.

D. Post-*Egan* Board Cases

In 2007, the Board addressed the application of *Egan* to an adverse action appeal where the possession of a security clearance, and hence access to classified information, was not a factor in an agency's decision to remove an employee from service based on the agency's revocation of his access to a computer system containing sensitive information. *See Adams*, 105 M.S.P.R. 50. In *Adams*, the agency revoked Adams' access to a computer system used in his position as a human resources assistant after receiving the results of a background investigation conducted by OPM. The agency cited Adams' financial situation as the basis for its revocation. *Id* at 52. The agency then removed Adams from service based on the revocation of his computer access.

When Adams appealed to the Board the agency expressly argued that *Egan* precluded the Board from reviewing the merits of its decision to deny Adams computer access. *Id* at 54-55. In rejecting the agency's argument, the Board first reiterated that when an agency charge against an employee, "consists of the employing agency's withdrawal or revocation of its certification or other approval of the employee's fitness or other qualification to hold his position, the Board's authority generally extends to a

review of the merits of that withdrawal or revocation." *Id* at 55. Next, the Board dispensed with the agency's argument that *Egan* applied, finding that the national security considerations that motivated *Egan* were absent from Adams' case. Even though the agency characterized the information in its computer system as "sensitive," the Board rejected the agency's *Egan* argument because the information contained in the agency's system was not classified, and because Adams was not required to hold a security clearance in order to occupy his position. *Id.*

Beginning with his separate non-precedential opinion in *Brown* and ending with the now-vacated opinion in *Crumpler*, involving a GS-4 Store Associate, former Board Chairman McPhie rejected *Adams* and argued that *Egan* should be extended to limit Board review of sensitive position eligibility determinations. *See Crumpler*, 112 M.S.P.R. at 641-42. Chairman McPhie saw no "meaningful distinction" between an agency determination that an employee is ineligible to occupy a sensitive position and an agency determination denying or revoking a security clearance. *Id.*

Further, relying on *Romero v. Department of Defense*, 527 F.3d 1324 (Fed. Cir. 2008) ("*Romero*"), he went on to argue that whether an employee's position required a security clearance or access to classified information was irrelevant to whether *Egan* should be applied because the term "security clearance" is not a term of art. *Id* at 643.

II. ARGUMENT

As argued above, the Board should not apply *Egan* to limit its review of adverse action appeals arising from agency determinations on employee eligibility to occupy sensitive positions. To begin with, the Board should not expand *Egan* to cover sensitive position eligibility determinations because the term "security clearance" is, in fact, a term of art used to connote access to classified information. This is so because access to classified information, the proxy used by the Court in *Egan* for access to national security information, is governed by an executive order separate and apart from Executive Order 10450 and its implementing regulations found in Part 732.

Specifically, access to classified information is controlled by Executive Order 12968. 60 Fed. Reg. 40245 ("This order establishes a uniform Federal personnel security program for employees who will be considered for initial or continued access to classified information.") Executive Order 12968 sets forth, *inter alia*, the parameters governing when an employee should be granted access to classified information, what constitutes classified information, and the procedures governing review of agency access determinations. *Id.*

This means that the distinction between an agency determination that an employee is ineligible to occupy a sensitive position and an agency determination denying or revoking a security clearance is a distinction with a difference. It would make no sense to erect a separate program controlling access to classified information only to have that program rendered superfluous by treating all employees as if they had access to classified national security information for purposes of their adverse action appeal rights.

It is the possession of a security clearance and the attendant access to classified information that implicates national security.

In turn, it is the definite relationship between a security clearance, classified information and national security that formed the basis for the Court's opinion in *Egan*. Any other reading of *Egan* simply ignores the plain language of that decision. *Supra* pgs. 6-7. Consequently, the Board should not apply *Egan* to sensitive position eligibility determinations because there is no definite relationship between sensitive position eligibility determinations and national security similar to that present in the security clearance context. *See Brown*, 110 M.S.P.R. at 603 (agency designated appellant's position as non-critical sensitive because of the need to protect store inventory, and not for national security reasons). Put another way, whether the commissary at Gunter Air Force Base has a sufficient number of mustard jars on its shelves is not the type of information that the Court sought to protect in *Egan*.

Further, the mere assertion that certain information is "sensitive" is not analogous to a properly made determination that information is classified by virtue of its national security value. *See* Executive Order 12968. In this vein, former Chairman McPhie's attempt to distinguish *Adams* by reliance on *Romero* fails. The appellant in *Romero*, like the appellants in *Tchakmakjian v. Department of Defense*, 57 F. App'x 438, 440 (Fed. Cir. 2003), and *Brown v. Department of the Navy*, 49 M.S.P.R. 277, 282 (1991), was required to hold a security clearance. *Romero*, 527 F.3d at 1325. Thus, because Romero never contested that he was required to hold a security clearance, the application of *Egan* was never in doubt. The court's discussion of whether Romero's security clearance had been revoked, relied on by McPhie in *Brown* and *Crumpler*, only went to the question of

whether the agency had proved the fact of the clearance's revocation, and was part and parcel of Romero's argument that the agency made procedural errors when it revoked his clearance. *Id* at 1329-30. The court was not passing on the question of whether eligibility to occupy a sensitive position was equivalent to possession of a security clearance for the purpose of Board review.

Finally, the argument that the Board should apply *Egan* to adverse actions arising out of agency eligibility determinations because otherwise the Board will have no standard by which to weigh the merits of agency decisions is a red herring. As evidenced by the Board's decision in *Adams*, the Board is well equipped to weigh the merits of agency eligibility determinations just as the Board weighs any of the numerous questions that the Board is forced to resolve in other adverse actions brought under Chapter 75; the bottom line question being whether an agency's adverse action promotes the efficiency of the service. AFGE believes this result to be particularly appropriate considering that there is no meaningful distinction between *Adams* and the *Conyers* and *Northover* cases.

Weighed against the large number of employees who occupy non-critical sensitive positions, and especially considering the more than twenty years of Congressional silence since *Egan* was decided, it would be a perversion of the Court's rationale in *Egan* to allow that narrow exception to swallow the rule of Federal employment.

III. CONCLUSION

Based on all of the foregoing, AFGE respectfully submits that the Board should not should not apply *Egan* to limit its review of adverse actions taken against employees occupying "non-critical sensitive" positions that are premised on the denial of continued eligibility for employment in a sensitive position.

Respectfully submitted,

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March 1, 2010
Date

CERTIFICATE OF SERVICE

AMICUS BRIEF, *CONYERS* AND *NORTHOVER*

I hereby certify and affirm that on this day, March 1, 2010, I caused complete copies of the Amicus Brief, *Conyers* and *Northover*, by the American Federation of Government Employees to be filed as follows:

MSPB
(via fax and U.S. First Class Certified Mail)

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March 1, 2010
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