

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

DEVON HAUGHTON NORTHOVER
Appellant,

v.

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

DEPARTMENT OF DEFENSE,
Agency.

**NORTHOVER RESPONSE TO SUPPLEMENTAL AGENCY NARRATIVE
REGARDING SCOPE OF REVIEW**

Facts:

Devon Northover was hired at Gunter AF Base on September 8, 2002 as a Computer Assisted Ordering Specialist (CAO), *aka* Commissary Management Specialist, a GS-5 non-sensitive position. On September 21, 2003 he was promoted in this career ladder position to a GS-7, and was never informed that position was other than non-sensitive.¹ Northover's function is to monitor quantities of Commissary inventory [basically grocery items] maintaining adequate inventory using a hand held transmittal and CAO program on a computer, providing a database of suppliers and merchandise by

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¹ There is considerable dispute as to whether Northover's position was actually designated non-critical sensitive or whether he was notified of that designation. DOD has suggested in its initial Agency Narrative Response inadvertent errors in listing the non-sensitivity designation on the GS-7 Position Description, and unknowing alterations to the position descriptions. For purposes of this Response limited to the scope of review it is assumed that the position was properly designated non-critical sensitive and that Northover was properly notified of such action, although no such concession is made for the evaluation of this adverse action.

categories.² Gunter AF Base utilizes a Defense Integrated Buying System, and Northover is not responsible for entries on the program, maintaining that program or altering matters in the program, any such changes or maintenance done at HQ.

After being in that position approximately 4 years, Northover was asked to complete an SF 85P, Background investigation. A National Agency Check with Inquiries [NACI] was performed by Washington HQ Services and OPM, (according to the Notice of Proposed Demotion, para. 2) and was submitted in January, 2007 and closed in April 2007.³ The Washington Headquarters Service, Consolidated Adjudications Facility (WHS/CAF) issued a Statement of Reasons on May 27, 2009 informing Northover of their tentative unfavorable determination to “deny him eligibility for access to classified information and/or occupancy of a sensitive position.” Northover was permitted to respond to certain questions regarding financial obligations, and requested an extension. An extension was granted, and Northover requested a second extension “due to helping his mother care for his terminally ill father in [REDACTED] having to attend his brother’s

² In the **Civilian Performance Plan** (Plan) for the CAO position, (Appellant Exh.1) the main corporate objective is Inventory Control – i.e. “maintains perpetual inventory balance on hand, shelves and in back up by line item; evaluates stock levels of all CA categories... through a physical review of storage and display locations; maintains the CAO system with current accurate data to ensure optimal order quantities are calculated to sustain customer demand and prevent NIS condition; resolve discrepancies.” Regarding Inventory Control, the Plan also provides that the employee “evaluates stock level of all CAO categories daily, monitors and adjusts calculated orders when insufficient or excessive quantities are projected on orders.” The Plan also addresses Administrative and Customer service functions, and addresses Safety/Security solely “in order to maintain a safe and secure work environment for our patrons and employees.” See also two Job Descriptions purportedly for the same position at Agency Tab 4p and Agency Tab 4aa.

³ In response to Interrogatory 11 propounded to the Agency, DECA acknowledges that “NACI investigations are normally supposed to be submitted within 3-5 days of a person’s hire.”(Appellant Exhibit 2).

funeral in [REDACTED] and because of “the stress involved.” Agency Tab 4k. That additional extension was denied. On or about March 6, 2009, the Deputy Chief. WHS/CAF issued a Letter to Northover denying his eligibility for access to classified information and/or occupancy of a sensitive position.

On August 24, 2009, the Agency proposed Northover’s demotion to the position of GS-1101-04 Store Associate due to his alleged loss of eligibility for access to classified information and/or occupancy of a sensitive position. After Northover submitted a Reply, DOD demoted him from his Management Specialist position to a Store Associate position GS-4, part-time, “based solely on Northover’s inability to maintain eligibility to occupy a sensitive position,” effective December 6, 2009.

Northover did not hold, nor was he required to hold, a security clearance in order to occupy his Management Specialist position. In its Answer to Interrogatory 12, DECA acknowledged, “In his position as a CAO with the Agency, the Appellant did not work with classified information.” (Appellant Exh. 1).

In the position to which Northover was demoted, Store Associate, he has access to cash and non-cash transactions (checks, coupons, vouchers, food stamps, credit cards); which were previously not available to him as a CAO. The incumbent is to ensure adequate quantities of products are maintained and there is stock rotation. He verifies and makes annotations to accountable documents, such as invoices, receipts, vouchers, data entry to computers, handheld devices and/or electronic systems. (Appellant Exh. 3 – Civilian Performance Plan for Store Associate position). Northover continues to “operate a computer terminal to maintain the CAO system with accurate data to ensure that

optimal quantities are calculated and uses a frequency hand-held terminal to gather necessary inventory data.(Agency Tab 4a - Position description- Store Associate). By letter dated July 6, 2009, DCA HQ determined that Store Associate positions will have non-sensitive position determinations [no access to ADP/IT level II systems] (Agency Tab 4i).⁴

Argument

The Merit Systems Protection Board [Board] has respectfully vacillated on the issue of whether it has the authority to review the merits of an agency determination where the removal is based on the denial of eligibility to an employee occupying a non-critical sensitive position that does not require a security clearance. However, in its **last pronouncement on this matter**, the current members of the Board [the present Chairman and Vice-Chairman having not yet weighed in on this issue] in Crumpler v. Dept. of Defense, 2009 MSPB 233, 2009 WL 5248887 (Dec. 18, 2009) reopened Crumpler's appeal, declaring:

The Board's November 2, 2009 decision marked a momentous change in the law. **In the previous 21 years the Board has never interpreted [Dept. of Navy v. Egan, [484 U.S. 518 (1988)] as restricting Board access in an appeal brought by an employee who was not required to maintain a security clearance for access to classified information to hold this position.** The Board's November 2, 2009 decision thus announced a major limitation on **"the basic procedural rights"** of untold numbers of employees in the Department of Defense, Department of Homeland Security, and elsewhere **whose work does not involve**

⁴ Thus, if there is any distinction in access to financial records or transactions, the Store Associate position provides access that the CAO position does not possess.

access to classified information, but whose positions have been designated non-critical sensitive.⁵

Former Vice Chair and current Member Rose in Brown v. Dept. of Defense, 110 MSPR 593 (2009), motion for remand pending in Federal Circuit, Dkt. No. 2009-3176, authored a cogent Separate Opinion, before then changing that Opinion in Crumpler, based on her very broad view of the governing principles under *stare decisis*, and before then agreeing to the Reopening there. That Opinion began with an analysis of the Supreme Court's ruling in Egan. Member Rose found Egan clearly distinguishable in that Brown, a commissary contract monitor occupying a non-critical sensitive position, like Northover, was not required to have a security clearance nor had access to classified information. As Board member Rose pointed out in note 1, although the position held by the employee in Egan was also "non-critical-sensitive," 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 noted above, on the government's need to protect the classified national security information to which the employee had access." Member Rose earlier referenced language from Egan regarding the Court's reference to "efforts to protect national security information by means of a classification system," Egan at 527; and to the "reasonable basis [it had found] for the view that an agency head who must bear the responsibility for the

⁵ The Board thereafter permitted OPM and other amici the opportunity to express their views on this issue in a published Federal Register Notice. When the Crumpler case settled, the Board continued to invite amici briefs in Northover and Conyers, although the Northover case was not yet before it. AFGE submitted a Brief nonetheless, and at least 1 other amicus brief was filed by March 1.

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. Egan at 529.”

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. The Agency denied Egan a security clearance following a background investigation and then removed Egan for failure to maintain a security clearance as required for his position. *Id*. The Supreme 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 Supreme 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.⁶

Note also Cole v. Young, 351 U.S. 356 (1956), cited in Egan, where the Supreme Court recognized that “national security” is defined as only those activities of the government directly concerned with protection of the nation from internal subversion or foreign aggression. The Supreme Court recognized:

It is difficult to justify summary suspensions and unreviewable dismissals on loyalty grounds of employees who are not in sensitive positions and who are not situated where they can bring about any discernible adverse affects on the national security. In the absence of an immediate threat of harm to the national security, the normal dismissal procedures seem fully adequate and the justification for summary powers disappears. Indeed, in view of the stigma attached to persons dismissed on loyalty grounds, the need for procedural safeguards seems even greater than in other cases, and we **will not lightly assume that Congress intended to take away those safeguards in the absence of some overriding necessity such as exists in the case of employees handling defense secrets.** 351 U.S. at 546.

⁶ Moreover, Congress carefully provided an alternate procedure to be used when the Government determines that an employee’s removal is “necessary or advisable in the interests of national security.” 5 U.S.C. 7532. Even under these more streamlined procedures where there are imminent national security risks, Congress guaranteed every discharged employee a hearing into the “cause” for his removal, even if the hearing there was confined to that within the Agency. Here, where the action is brought pursuant to 5 U.S.C. 7511-7514, an employee is entitled to a hearing before the Board. 5 U.S.C. 7701(a)(1), and the employee’s discharge is to be sustained by the Board “only if supported by a preponderance of the evidence,” 5 U.S.C. 7701(c)(1)(B), and “only for such cause as will promote the efficiency of the service.” 5 U.S.C. 7513(a). An employee under these circumstances here must be entitled to a hearing to challenge false allegations raised or improper characterizations in an investigation, or that the reasons lack any rational nexus to retention of that eligibility.

Furthermore, Northover has a property and liberty interest in retention of his civil service position, enforced by a procedural mechanism designated for the determination of cause and an Agency burden of proof. Board of Regents v. Roth, 408 U.S. 564 (1972); Arnett v. Kennedy, 416 U.S. 134 (1974). Due process under the CSRA requires a full evidentiary post-termination hearing as provided in 5 U.S.C. 7513 and 7701(a)(1). Cleveland Board of Education v. Loudermill, 105 S. Ct. 1487 (1985); Arnett v. Kennedy, *supra*

As Member Rose in Brown elaborated further, “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.” For example, she maintained that the Board has held that 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 of the employee’s removal. Siegert v. Dept. of Army, 38 MSPR 684 (1988); and the authority to review the validity of a medical determination underlying the removal of an air traffic control specialist, Crosby v. FAA, 30 MSPR 16 (1986); positions, unlike that held by Northover, clearly having the potential to impact national security. Member Rose also cited 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).

In Adams, 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. 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. As here, 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 to be absent from Adams' case. Even though the Agency characterized the information in its computer system as "sensitive," the Board rejected the Agency's 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*.

Member Rose also cited Jacobs v. Dept. of the Army, 62 MSPR 688 (1994), the Board finding that it had the authority to review a security guard's qualification from the Chemical Reliability Program based on his verbal assault on a security officer; and Dodson v. Dept. of the Army, 35 MSPR 562 (1987), the Board holding it had the authority to review the employee's disqualification under the Agency's Personnel

Reliability Program based on allegedly negligent conduct. Member Rose noted further with respect to Brown's similar Commissary position that Agency officials regarded his responsibilities as sensitive because of the need to protect the store's inventory, and not for any national security reasons; and that any duties with respect to store security are similar to those of others entrusted with the responsibility of safeguarding agency property, where the Board routinely reviews agency determinations underlying removals of such employees. Moreover, Member Rose recognized that the only computer programs to which Brown had access related to the personnel program, pricing, billing, inventory and ordering, which access does not possess any threat to national security, again citing Adams.⁷

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 Court in Egan relied on access to classified national security information and maintenance of a security clearance, governed by Executive Order 10450, and its implementing regulations found in Part 732. Specifically, access to

⁷ Chairman McPhie in his opposing Opinion asserted that "the Board's judgment as to whether the position involves access to classified information or otherwise implicates national security is irrelevant." This is not a matter of the Board's judgment, but a manifest assessment of the plain facts before the Board whether maintenance of commissary grocery inventory is a matter of national security. Presumably, according to former Chairman McPhie, DOD can simply designate every civilian position without regard to actual national security implications as allegedly impacting national security, making every disqualification of a civilian employee virtually unreviewable. However, that ignores the E.O. 12968 addressing the truly recognized pertinent issue of Access to Classified Information, and the recognition therein that "the number of employees that each agency determines are eligible for access to classified information shall be kept to the minimum required for the conduct of agency functions." Sec. 2.1.

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.

It is the possession of a security clearance and the attendant access to classified information that implicates national security. 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. 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). As we maintained in our Amicus Brief, “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.”

Moreover, if an agency decides that a position does genuinely implicate access to classified national security information, then that agency possibly may, subject to the appropriate procedures and arrangements, require a security clearance for the position,

and to thereby properly avail itself of Egan. Weighed against the large number of employees who occupy non-critical sensitive it is a perversion of the Court's rationale in Egan to allow the exception to swallow the rule of federal employment. See also Attachment 3 to Northover's Reply to the Proposed Demotion (Agency Tab 4f) references DOD 5200.2-R Personnel Security System. It also provides at Sec. C3.4.5 that "personnel security clearances must be kept to the absolute minimum necessary to meet mission requirements," and that "personnel security clearances shall normally not be issued ... to persons whose regular duties do not require authorized access to classified information.... [or to] "food service personnel, vendors and similar commercial sales or service personnel whose duties do not require access to classified information."

The DeCA Directive 50-25 (Agency Tab 4gg) provides at para. 1-5 that the NACI utilized here is the minimum personnel suitability investigation required for all employees assigned to non-sensitive positions and positions of public trust where no security clearance is required, and the "SF85P, Questionnaire for Public Trust positions, will be submitted by OPM for initiation of appropriate personnel suitability investigation." Despite this position allegedly being non-critical sensitive, the type of investigation is one assigned to non-sensitive positions. Thus, it would seem appropriate to examine the analogous suitability regulations promulgated by OPM regarding MSPB review.

5 C.F.R.. 731.202 entitled Criteria for Suitability determinations provides that "in determining whether its action will promote the efficiency of the service, OPM or an agency to which OPM has delegated authority shall make its determination on the basis

of specific factors in para. (b) of this section with appropriate consideration to the additional considerations outlined in para. (c) of this section.” The specific factors listed include, *inter alia*, issues of deception or material, intentional false statements in examination or appointment; refusal to furnish testimony; dishonest conduct and other matters. The additional considerations include, *inter alia*, the nature of the position, nature, circumstances and recency of the conduct. 5 C.F.R. 731.501 addresses appeals to the MSPB:

(a) When OPM or an agency acting under delegated authority under this part takes a suitability action against a person, that person may appeal to the Merit Systems Protection Board. (b) Decisions by the Merit Systems Protection Board – (1) If the Board finds that one or more of the charges brought by OPM or an Agency against the person is supported by a preponderance of the evidence, it must affirm the suitability determination. The Board must consider the record as a whole and make a finding on each charge and specification in making the decision. (2) If the Board sustains fewer than all the charges, the Board shall remand the case to OPM the Agency to determine whether the action is still appropriate based on the sustained charge(s). However, the Agency must hold in abeyance a decision on remand until the person has exhausted all rights to seek review of the Board’s decision, including court review. (3). Once review is final, OPM or an agency will determine whether the action is appropriate based on the sustained charges and this determination will be final without any further appeal to the Board...

Similar arguments were made in these cases that Congress granted the President authority to make suitability determinations. Maximo v. OPM, 30 MSPR 510 (1986). Nevertheless, the Board held that to sustain its burden of proof in a negative suitability determination case, the Agency or OPM must show that the appellant’s conduct may reasonably be expected to interfere with or prevent efficient service in his position or effective accomplishment by the employing agency of its duties or responsibilities. Here, it must be noted that Northover performed effectively for 5 years before any investigation

even commenced here. See Mervar v. OPM., 21 MSPR 309)(employee’s behavior as a disc jockey is not predictive of his behavior as an air traffic controller). See also Folio v. Dept. of Homeland Security, 402 F.3d 1350 (Fed. Cir. 2005) (Federal Circuit held that on appeal from the decision of the INS , the Board was not limited solely to reviewing the factual underpinnings of allegations on which suitability charges were based, but could review all aspects of an unsuitability determination, including whether the charged conduct renders an individual unsuitable for the position in question, there an Immigration Inspector. The Court held further that the AJ on remand may consider all aspects under 5 C.F.R. 731.202 of Folio’s ability to perform as an Immigration Inspector in order to decide whether he is in fact unsuitable for the job. The statement retained in 5 C.F.R. 731.501 (modified in 2008) regarding final agency action without further Board appeal, “does not prevent the Board from considering the additional considerations that constitute the “nexus” between the specific factors of [731.202] para. (b) and the additional considerations of [731.202] para. (c). Section 731.202(a) expressly states that those specific factors and the additional considerations form the basis for the general determination whether the action will promote the efficiency of the service. They are all reviewable by the Board.” The qualifications of a Homeland Security Immigration Inspector, and the suitability of his application for employment, all fully reviewable by the Board, clearly may have an impact on national security, unlike that of a Commissary employee whose position is confined to grocery store inventory.

Whether considering an analogous suitability evaluation by the MSPB or not, the same standards governing adverse actions under 5 U.S.C. 7511-7514 and 7701 as would

apply to any other eligibility qualifications cases, Congress intended to be considered by the Board.

Respectfully Submitted,

A handwritten signature in black ink that reads "Stuart A. Kirsch". The signature is written in a cursive style with a large initial 'S' and 'K'.

Stuart A. Kirsch

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Certificate of Service

I hereby certify that a copy of the foregoing RESPONSE TO SUPPLEMENTAL AGENCY NARRATIVE REGARDING SCOPE OF REVIEW was served by certified mail this 11th day of March, 2010 upon the following:

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Stuart A. Kirsch