No. 2011-3207

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JOHN BERRY, Director, Office of Personnel Management,
Petitioner,

v.

RHONDA K. CONYERS and DEVON HAUGHTON NORTHOVER,
Respondents,

and

MERIT SYSTEMS PROTECTION BOARD,
Respondent.

ON PETITION FOR REVIEW OF A DECISION OF
THE MERIT SYSTEMS PROTECTION BOARD

BRIEF OF THE NATIONAL TREASURY EMPLOYEES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF THE NATION'S CAPITAL AS AMICI CURIAE IN SUPPORT OF THE RESPONDENTS URGING AFFIRMANCE ON REHEARING EN BANC

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March 18, 2013

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BERRY v. CONYERS et al.

No. 2011-3207

CERTIFICATE OF INTEREST

Counsel for the amicus National Treasury Employees Union (NTEU) certifies the following:

1. The full name of every party or amicus represented by me is: National Treasury Employees Union.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is: National Treasury Employees Union.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are: None.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are: Gregory O'Duden, NTEU; Larry J. Adkins, NTEU; Julie M. Wilson, NTEU; Paras N. Shah, NTEU; and Barbara A. Atkin, NTEU.

3/18/2013
DATE

PARAS N. SHAH
Counsel for Amicus National
Treasury Employees Union

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BERRY v. CONYERS et al.

No. 2011-3207

CERTIFICATE OF INTEREST

Counsel for the amicus American Civil Liberties Union of the Nation's Capital certifies the following:

1. The full name of every party or amicus represented by me is: American Civil Liberties Union of the Nation's Capital.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is: American Civil Liberties Union of the Nation's Capital.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are: None.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are: Arthur B. Spitzer, American Civil Liberties Union of the Nation's Capital.

March 14, 2013
DATE

ARTHUR B. SPITZER
Counsel for Amicus American Civil Liberties Union of the Nation's Capital

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page:

CASES

STATUTES

REGULATIONS

MISCELLANEOUS

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INTEREST OF THE AMICI CURIAE

The National Treasury Employees Union (NTEU) is a federal sector labor organization that represents thousands of employees who, like Respondents Rhonda K. Conyers and Devon Haughton Northover, occupy sensitive positions but do not hold security clearances. The American Civil Liberties Union of the Nation's Capital (ACLU) is a non-profit, non-partisan organization that works to defend civil liberties for those in the Nation's Capital, including federal employees. NTEU and the ACLU file this brief pursuant to the Court's January 24, 2013 Order inviting the views of amici curiae on the issues raised therein.

NTEU and the ACLU submit this brief to emphasize the damage to the fundamental statutory rights of federal employees that would result if this Court reverses the Merit Systems Protection Board (MSPB or Board). NTEU and the ACLU are concerned that, if the Board loses its ability to review "eligibility determinations," the design of the Civil Service Reform Act (CSRA) will be undermined: "sensitive" employees who do not have access to classified information will face unreviewable personnel actions. Indeed, if the Board is reversed, agencies--which already have great discretion to designate positions as "sensitive"--will be able to remove, suspend, or demote any employees whom they deem "ineligible" to hold these sensitive positions without ever having to justify the basis for their determination to any neutral arbiter.

ARGUMENT

I. EGAN IS CONFINED TO DETERMINATIONS THAT AN EMPLOYEE IS INELIGIBLE TO HOLD A SECURITY CLEARANCE.

When it enacted the CSRA, Congress created the Board and generally granted it broad jurisdiction over any adverse action (e.g., demotion, suspension over fourteen days, or removal) to which a federal civil service employee is subjected. See 5 U.S.C. § 7513. Against the backdrop of this grant of statutory jurisdiction, the Supreme Court carved out a very limited exception to the Board's jurisdiction in Department of the Navy

v. Egan, 484 U.S. 518 (1988). In what the Supreme Court stressed was a "narrow" ruling (id. at 520), the Court held that, in deference to the Executive's unique role in determining who may have access to the Nation's national security secrets, the Board could not review a security clearance determination underlying an adverse action.

The Office of Personnel Management (OPM) seeks to expand Egan well beyond its highly circumscribed scope and beyond the interpretation given Egan by this Court and the Board for the last twenty-five years. OPM attempts to bootstrap Egan's narrow holding into the context of adverse actions involving employees in "sensitive" positions who do not have access to classified information. There is no legal basis for the new far-reaching restriction OPM seeks to impose on the Board's (and, in turn, this Court's) statutory jurisdiction.

A. The Board's Statutory Jurisdiction and the Presumption of Judicial Review Generally Extend to All Adverse Actions.

As the "'vigorous protector' of the merit system" (Hagmeyer v. Dep't of the Treasury, 852 F.2d 531, 538 (Fed. Cir. 1988)), and in accordance with the CSRA, the Board's statutory jurisdiction extends to the adverse actions at issue here. Congress has provided that "[a]n employee [] may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or

regulation." 5 U.S.C. § 7701. The Board, moreover, is "authorized and directed to 'take final action' on any matter within its jurisdiction." Douglas v. Veterans Admin., 5 M.S.P.R. 280, 284 (1981) (quoting 5 U.S.C. § 1205(a)(1) (1978)).

The Board's statutory jurisdiction includes jurisdiction over any adverse action taken pursuant to 5 U.S.C. § 7512. Significantly, the Board's authority to review the merits of a removal presumptively includes a review of the merits of any determination underlying that removal. See Egan v. Dep't of the Navy, 28 M.S.P.R. 509, 517 n.5 (1986); accord Adams v. Dep't of the Army, 105 M.S.P.R. 50, 55 (2007), aff'd, 273 Fed. Appx. 947 (Fed. Cir. 2008). This broad statutory jurisdiction reflects the "strong presumption that Congress intends judicial review of administrative action[s]" affecting federal employees. Bosco v. United States, 976 F.2d 710, 715 (Fed. Cir. 1992). This essential review may not be denied "unless there is clear and convincing evidence" that Congress meant to foreclose it. Martinez v. United States, 333 F.3d 1295, 1327 (Fed. Cir. 2003).

Congress's intent that adverse actions affecting civil servants receive adequate judicial review is underscored not only by its creation of the Board, but also its unique grant of jurisdiction to this Court. Congress gave this Court jurisdiction over Board decisions (with limited exceptions)--

both where an appellant seeks review and also where OPM seeks review of a Board decision "affecting personnel management" that would "substantial[ly] impact" civil service law or policy. See 5 U.S.C. § 7703(b), (d). The limitation that OPM urges on the Board's statutory jurisdiction would constrict this Court's jurisdiction by dramatically narrowing the categories of civil servants able to seek review of adverse actions taken against them.

In its effort to extend Egan, OPM does not rely on a construction of the CSRA, for the language of the statute is clear and precludes the position that OPM advances. OPM purports to rely on the Constitution to add an exemption to an Act of Congress that all agree Congress itself did not enact. As shown below, the constitutional concerns that the Egan Court relied upon to remove the protections of the CSRA in that case do not exist where, as here, the employee does not have access to classified information. See, e.g., United States v. Morrison, 529 U.S. 598, 607 (2000) ("[W]e invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds.").

B. Egan Carves Out a Very Limited Exception to the Board's Jurisdiction that Applies Only to Security Clearance Determinations.

The "narrow question" presented to the Supreme Court in Egan was whether the Board "has the 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). The Court held that the Board lacked such authority. Id. at 530-31. In doing so, it emphasized the exceptionally sensitive nature of Mr. Egan's work--the repair and maintenance of a nuclear weapon-carrying submarine that was, at the time, the "most sophisticated and sensitive weapon in the Navy's arsenal." Id. at 520-21. The Court also noted that Mr. Egan needed a security clearance, and relied on the President's constitutional responsibility to protect the classified information related to such work. Id. at 520-21, 527.

In reaching its decision, the Court stressed its concerns about interfering with the President's vital ability to protect the Nation's most critical secrets. Id. at 527 (recognizing government's "'compelling interest' in withholding national security information from unauthorized persons"). It deferred to the President's right to determine whether an employee should have access to classified information. Id. According to the Egan Court, such a critical decision should be made only by

those "who must bear the responsibility for the protection of classified information" and, as a result, have the "necessary expertise": the executive agency responsible for the information. Id. at 529. Thus, the Court ruled, the Board did not have jurisdiction to review a security clearance determination underlying an adverse action.

Contrary to the panel majority's characterization, Egan does not stand for the proposition that "the CSRA did not confer broad authority on the Board in the national security context" (see 692 F.3d at 1229 (emphasis added)). Instead, it stands--quite explicitly--for a much narrower proposition: that the CSRA "does not confer broad authority on the Board to review a security-clearance determination." Egan, 484 U.S. at 530 (emphasis added).

For over twenty-five years since it was decided, this Court has consistently interpreted Egan in such a manner.[1] All other federal appellate courts that have considered Egan have likewise

[1] See, e.g., King v. Alston, 75 F.3d 657, 662 (Fed. Cir. 1996) ("In Egan, the Supreme Court was faced with the 'narrow question . . . whether the Merit Systems Protection Board (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.'"); Griffin v. Def. Mapping Agency, 864 F.2d 1579, 1580 (Fed. Cir. 1989) (same framing of the "narrow question" that Egan addressed).

applied its holding narrowly.[2] The Board has as well.[3] This Court has stated, "[t]he teaching we glean from Egan [] is this: in a case involving a suspension resulting from the suspension of a security clearance, both the Board's and this court's review is limited." Cheney v. Dep't of Justice, 479 F.3d 1343, 1351-52 (Fed. Cir. 2007).[4] Egan and its progeny stand for no more. See Opening Brief for Respondent Merit Systems Protection Board on Rehearing En Banc (MSPB Br.) at 25-29 (noting the Supreme Court's warning that "national security," in any event,

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[2] See, e.g., Berry v. Conyers, 692 F.3d 1223, 1247 & n.16 (Dyk, J., dissenting) ("[E]very other circuit that has considered Egan has uniformly interpreted it as relating to security clearance determinations.") (citing cases), vacated by 2013 U.S. App. LEXIS 1885 (Fed. Cir. Jan. 24, 2013); Guillot v. Garrett, 970 F.2d 1320, 1325 (4th Cir. 1992) ("[T]he only question before the Court in Egan was whether § 7513 authorized the MSPB to review the Executive's substantive decisions of whether or not to grant particular security clearances.").

[3] Northover v. Dep't of Def., 2010 M.S.P.B. 248, ¶¶ 19-22 (2010) (noting Board has "long considered" Egan to be limited to adverse actions based on security clearance determinations).

[4] Accord Hesse v. Dep't of State, 217 F.3d 1372, 1376 (Fed. Cir. 2000) ("The principles we draw from the Court's decision in Egan are these: (1) there is no presumption that security clearance determinations will be subject to administrative or judicial review . . . ; (2) unless Congress specifically provides otherwise, the Merit Systems Protection Board is not authorized to review security clearance determinations or agency actions based on security clearance determinations; and (3) when an agency action is challenged under the provisions of chapter 75 of title 5, the Board may determine whether a security clearance was denied, whether the security clearance was a requirement of the appellant's position, and whether the procedures set forth in section 7513 were followed, but the Board may not examine the underlying merits of the security clearance determination.") (emphases added).

should not be construed so broadly as to effectively override personnel laws).

C. Reversing the MSPB Would Have Major Adverse Ramifications for Hundreds of Thousands of Employees.

Reversing the Board and overriding Congress to eliminate substantive review of adverse actions involving employees in "sensitive" positions, under the guise of applying Egan, would be a devastating blow to the federal civil service system. Such a decision would deprive hundreds of thousands of employees of basic rights that Congress clearly intended them to have and obstruct the Board in its mission to protect the government's workforce. Most critically, extending Egan beyond its well-settled, decades-long application would "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." Conyers v. Dep't of Def., 2010 M.S.P.B. 247, ¶ 24 (2010); Northover, 2010 M.S.P.B. at ¶ 24.

1. The sensitivity designation process is ripe for abuse.

OPM's effort to extend Egan is particularly troubling given the ever-expanding categorization of federal sector positions as "sensitive" and the opacity of the criteria for such

determinations. By regulation, each agency is required to designate any position as "sensitive" if the agency asserts that the occupant could have "a material adverse effect on the national security." 5 C.F.R. § 732.201(a). Based on the positions at issue in this case and others, agencies have interpreted "sensitive" in a broad and elastic manner. See, e.g., MSPB Br. at 24.

Not only is there little uniformity or transparency in the sensitivity designation process (see MSPB Br. at 41), but the resulting designations are also immune from Board review. See Skees v. Dep't of the Navy, 864 F.2d 1576, 1578 (Fed. Cir. 1998). Thus, if the Board is reversed, agencies will be able to circumvent the CSRA's adverse action protections through "sensitivity" designations and removals couched as "eligibility" determinations: both would be insulated from Board review and, consequently, any judicial review. See MSPB Br. at 24 (discussing increases in sensitivity designations), 45.

As a result, an agency could deem a "sensitive" employee "ineligible" based on incomplete or faulty background information; for reasons motivated by an employee's race, religion, or constitutionally protected speech; or for retaliatory reasons (or for all of the above). See Conyers, 692 F.3d at 1238-39 (Dyk, J., dissenting). It could even remove an employee who has successfully challenged a removal on other

grounds before the Board by claiming that the employee is now "ineligible" to hold her newly "sensitive" position. And all of these actions could be taken without Board review of the underlying eligibility determination. That result cannot be squared with Congress's intention to protect civil servants from improper adverse actions, as embodied in the CSRA.

Whistleblowers are at particular risk of being adversely affected by a reversal of the Board's decisions. Under OPM's radically expansive interpretation of Egan, retaliatory adverse actions--made under the guise of suspensions, removals, or demotions for "ineligibility"--taken against such whistleblowers would be insulated from Board (and, in turn, judicial) review. Neither Egan nor any statute prescribes such an invidious result. See Wren v. Merit Sys. Protection Bd., 681 F.2d 867, 873 (D.C. Cir. 1982) ("Congress designed the MSPB and the OSC to protect whistleblowers against reprisal."). The disclosure of waste, fraud, abuse, and other misconduct by the government, moreover, is itself an important part of protecting our national security.

2. Agencies could use an expansion of Egan to deprive larger numbers of employees of their statutory appeal rights.

If Egan's application is expanded as OPM urges, agencies will have added incentive to designate even greater numbers of positions--regardless of the responsibilities that they entail--

as "sensitive." Doing so would eliminate the ability of the employees holding those positions to challenge the merits of the adverse actions to which they are subjected.

It is undisputed that agencies are classifying increasing numbers of employees as "sensitive." As OPM stated in its opening brief before the panel, there are approximately 500,000 civilian employees within the Department of Defense (DOD) alone who occupy sensitive positions. See Brief for Director, Office of Personnel Management filed 11/23/2011 (OPM Br.) at 10 n.7. It is unclear how many of those employees do not have security clearances, but, since relatively few employees hold clearances, it is likely in the hundreds of thousands. See id.; see also Conyers, 692 F.3d at 1237 (Dyk, J., dissenting). As another example, virtually every NTEU bargaining unit position at U.S. Customs and Border Protection (roughly 24,000 positions) is designated as "sensitive," but very few require a security clearance.

As the sheer number of "sensitive" employees suggests, many of them have only an attenuated connection to national security. Mr. Northover, for example, was a GS-07 Commissary Management Specialist at a military commissary where he stocked and controlled inventory. See 692 F.3d at 1237-38 (Dyk, J., dissenting). Ms. Conyers was a GS-05 Accounting Technician. Id. Both had positions dramatically different than that of

Thomas Egan, whose job required a security clearance and involved repairing the "most sophisticated and sensitive weapon in the Navy's arsenal." Compare id., with 484 U.S. at 520. Indeed, DOD eventually conceded that, because Mr. Northover had "no access to classified material," it was "unlikely" that he could have "a material adverse effect on national security," and reinstated him to his position. Northover, 2010 M.S.P.B. at ¶ 32. But without the check of Board and judicial review that was available in this case, agencies would have no incentive to correct such mistakes in the future.

Those who will be affected by this Court's ruling include countless employees like Ms. Conyers and Mr. Northover who perform routine duties and who are unlikely, as suggested by the panel majority, to be "potential espionage targets" or avenues for "cyber-warfare" against the government. See 692 F.3d at 1235. And, in any event, even assuming that the panel majority's national security concerns were supported by the record, which they are not, these concerns cannot supplant the CSRA or expand the narrow decision that the Egan Court issued.

II. CONGRESS INTENDED MSPB REVIEW OF ADVERSE ACTIONS TAKEN AGAINST EMPLOYEES IN SENSITIVE POSITIONS WHO DO NOT HAVE SECURITY CLEARANCES.

The Civil Service Reform Act, by which Congress established the Board's jurisdiction, was enacted in 1978, and the Supreme Court issued its Egan decision in 1988. Until the government's

actions against Respondents Conyers and Northover, agencies made no attempt to deprive "sensitive" employees of their statutory due process rights under Egan's rationale. As we demonstrate, there is no statutory justification for the government's departure from its longstanding recognition of statutory adverse action rights.

It is undisputed that Ms. Conyers and Mr. Northover are "employees" under the CSRA, and thus entitled to Board review of their adverse action appeals pursuant to 5 U.S.C. §§ 7511(a)(1) (defining "employee") and 7513 (appeal rights). See MSPB Br. at 39-40. OPM points to nothing in the statute that limits the Board's jurisdiction over adverse actions affecting so-called "sensitive" employees, such as Ms. Conyers and Mr. Northover, who do not have access to classified information. A denial of substantive appeal rights can hardly be inferred from silence.

Indeed, as Judge Dyk noted in his dissent, Congress's intent that these employees receive the full protection of the statute is made clear in Congress's decision to exclude other specific groups of employees from Title 5. See 692 F.3d at 1241-45 (Dyk, J., dissenting) ("Where Congress has crafted some exceptions for national security and not others, employees are entitled to Board review of the merits of adverse employment actions, regardless of the Department of Defense's or the majority's views that additional exceptions for national

security positions would be desirable."). In fact, where national security was considered a concern, for example, at the Federal Bureau of Investigation and the National Security Agency, Congress excluded the entire Executive agency from coverage of the statute. See id. at 1242-43 (Dyk, J., dissenting); see also MSPB Br. at 30-32.

The existence of 5 U.S.C. § 7532 further demonstrates Congress's intent to preserve Board review of adverse actions for employees such as those at issue here. See 692 F.3d at 1242 & n.10 (Dyk, J., dissenting); see also Conyers, 2010 M.S.P.B. at ¶ 23 n.17 ("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."); MSPB Br. at 32-36 (discussing legislative history of Section 7532). Section 7532 provides agencies with narrow but powerful authority to indefinitely suspend and later remove employees "in the interest of national security" while bypassing substantive Board review. See Romero v. Dep't of Def., 658 F.3d 1372, 1377 (Fed. Cir. 2011); see also OPM Br. at 7 n.3 (noting actions taken pursuant to Section 7532 are

excluded from the definition of "adverse action" under Chapter 75).[5]

Under Section 7532, an agency may summarily suspend a government employee without pay, "[n]otwithstanding other statutes," if such action is "necessary in the interests of national security." 5 U.S.C. § 7532(a); see Egan, 484 U.S. at 522 n.4; OPM Br. at 36. Then, after complying with the procedures specified in Section 7532(c), such as notice and an opportunity to respond, the agency head may remove the suspended employee if "that removal is necessary or advisable in the interests of national security"--a determination that is "final" and not subject to Board review. 5 U.S.C. § 7532; Carlucci v. Doe, 488 U.S. 93, 95, 102 (1988) ("Section 7532 . . . authorizes summary suspension and unreviewable removal at the Secretary's personal initiative after a hearing of unspecified scope."); Egan, 484 U.S. at 523 n.4 ("Removal under § 7532 is not subject to Board review."). An employee so removed is ineligible for

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[5] The Egan Court rejected the argument that the availability of Section 7532 supported the notion of Board review of security clearance determinations underlying adverse actions brought under Section 7513. See 484 U.S. at 532-34. Its reasoning for doing so, however, is inapplicable here. As discussed above, security clearance determinations bring into play a host of other considerations, including, most critically, the President's constitutional responsibility to protect classified information. It was those considerations that led to Egan's exclusion of security clearance determinations from Board review. See id. at 527-30. Such concerns are not present here.

employment elsewhere in the federal government without OPM's approval. Carlucci, 488 U.S. at 102.

To guard against abuse, however, Section 7532 can be invoked "only where there is 'an immediate threat of harm to the national security' in the sense that the delay from invoking 'normal dismissal procedures' could 'cause serious damage to the national security.'" Id. Indeed, Section 7532 and its antecedents were proposed as "extraordinary, supplemental measures to enable the Secretary of Defense, and other agency heads responsible for United States security, to respond to rare, urgent threats to national security." Id. at 101 n.5 (discussing legislative history).

Still, Section 7532 serves precisely "to increase the authority of the heads of Government departments engaged in sensitive activities to summarily suspend employees considered to be bad security risks, and to terminate their services if subsequent investigation develops facts which support such action." Id. at 103-04 (internal citations omitted). The enactment of this narrow but essentially unreviewable agency authority demonstrates that Congress intended something different for these employees than the adverse action review made available under Section 7513. See 692 F.3d at 1242 (Dyk, J. dissenting) ("[I]n enacting 5 U.S.C. § 7532, Congress provided an alternative mechanism to bypass the Board for

national security purposes--an alternative not invoked here.") (footnote omitted). OPM's proposal to expand Egan to allow agencies this same unreviewable authority for adverse actions under Section 7513 should therefore be rejected.

III. THE PROCESSES AND CRITERIA USED TO DETERMINE ELIGIBILITY TO HOLD A "SENSITIVE" POSITION ARE SEPARATE FROM THOSE USED IN THE SECURITY CLEARANCE CONTEXT.

OPM argued before the panel that "[t]his case is on all fours with Egan" because "[t]he nature of an agency's decision regarding eligibility for access to classified information and the nature of an agency's decision regarding eligibility for employment in a national security position are the same." OPM Br. at 32. That is not true. The Executive has created a structure for assigning different degrees of sensitivity to federal positions; that structure requires security clearances for those relatively few federal employees with access to information that could harm national security.

As the Egan Court understood, the Executive makes an affirmative determination as to whether a federal employee needs a security clearance, and that determination requires greater deference than others. See OPM Br. at 8 ("Eligibility for access [to classified information] requires a specific determination by an agency head or designated official" that there is "a demonstrated, foreseeable need for access."). Egan recognized this distinction and deferred to agencies in the

security clearance context without otherwise disturbing the Board's broad statutory jurisdiction. See 484 U.S. at 529. This Court should do the same.

Further, OPM cannot rely on its own regulations to obscure the critical distinction between an employee who holds a security clearance and one who does not (but occupies a sensitive position). Cf. OPM Br. at 34 ("OPM regulations [] recognize the symmetry of these national security determinations."). While OPM's regulations may conflate these two categories of employees (see, e.g., id. at 9, 29, 32, 34-36; 5 C.F.R. §§ 732.102, 732.201), Executive Order 10,450, which provides the legal basis for those regulations, does not. It clearly treats these two eligibility determinations as different.

For OPM to argue, now, that its own conflation of the two separate sets of eligibility requirements merits an expansion of Egan and a corresponding restriction of the Board's statutory jurisdiction is circular and troubling. It would allow OPM to manipulate its own regulations to make any situation "on all fours with Egan" and justify the elimination of Board review. See MSPB Br. at 44-45 (discussing Congress's intent for a check on OPM's administration of the civil system system). Such self-serving interpretation of its own regulations, in any event, cannot limit the Board's statutory jurisdiction. See Dixon v.

United States, 381 U.S. 68, 74 (1965) ("A regulation which . . . operates to create a rule out of harmony with the statute, is a mere nullity."); Aguzie v. Office of Personnel Mgmt., 116 M.S.P.R. 64, 71 (2011); see also MSPB Br. at 12, 25 (noting OPM's concessions that "the scope of the Egan decision cannot be determined by reference to OPM's regulations" and that its own regulations promulgated under Executive Order 10,450 do not "affect any appeal right under law").

IV. THE MSPB IS WELL-SUITED TO REVIEW ADVERSE ACTION APPEALS FOR EMPLOYEES HOLDING "SENSITIVE" POSITIONS NOT REQUIRING A SECURITY CLEARANCE, AND HAS DONE SO SINCE ITS CREATION.

Since its creation in 1978, the Board has exercised jurisdiction over adverse actions involving employees with access to sensitive, but not classified, information. Where those adverse actions are based on a finding that the employee is not fit or eligible to hold the position, the Board has routinely reviewed that underlying determination under its statutory-prescribed preponderance of the evidence standard. See, e.g., Adams, 105 M.S.P.R. at 55; Egan, 28 M.S.P.R. at 517 n.5. In so doing, the Board has regularly evaluated such factors as loyalty, trustworthiness, and judgment to determine if an employee's discharge will "promote the efficiency of the service." See Jacobs v. Dep't of the Army, 62 M.S.P.R. 688, 695 (1994). As shown below, the Board has reviewed such underlying determinations--even where national security concerns were

present--in a deferential and thoughtful manner for decades. Neither OPM nor the panel majority has provided any reason to believe that will change.

In Adams v. Department of the Army, 105 M.S.P.R. 50 (2007), aff'd, 273 Fed. Appx. 947 (Fed. Cir. 2008), for example, the Board ably reviewed, over the agency's objection, a removal involving an Army human resources specialist whose sensitive position included access to "sensitive information" through the agency's computer system. Id. at 52, 56. The Board found that the agency's concerns that the employee's difficult financial position reflected poorly on his ability to act "responsibly" and with "integrity" were "legitimate" and upheld the removal. Id. at 57-58 (reversing initial decision). It reasoned that the agency had presented "ample evidence that its computer system contains sensitive information, and that access to this information therefore must be limited to those who have demonstrated integrity and responsibility." Id. at 57.

The Board also found that the agency presented "persuasive evidence [that] a background investigation with favorable results is required of employees who . . . are required to use the computer system in their jobs" and that the agency's guidelines were "not inconsistent with the view that delinquent debts may reflect unfavorably on an individual's integrity," and, thus, "may serve as a basis for disqualification." Id.

This Court affirmed the Board's decision (273 Fed. Appx. 947 (Fed. Cir. 2008)).

Similarly, in Jacobs v. Department of the Army, the Board reviewed the merits of an agency disqualification of a security guard from its Chemical Personnel Reliability Program--a program "designed to ensure the safety, security, and reliability of chemical agents and weapons in the custody of the U.S. Army"--where the agency claimed an alleged verbal assault by the guard demonstrated poor judgment, contempt for authority, and an unprofessional attitude. See 62 M.S.P.R. at 689-90, 694-95 (ruling that "[t]he critical nature of the work performed by CPRP employees simply does not require that they be denied access to the Board" and listing other federal employees performing "critical work" who are likewise entitled to "full Board review of an agency action"). After a hearing at which the employee disputed the agency's account of the incident, the administrative judge mitigated the agency's proposed removal to a thirty-day suspension, and the Board affirmed the mitigation. Id. at 690, 695.

Initial decisions issued by administrative judges after the Board's decisions in Conyers and Northover likewise illustrate that the Board can capably review adverse actions involving employees in "sensitive" positions who do not have security clearances using the preponderance of the evidence standard.

Indeed, many, if not most, of these administrative judge decisions involve personnel actions for failure to satisfy debt--like those at issue in this case--which the Board has capably reviewed since the earliest days of its existence. See MSPB Br. at 43-44; see also Harmon v. Dep't of Def., 2011 MSPB LEXIS 3061, at *8-10 (M.S.P.B. May 16, 2011); Hunt v. Dep't of Def., 2011 MSPB LEXIS 2843, at *8-10, *21 (M.S.P.B. May 6, 2011); Winns v. Dep't of Def., 2011 MSPB LEXIS 5745, at *15-16, *22 (M.S.P.B. Sept. 26, 2011); Woods v. Dep't of Def., 2011 MSPB LEXIS 3200, at *7-8 (M.S.P.B. May 20, 2011).

The Board and its administrative judges, in any event, have been suitably deferential in the application of the preponderance of the evidence standard and the application of penalty mitigation factors (see Douglas, 5 M.S.P.R. at 305-06), while providing employees with vital neutral review. The Board has shown, moreover, that if an administrative judge is not appropriately deferential in his or her review, the Board will reverse that judge's initial ruling. See, e.g., Adams, 105 M.S.P.R. at 52 (reversing administrative judge decision and sustaining agency removal). And if the Board, in turn, is not suitably deferential, OPM can seek reconsideration and petition this Court for review. See 5 U.S.C. § 7703(d).

Accordingly, to fulfill its statutory role as the "protector of the government's merit systems," the Board has

rejected entreaties to expand Egan and "divest federal employees whose positions do not require a security clearance of basic protections against non-meritorious agency actions." Jacobs, 62 M.S.P.R. at 695. This Court should do the same.

CONCLUSION

For the foregoing reasons, NTEU and the ACLU urge the Court to affirm the Board's conclusion that it has jurisdiction to review the merits of an eligibility determination when reviewing an adverse action taken against an employee deemed ineligible to hold a "sensitive" position where the adverse action does not involve a security clearance or access to classified information.

Respectfully submitted,

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March 18, 2013

CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

I certify that the foregoing Brief of the National Treasury Employees Union and the American Civil Liberties Union of the Nation's Capital as Amici Curiae in Support of the Respondents Urging Affirmance on Rehearing En Banc complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief contains 5119 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in twelve-point Courier New font.

3/18/2013
DATE

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Certificate of Service

I certify that the appropriate number of copies of the foregoing Brief of the National Treasury Employees Union and the American Civil Liberties Union of the Nation's Capital as Amici Curiae in Support of the Respondents Urging Affirmance on Rehearing En Banc was sent by regular U.S. Mail this 18th day of March, 2013 to:

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