UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 247

Docket Nos. CH-0752-09-0925-I-1
CH-0752-09-0925-I-2

Rhonda K. Conyers,

Appellant,

v.

Department of Defense,

Agency.

December 22, 2010

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

Cynthia C. Cummings, Esquire, Columbus, Ohio, and Frank M. Yount, Esquire, Indianapolis, Indiana, 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 administrative judge's February 17, 2010 order. The administrative judge stayed the proceedings and certified for Board review her ruling that she would not 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 indefinite suspension. For the reasons discussed below, we AFFIRM the administrative judge's ruling AS MODIFIED by this Opinion and Order, VACATE the stay

order, and RETURN the appeal to the administrative judge for further adjudication consistent with this Opinion and Order.

BACKGROUND[1]

¶2 Effective September 11, 2009, the agency indefinitely suspended the appellant from the competitive service position of GS-525-05 Accounting Technician at the Defense Finance and Accounting Service (DFAS).[2] Initial Appeal File (IAF), Tab 5, Subtabs 4i, 4j. The agency took the action because the appellant had been "denied eligibility to occupy a sensitive position by [the agency's] Washington Headquarters Services (WHS) Consolidated Adjudications Facility (CAF), and we are awaiting a decision on your appeal of the CAF's denial from the Defense Office of Hearing and Appeals (DOHA) Administrative Judge."[3] *Id.*, Subtab 4i at 1. The agency stated that the appellant's position required her to have access to sensitive information, the WHS/CAF had denied her such access, and therefore she did not meet a qualification requirement of her position. *Id.* In its notice of proposed indefinite suspension, the agency stated that the reason for the proposal was the WHS/CAF's decision to deny the

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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 administrative judge should reopen the record when deciding the appeal. Except for the parties' stipulations, she 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 3, 1985. Initial Appeal File, Tab 5, Subtab 4j.

[3] The record indicates that the DOHA administrative judge issued a recommendation in the appellant's favor, but that on September 15, 2009, the Clearance Appeal Board did not accept the recommendation and denied her appeal. IAF, Tab 10, Ex. A. The agency subsequently removed the appellant effective February 19, 2010. Petition For Review (PFR) File, Tab 25, Ex. 1. The Board denied the appellant's motion to incorporate her removal into this appeal. *Id.*, Tab 32.

appellant "eligibility for access to sensitive or classified information." IAF, Tab 5, Subtab 4g.

¶3 The appellant filed an appeal of her indefinite suspension. IAF, Tab 1. In responding to the appeal, the agency stated that the appellant's position had been designated non-critical sensitive (NCS) under the Department of Defense Personnel Security Program Regulation, that her position required her to access "sensitive or classified information," and that, under *Egan*, the Board cannot review the merits of the WHS/CAF's decision to deny her eligibility for access "to sensitive or classified information and/or occupancy of a sensitive position."[4] *Id.*, Tab 5, Subtab 1 at 1-2, 5-6.

¶4 On February 17, 2010, the administrative judge issued an Order Granting Motion for Certification of Interlocutory Appeal and Staying Proceeding. IAF 2, Tab 4 at 2. The administrative judge stated that she had "informed the parties that [she] would decide the case under the broader standard applied in *Adams* [*v. Department of the Army*, 105 M.S.P.R. 50 (2007), *aff'd*, 273 F. App'x 947 (Fed. Cir. 2008)] and other [5 U.S.C.] Chapter 75 cases which do not involve security clearances;" that the agency moved to certify this ruling for interlocutory appeal;[5] and that the regulatory requirements for certifying her ruling had been satisfied.

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[4] The administrative judge subsequently issued a January 13, 2010 initial decision dismissing the appeal without prejudice. IAF, Tab 13. The appellant filed a petition for review of the initial decision, PFR File, Tab 2, but the administrative judge docketed her January 13, 2010 initial decision as the appellant's refiled appeal, IAF 2, Tab 1, thereby mooting the petition for review.

[5] For the first time at oral argument, and then again in its closing brief, the agency asserts that it did not request an interlocutory appeal. Transcript (Tr.) at 23; PFR File, Tab 43 at 3. However, the February 17, 2010 Order expressly noted that the administrative judge was granting the *agency's motion* to certify the issue for interlocutory appeal. IAF 2, Tab 4 at 2. The agency did not dispute the administrative judge's characterization of the origin of this interlocutory appeal until over seven months later at oral argument in this matter. In any event, as we explain below, we find that the administrative judge properly certified her ruling for interlocutory appeal.

She therefore granted the agency's motion and stayed proceedings pending the Board's resolution of the certified ruling. *Id.* at 2.

¶5 The Board found that this interlocutory appeal presented the same legal issue as that presented by the interlocutory appeal in *Northover v. Department of Defense*, MSPB Docket No. AT-0752-10-0184-I-1. 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. PFR File, Tab 1. 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, 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 opinion and a supplementary letter, five amici submitted briefs,[6] and the parties submitted additional argument. PFR File, Tabs 4-8, 10, 15-17.

¶6 On September 21, 2010, the Board held oral argument in *Conyers* and *Northover*.[7] The Board heard argument from the appellants' representative, the

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[6] 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. PFR File, Tabs 4-8.

[7] 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. PFR File, Tabs 25, 31-32, 35-37. While continuing to so argue, *id*., Tab 43, 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

agency's representatives, and representatives for the amici from the Government Accountability Project and the National Treasury Employees Union.[8] The Board allowed the parties and amici to submit written closing arguments by October 5, 2010. Tr. at 79; PFR File, Tab 40. The parties, the National Treasury Employees Union, and the Government Accountability Project submitted closing arguments. PFR File, Tabs 41-43, 45-46. 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 44, and the Board granted ODNI an opportunity to submit a statement presenting its position, *id.*, Tab 47. 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 48, 49. The record closed on October 25, 2010. *Id.*, Tab 47. The Board has considered the entire record in ruling on this interlocutory appeal.

ANALYSIS

The administrative judge properly certified her 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 she 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 her own motion. If

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previous orders. If necessary, the administrative judge should address the mootness issue on return of this appeal.

[8] OPM declined the Board's invitation to present oral argument. PFR File, Tab 27; Tr. at 4.

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),[9] the Board recognized that the legal issue presented here would have potentially far-reaching implications across the federal civil service. *Id*., ¶ 6. Thus, the administrative judge'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 administrative judge properly certified her 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.

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

§ 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 suspensions for more than 14 days. 5 U.S.C. § 7512(2). 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);[10] *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*, 105 M.S.P.R. 50, ¶ 10.

¶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 3, 1985. IAF, Tab 5, Subtab 4j. She therefore comes within the definition of "employee" in 5 U.S.C. §§ 7511(a)(1)(A)(ii), which the agency does not dispute. On September 11, 2009, DFAS indefinitely suspended her from her position of GS-525-05 Accounting Technician. *Id.*, Subtabs 4i, 4j. That suspension extended beyond 14 days, and therefore, constitutes an appealable action under 5 U.S.C.§§ 7512(2); 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

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[10] 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).

prescribed by the Supreme Court in *Egan*. IAF, Tab 5, Subtab 1 at 1-2, 5-6; PFR File, Tab 17, Resp. at 4-12, 14-15. 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[11] 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.

PFR File, Tab 24. In other words, the appellant is not required to have a security clearance and she 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 indefinite suspension 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

[11] 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.

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 administrative judge, on return of this appeal, to conduct a hearing consistent with the Board's statutory duty to determine whether the appellant's indefinite suspension 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 a 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.[12]

¶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 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"). In addition, the agency in this appeal has conceded that "determinations whether to grant an individual a security clearance and whether an individual is eligible to

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[12] 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 she has no need for access to any classified information.

occupy a national security sensitive position are separate inquiries." PFR File, Tab 17, Agency Resp. at 5 n.5.

¶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.[13]

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[13] 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

¶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 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, PFR File, Tab 17, Resp. at 6-7, that as an outside non-expert

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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 regulation.

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. *Jacob*s, 62 M.S.P.R. at 695. 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.[14] *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. *See 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, PFR File, Tab 17, Resp. at 7, that the suspension of computer access was 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*. *See 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

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

Board to adjudicate removals. As previously noted, the Board 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.[15]

¶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),[16] cited with

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[15] 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).

[16] 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

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).[17] In ruling that

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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.

[17] 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) (rejecting 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 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.

Executive Order No. 10,450[18] did not trump the employee's statutory veterans' preference rights, the *Cole* Court interpreted "national security" as used in the Act.[19] *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.[20] 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 otherwise appealable action cannot be preempted by an agency's generalized claim of "national security."[21]

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[18] 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.

[19] 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 21 *supra*.

[20] 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.

[21] 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 Von Raab*, 489 U.S. 656. 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

¶24 In this regard, we agree with the appellant 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 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

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criteria used by the [Customs] Service in determining what materials are classified and in deciding whom to test under this rubric." *Id.* at 678.

determination underlying the agency's indefinite suspension here.[22] 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.[23]

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 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

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[22] 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. We note that the agency has not contested the appellant's assertion that DFAS has designated 100% of its positions as sensitive.

[23] 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.

> 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 she was improperly suspended based upon the agency's determination that she was ineligible to occupy a national security position. PFR File, Tab 43, Br. at 7. 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. PFR File, Tab 10, 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. PFR File, Tab 48, 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 For the first time at oral argument and in its closing brief, the agency apparently argues that, following *Egan*, Congress has imposed another limitation on the Board's review authority by enacting 10 U.S.C. § 1564(e). Tr. at 31-32; PFR File, Tab 43, Br. at 5. Section (e) provides as follows:

> Sensitive Duties. - For the purpose of this section, it is not necessary for the performance of duties to involve classified activities or classified matters in order for the duties to be considered sensitive and critical to national security.

¶31 We find that the agency has failed to show that 10 U.S.C. § 1564 imposes an additional Congressional limitation on the Board's review authority. Section 1564 is entitled "Security clearance investigations." Subsection (a) sets outs the reason for the section as follows:

> Expedited Process. - The Secretary of Defense shall prescribe a process for expediting the completion of the background investigations necessary for granting security clearances for Department of Defense personnel and Department of Defense contractor personnel who are engaged in sensitive duties that are critical to the national security.

Thus, the statutory section as a whole reveals that it is concerned with the process for granting security clearances, which are not at issue in this appeal.[24] In any event, the statute does not limit the Board's authority to adjudicate adverse action appeals.

¶32 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,

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[24] In that regard, we note that the statute does not explicitly define "security clearances" as anything other than eligibility for access to, or access to, classified information. We reject the agency's attempt to equate "security clearances" with its decisions to designate positions as "sensitive" or to find that employees are no longer eligible for such sensitive positions. Absent a requirement that an employee have access to classified information, or be eligible for such access, *Egan* does not limit the Board's review of an appealable adverse action taken against a covered employee.

and that the Board's authority to exercise its statutory review of the appellant's indefinite suspension 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 have exercised its authority pursuant to 5 U.S.C. § 7532. *See id*.

¶33 The agency argues 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. PFR File, Tab 17, Resp. at 8-9. We note, however, that the agency's own actions belie its concern. Although on June 27, 2007, the WHS/CAF issued the appellant its tentative decision to deny her eligibility to occupy her NCS position, the agency did not issue its decision to actually suspend her from the position until September 3, 2009. IAF, Tab 5, Subtabs 4b, 4i. Thus, the agency kept the appellant in her NCS position for over two years after making a tentative determination to deny her eligibility. Although the appellant was admittedly proceeding through the agency's internal review process during part of this time, the record does not indicate that the agency took any action between the appellant's September 22, 2007 response to its tentative determination to deny her eligibility and its February 18, 2009 decision to deny her eligibility, i.e., for over one year. *Id.*, Subtabs 4d, 4e. Therefore, the

agency's own actions do not support its 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 for further proceedings.

¶34 Because *Egan*'s limited scope of Board review does not apply in this appeal, Board review of the challenged indefinite suspension includes consideration of the underlying merits of the agency's reasons to deny the appellant eligibility to occupy an NCS position. The administrative judge 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

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

FOR THE BOARD:

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

DISSENTING OPINION OF MARY M. ROSE

in

Rhonda K. Conyers v. Department of Defense

MSPB Docket Nos. CH-0752-09-0925-I-1 & CH-0752-09-0925-I-2

¶1 As explained below, I would hold that the Board cannot review the reasons underlying the agency's determination that the appellant is no longer eligible to occupy a sensitive position. When Congress created the Merit Systems Protection Board, it did not mean to limit (assuming it could have) the longstanding discretion vested in the President and agency heads over national security matters. The substance of 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, and I would hold that it is not subject to such review.

BACKGROUND

¶2 The appellant was a GS-525-05 Accounting Technician with the Defense Finance & Accounting Service. By authority of Executive Order No. 10,450 and 5 C.F.R. Part 732, the agency designated the appellant's position as "non-critical sensitive," based on its judgment that the incumbent "could bring about, by virtue of the nature of the position, a material adverse effect on the national security." Initial Appeal File (IAF), Tab 5, Subtab 4A; *see* 5 C.F.R. § 732.201(a). Effective September 11, 2009, the agency suspended the appellant indefinitely because the agency's Washington Headquarters Services (WHS) Consolidated Adjudications Facility (CAF) had denied her continued "eligibility to occupy a sensitive position." Specifically, the agency stated that the appellant's position required her to have access to sensitive information, that the WHS/CAF had denied her such access, and that as a result she did not meet a qualification requirement of

her position. The suspension was imposed pending her appeal to the Defense Office of Hearings and Appeals. IAF, Tab 5, Subtabs 4G, 4I.

¶3 The appellant filed this appeal. IAF, Tab 1. In response, the agency argued that the Board lacks authority to review the reasons underlying its determination that the appellant is no longer eligible to occupy a sensitive position or have access to sensitive information. IAF, Tab 5, Subtab 1 at 1-2, 5-6. The administrative judge dismissed the appeal without prejudice pending the outcome of related litigation at Board headquarters, IAF, Tab 13, and the appeal was later refiled, IAF (I-2), Tab 1. Subsequently, the administrative judge ruled that the Board is not restricted in its authority to review the reasons underlying the agency's determination to disqualify the appellant from a sensitive position. The administrative judge certified her ruling for interlocutory review by the full Board. IAF (I-2), Tab 4. In the ensuing proceeding at headquarters, the parties and amici filed numerous briefs, and the Board held oral argument on the legal issues presented.

DISCUSSION

¶4 Executive Order No. 10,450, 18 Fed. Reg. 2489 (1953), provides in relevant part as follows:

> NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States . . ., and as President of the United States, and deeming such action necessary in the best interests of the national security, it is hereby ordered as follows:
>
> * * *
>
> Sec. 2. The head of each department and agency of the Government shall be responsible for establishing and maintaining within his department or agency an effective program to insure that the employment and retention in employment of any civilian officer or employee within the department or agency is clearly consistent with the interests of the national security.
>
> Sec. 3. (a) The appointment of each civilian officer or employee in any department or agency of the Government shall be made subject to investigation. The scope of the investigation shall be determined

> in the first instance according to the degree of adverse effect the occupant of the position sought to be filled could bring about, by virtue of the nature of the position, on the national security . . . .
>
> (b) The head of any department or agency shall designate, or cause to be designated, any position within his 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. Any position so designated shall be filled or occupied only by a person with respect to whom a full field investigation has been conducted.

¶5 Based on Executive Order No. 10,450, 5 U.S.C. § 3301, and other authorities, the Office of Personnel Management (OPM) has issued regulations at 5 C.F.R. Part 732 governing "National Security Positions." The regulations provide, at 5 C.F.R. § 732.101, as follows:

> This part sets forth certain requirements and procedures which each agency shall observe for determining national security positions pursuant to Executive Order 10450 . . . .

The regulations further provide, at 5 C.F.R. § 732.102:

> (a) For purposes of this part, 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. Procedures and guidance provided in OPM issuances apply.

Additionally, the regulations provide at 5 C.F.R. § 732.201:

> (a) 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.

¶6 The majority holds that although the Board lacks authority to review the reasons underlying an agency's decision to deny an employee access to classified information, the Board is authorized to review the reasons underlying an agency's determination that an employee is no longer eligible to occupy a sensitive position where classified information is not involved. I disagree.

I. Supreme Court precedent precludes the Board from reviewing the reasons underlying an agency's determination that an employee is no longer eligible to occupy a sensitive position.

¶7 In *Department of the Navy v. Egan*, 484 U.S. 518, 520-21 (1988), the Supreme Court considered the appeal of an individual appointed to a non-critical sensitive position on a military base, with his duties limited pending "satisfactory completion of security and medical reports." The agency discovered unfavorable information about Mr. Egan during its background investigation that it believed made him a security risk, and notified him of his right to respond. In the meantime, however, Mr. Egan completed his probationary period, thereby gaining appeal rights under 5 U.S.C. §§ 7511-7513. *Id*. at 521-22. Ultimately the agency found Mr. Egan ineligible for his position and removed him. *Id*. at 522. On appeal, the Board held that it lacks authority to review the reasons underlying an agency's determination that an individual poses an unacceptable threat to national security if allowed to remain in his position. *Id*. at 524; *see Egan v. Department of the Navy*, 28 M.S.P.R. 509 (1985).

¶8 In a later phase of the appeal, the Supreme Court agreed with the Board. The Court framed the issue before it to be 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. I do not agree with the majority that the Court was using the term "security clearance" as a term of art to mean a grant of access to classified information or eligibility for such access. The *Egan* decision, when read as a whole, makes clear that the Court was concerned with the Board intruding on discretionary national

security judgments committed to agency heads, regardless of whether the employee affected needed access to classified information as part of his job. One clear indication of the meaning of *Egan* is the Court's statement that once Mr. Egan was denied a "security clearance," his only possibility for continued employment was in a "nonsensitive position." *Id*. at 522. In other words, the Court considered a "security clearance" to be a requirement for any sensitive position.

¶9 In fact, the centerpiece of *Egan*'s discussion of the limits on Board review, Executive Order No. 10,450, makes no mention of classified information whatsoever. The Court discussed the requirements of Executive Order No. 10,450 in depth while using the terms "security clearance" and "clearance" in reference to "national security" positions generally, and did not confine its discussion to positions involving access to classified information. *Id*. at 528-29, 531. "National security position" refers not just to positions that require access to classified information, 5 C.F.R. § 732.102(a)(2), but also to positions not requiring such access but 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," 5 C.F.R. § 732.102(a)(1). Accordingly, I interpret *Egan* as holding that the Board lacks authority to review the reasons underlying an agency's determination that an employee is not eligible for a sensitive position, *i.e.*, a "national security position" within the meaning of Executive Order No. 10,450 and 5 C.F.R. Part 732, regardless of whether the employee worked with classified information. 484 U.S. at 529-30. As the Court explained, national security matters are traditionally the province of the President and, by delegation, the heads of the relevant agencies. *Id*. at 530. A non-expert outside body such as the Board is poorly-suited to making the necessary "predictive judgments" about the risk that

an individual poses to national security. *Id*. at 529. Congress simply did not intend to "involve the Board in second-guessing [an] agency's national security determinations." *Id*. at 531-32.[1]

¶10 The case of *Cole v. Young*, 351 U.S. 536 (1956), discussed by the majority, does not alter my conclusion. *Cole* was decided 22 years before the passage of the Civil Service Reform Act, which created the Board and contained the version of 5 U.S.C. § 7513 addressed in *Egan*. As a consequence, *Cole* does not provide guidance on the scope of the Board's review authority under section 7513. Moreover, *Cole* is distinguishable. In *Cole*, the Court held that an agency could not invoke a 1950 law authorizing summary removal of an employee who posed a threat to "national security" unless it had first made the "subsidiary determination" that the employee's position actually implicated "national security." 351 U.S. at 556. The Court found that Mr. Cole's termination was not authorized by the 1950 law because his employing agency had never made the requisite "subsidiary determination." *Id*. at 557. By contrast, in the present appeal, it is undisputed that the agency has formally determined, in accordance with Executive Order No. 10,450 and 5 C.F.R. Part 732, that the appellant's Accounting Technician position is a "national security" position. IAF, Tab 5, Subtab 4A.

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[1] Title 10 U.S.C. § 1564, "Security Clearance Investigations," provides further support for my view that the term "security clearance" does not have the fixed, limited meaning ascribed to it by the majority. Subsection (a), "Expedited Process," charges the Secretary of Defense with improving the timeliness of completion of "background investigations necessary for granting security clearances." Subsection (e), "Sensitive Duties," provides that "[f]or the purpose of this section, it is not necessary for the performance of duties to involve classified activities or classified matters in order for the duties to be considered sensitive and critical to the national security." I therefore disagree with footnote 20 of the majority opinion, which states that under section 1564 the term "security clearance" relates only to employees who need access to classified information as part of their jobs.

¶11 Additional cases cited by the majority also do not provide guidance on the issue at hand. In *Adams v. Department of the Army*, 105 M.S.P.R. 50 (2007), *aff'd*, 273 F. App'x 947 (Fed. Cir. 2008), the Board held that it had authority to review the reasons underlying the agency's decision to suspend the appellant's access to certain computer systems that he needed to use as part of his job. In *Jacobs v. Department of the Army*, 62 M.S.P.R. 688 (1994), the Board held that it had authority to review a security guard's disqualification from the Army's Chemical Personnel Reliability Program based on his alleged misconduct. In *Siegert v. Department of the Army*, 38 M.S.P.R. 684, 687-91 (1988), the Board held that it had authority to review the agency's reasons for revoking a Clinical Psychologist's privileges, and in *Cosby v. Federal Aviation Administration*, 30 M.S.P.R. 16, 18-19 (1986), the Board held that it had authority to review the agency's determination that an Air Traffic Controller was medically disqualified from his position. *Adams*, *Jacobs*, *Siegert*, and *Cosby* stand for the proposition that agencies cannot evade Board review of the reasons for an adverse action merely by creating their own credentialing or fitness standards and then finding those standards unmet. *Adams*, *Jacobs*, *Siegert*, and *Cosby* do not discuss or even cite Executive Order No. 10,450 or 5 C.F.R. Part 732; as a result, they do not support a finding that the Board has authority to review an agency's national security judgments made under delegation from the President.

¶12 Finally, in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), the Court ruled that the Customs Service could institute a drug testing program for employees involved in drug interdiction and who carried firearms, notwithstanding the employees' objection that such testing violated their constitutional right to be free from unreasonable searches; the Court remanded the cases for findings on the validity of the drug testing program as it related to employees who handled classified material. *Van Raab* said nothing about Executive Order No. 10,450 or Board review of adverse actions.

II. Alternatively, even if Supreme Court precedent does not directly address the issue, the Board cannot review an agency's determination that an employee is no longer eligible to occupy a sensitive position because doing so would involve the Board in sensitive national security judgments that are beyond its expertise and that it is not authorized to make.

¶13 The majority reads *Egan* as leaving open the question of the scope of Board review in adverse action appeals involving employees who occupied sensitive positions but did not need access to classified information as part of their jobs. I do not read *Egan* this narrowly. If I did, however, I nevertheless would hold that the Board cannot review the reasons underlying an agency's decision that an employee is no longer eligible for a sensitive position, even when the employee did not work with classified information, because doing so would involve the Board in delicate national security judgments that are beyond its expertise and that it is not authorized to make.

¶14 Regardless of whether an employee in a sensitive position handles classified information, for the Board to review the reasons underlying the agency's decision that an individual's continued employment poses a threat to national security requires the Board to make the "predictive judgments" that the Court said in *Egan* the Board is ill-equipped to make. 484 U.S. at 529. The majority likens these "predictive judgments" to matters that the Board routinely considers under *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981). It is true that when reviewing an agency-imposed penalty for misconduct the Board may consider an employee's rehabilitation potential, *id*. at 305, which is akin to predicting future behavior. Nevertheless, any such prediction within the *Douglas* framework is fundamentally different from determining "what constitutes an acceptable margin of error in assessing the potential risk" that an employee poses to national security. *Egan*, 484 U.S. at 529. The latter judgment is an inherently military one where, as in this appeal, the employee worked for a component of the Department of Defense. In *Egan*, the Court explicitly found that the Board is not an expert in the methods for protecting classified information in the military's

custody, 484 U.S. at 529, and nothing in the structure or staffing of the Board makes it sufficiently expert in military affairs to review other military judgments not involving classified information. As agency counsel observed at oral argument, although an employee with access to classified information might pose a more obvious threat to national security than an employee in a sensitive position who does not work with classified information, the difference between the two employees is one of degree, not kind.

¶15 Apart from the Board's lack of expertise in national security matters, the Board is not authorized to decide whether an employee is eligible for retention in a sensitive position. When the Board reviews an adverse action, the standard the Board applies is whether the action "promote[s] the efficiency of the service." 5 U.S.C. § 7513(a). When an agency determines whether an individual may continue to occupy a sensitive position, the standard the agency applies is whether "retention in employment" is "clearly consistent with the interests of national security." Executive Order No. 10,450, § 2. The Board does not apply the latter standard in adverse action appeals, nor is it permitted to do so under statute, Executive Order No. 10,450, or any other authority. Therefore, the distinction between an agency's determination to deny an employee access to classified information, which the majority says the Board cannot review, and an agency's determination to deny continued employment in a sensitive position where classified information is not involved, which the majority says the Board may review, is an artificial one.

¶16 It bears emphasizing that Executive Order No. 10,450 was issued 25 years before Congress created the Board in the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111. As stated in the Preamble to Executive Order No. 10,450, the position sensitivity system is based on the President's authority under the Constitution and related statutes which, as *Egan* explains, make the President the head of the Executive branch and the steward of national security. The President has delegated certain national security and management functions

to agency heads in Executive Order No. 10,450. Assuming that Congress has the power to limit the authority of the President and agency heads over national security matters,[2] it did not do so when it authorized the Board to adjudicate adverse action appeals. If in 1978 Congress meant to alter longstanding arrangements and delegations by giving the Board the power to overrule an agency head's judgment about the threat a particular employee poses to national security, one would expect a clear indication of such an intention. I find no such indication. In fact, given that Congress instructed the Board to review adverse actions under the "efficiency of the service" standard and not any standard related to national security, *see* 5 U.S.C. § 7513(a), it is reasonable to infer that Congress did not intend to allow the Board to review an agency head's judgment on national security matters.

III. The Board should not review the reasons underlying an agency's determination that an employee is ineligible to occupy a sensitive position because doing so creates the possibility of an irreconcilable conflict between a Board order and an agency head's authority under Executive Order No. 10,450.

¶17 In addition to the explanation above, there is a separate reason why the Board should not review the reasons underlying an agency's determination that an employee is no longer eligible for a sensitive position. Executive Order No. 10,450, § 7, provides that --

> Any person whose employment is suspended or terminated under the authority granted to heads of departments and agencies by or in

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[2] The majority observes that under the Constitution, Congress has the power "to declare war," "to raise and support Armies," "to provide and maintain a Navy," and "to make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. Art. I, § 8, cl. 11-14. It does not appear that these broad powers pertain to the classic Executive functions of managing the civilian workforce at military installations and providing for the security of such installations. In any event, despite my doubts, I assume for purposes of this dissent that Congress could create an agency in the Executive branch to review an agency head's determination that retaining a particular employee in a sensitive position would pose a risk to national security. I simply would find that Congress did not intend to do so.

> accordance with the said act of August 26, 1950, or pursuant to the said Executive Order No. 9835 or any other security or loyalty program relating to officers or employees of the Government, shall not be reinstated or restored to duty or reemployed in the same department or agency and shall not be reemployed in any other department or agency, unless the head of the department or agency concerned finds that such reinstatement, restoration, or reemployment is clearly consistent with the interests of the national security[.]

This restriction on reinstatement also appears in Department of Defense regulations. *See* 32 C.F.R. § 154.57(a).

¶18 If the Board reviewed the reasons underlying an agency's determination that an employee is no longer eligible for a sensitive position, and if it found those reasons unproven, ostensibly it would order cancellation of the employee's removal. As explained in Part II above, however, the Board's decision would be based on application of the "efficiency of the service" standard and not on the relevant "interests of national security" standard under Executive Order No. 10,450. Thus, even after the Board's decision, there would remain the undisturbed judgment of the agency that the individual's continued employment would not be consistent with the interests of national security. Under such circumstances, the agency head would be derelict in his responsibility under Executive Order No. 10,450 if he allowed the individual's reinstatement, yet he would be in violation of a Board order if he denied reinstatement.

¶19 I see no way to resolve this conflict. If the Board undertakes a review of the reasons underlying an agency's determination that an employee is no longer eligible for a sensitive position, it may be conducting empty process resulting in an unenforceable Board order.

CONCLUSION

¶20 For the reasons given above, I would hold that the Board cannot review the reasons underlying an agency's determination that an employee is no longer

eligible to occupy a position that the agency has designated "sensitive" under Executive Order No. 10,450 and its implementing regulations at 5 C.F.R. § 732.201(a). Before today those reasons have never been subject to third-party review, and I am unwilling to make this the first such case. Assuming for the sake of discussion that Congress could, consistent with the Constitution, empower the Board to review the reasons underlying an agency's determination that an employee is no longer eligible to occupy a sensitive national security position, there is no indication that it gave the Board such authority.

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Mary M. Rose
Member