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

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February 10, 2012

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: None.

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; Barbara Atkin, NTEU; Larry J. Adkins, NTEU; Julie M. Wilson, NTEU.

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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.

DATE: February 6, 2012

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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 and expand civil liberties for those in the Nation's Capital, including federal employees. Both organizations have a strong interest in ensuring that adequate due process is afforded to federal employees prior to discharge.

NTEU and the ACLU file this brief to emphasize the potential damage to the basic procedural rights of federal

employees that would result if this Court reverses the Merit Systems Protection Board (Board or MSPB) and limits the scope of the Board's review in this context to the same extent as in the context of an adverse action following the denial or revocation of a security clearance. NTEU and the ACLU are concerned, in particular, that the process of suspending, removing, or demoting a sensitive employee who does not have access to classified information is subject to abuse if the Board loses its ability to review the underlying eligibility determination.

NTEU has already seen an agency attempt to remove an employee through this avenue after an arbitrator reversed an unrelated adverse action taken against that employee. It takes no stretch of the imagination to foresee additional agency attempts to retaliate against employees--such as whistleblowers--under the guise of suspending, removing, or demoting them for national security reasons. Those decisions would be unreviewable if the Board is reversed.

Pursuant to Federal Rule of Appellate Procedure 29(a), all parties have consented to the filing of this brief.[1]

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[1] No counsel for any party in this action authored this brief in whole or in part, and no party or party's counsel or person other than the amici curiae or its members or its counsel contributed money intended to fund preparing or submitting this brief. See Fed. R. App. P. 29(c)(5).

STATEMENT OF THE ISSUE

Whether the Board properly held that its statutory jurisdiction to review adverse actions includes the review of an adverse action taken against an employee found to be "ineligible to hold a sensitive position" where the adverse action does not involve suspension or revocation of a security clearance.

SUMMARY OF THE ARGUMENT

Congress created the Board and granted it broad jurisdiction over any demotion, indefinite suspension, or removal of a federal civil service employee by a federal agency. See 5 U.S.C. § 7513. Against the backdrop of this grant of statutory jurisdiction and the strong presumption of judicial review of administrative action, the Supreme Court carved out a narrow exception to the Board's jurisdiction in Department of the Navy v. Egan, 484 U.S. 518 (1988). In a self-described "narrow" ruling, the Supreme 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. Id. at 527-31.

The Office of Personnel Management (OPM) seeks to expand Egan radically beyond its intended scope and beyond the interpretation given Egan by this Court and the Board for the last twenty-four years. OPM attempts to bootstrap Egan's

limited holding into the context of adverse actions involving employees in sensitive positions who do not have access to classified information. There is no statutory, regulatory, or common law basis for the new restriction OPM seeks to impose on the Board's jurisdiction, and policy implications counsel against it.

Reversing the Board and eliminating its review here would impact hundreds of thousands of employees, such as accounting technicians and commissary specialists like Respondents Conyers and Northover who do not hold security clearances. These employees could be suspended or removed because they are found to be ineligible for their jobs based on faulty or incomplete information that would not be subjected to impartial Board review--a process ripe for abuse, including retaliation against whistleblowers. Notably, the same Board review that OPM seeks to eliminate led to the Department of Defense (DOD) appropriately reassessing and reversing the adverse actions at issue here. As the Board's opinion notes, DOD reinstated Respondent Northover to the position from which he was demoted after the initial decision and before the Board's decision because he had "no access to classified material," which made it "unlikely" he could have "a material adverse effect on national security." Similarly, DOD cancelled the indefinite suspension to which Respondent Conyers had been subjected during

litigation. Without any possibility of Board review, such a result would have been unlikely and these two dedicated federal employees would have been improperly stripped of their livelihoods.

OPM's fears of Board review in this context are misguided. First, a suspension or removal legitimately imposed in the interest of national security is possible under 5 U.S.C. § 7532.[2] Section 7532 allows for a summary suspension followed, after certain procedural protections, by a removal that is unreviewable by the Board if the employee poses an immediate threat to national security. Thus, affirming the Board and keeping intact its statutory jurisdiction under Section 7513 will not adversely affect an agency's ability to suspend or remove employees in the interests of national security without substantive Board review when such exceptional action is warranted. Second, the Board has reviewed the fitness determinations underlying adverse actions for decades; it has been suitably deferential in its application of the statutorily-prescribed preponderance of the evidence standard and its application of common law penalty mitigation factors. And when administrative judges have not been adequately deferential to an

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[2] Section 7532 procedures are available to many agencies and can be made available to others by means of a Presidential determination. See Note 7 infra.

agency's national security concerns, the Board has reversed initial decisions and sustained the adverse action.

ARGUMENT

I. CONGRESS HAS GIVEN THE BOARD UNAMBIGUOUS STATUTORY JURISDICTION OVER THE ADVERSE ACTIONS AT ISSUE

The broad grant of statutory jurisdiction from Congress to the Board and the strong presumption of judicial review of administrative action make clear that the Board has jurisdiction over the adverse actions at issue here. Department of the Navy v. Egan, 484 U.S. 518 (1988)--a self-described "narrow" decision that this Court and the Board have likewise interpreted narrowly for over two decades--does not change this fact. As we show, Egan is properly read as limiting the scope of Board review only in cases involving adverse actions stemming from the suspension or revocation of security clearances.

A. The Board's Statutory Grant of Jurisdiction and the Presumption of Judicial Review

As the "'vigorous protector' of the merit system and the 'cornerstone' of civil service reform" (Hagmeyer v. Dep't of the Treasury, 852 F.2d 531, 538 (Fed. Cir. 1988)), the Board has broad statutory jurisdiction. Congress has unambiguously provided that "[a]n employee, or applicant for employment, 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), as enacted by the Civil Service Reform Act of 1978).

The Board's statutory jurisdiction includes jurisdiction over any demotion, indefinite suspension, or removal of a federal employee (as defined in 5 U.S.C. § 7511) by a federal agency pursuant to 5 U.S.C. § 7513. 5 U.S.C. § 7512. Significantly, the Board's authority to review the merits of a removal case 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).

There is, moreover, no statutory basis for limiting the Board's jurisdiction over adverse actions affecting so-called "sensitive" employees who do not have access to classified information, including where the adverse action is a consequence of a determination that the employee is no longer "eligible" to hold that sensitive position. Nothing in Title 5 of the U.S. Code imposes such a limitation. A denial of substantive appeal rights can hardly be inferred from silence.[3]

[3] Nor does any regulation purport to limit the Board's statutory jurisdiction. OPM admits that 5 C.F.R. Part 732 is

This broad statutory jurisdiction is buttressed by the "strong presumption that Congress intends judicial review of administrative action" (Bosco v. United States, 976 F.2d 710, 715 (Fed. Cir. 1992))--review that will not be cut off "unless there is clear and convincing evidence that Congress intended to foreclose such review." Martinez v. United States, 333 F.3d 1295, 1327 (Fed. Cir. 2003); accord Conoco, Inc. v. U.S. Foreign-Trade Zones Bd., 18 F.3d 1581, 1585 (Fed. Cir. 1994). 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 by its unique grant of jurisdiction to this Court. Congress granted 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).

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silent on the scope of Board review of an agency determination that an employee is ineligible to occupy a sensitive position. See Conyers v. Dep't of Defense, 2010 M.S.P.B. 247, at 19-20 ¶ 27 (2010); Northover v. Dep't of Defense, 2010 M.S.P.B. 248, at 18-19 ¶ 27 (2010). In any event, OPM cannot by regulation limit the Board's statutory jurisdiction. See, e.g., Aguzie v. OPM, 116 M.S.P.R. 64, 71, 74 (2011) (reconsideration pending); Siegert v. Dep't of the Army, 38 M.S.P.R. 684, 691 (1988).

B. The Board Has Reviewed Fitness Determinations Underlying Adverse Actions Since Its Creation

Since it was created 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. See, e.g., Adams, 105 M.S.P.R. at 55; Egan, 28 M.S.P.R. at 517 n.5. Indeed, the Board has reviewed such underlying determinations--even where national security concerns were present--in a thoughtful manner for decades.

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 reviewed the merits of an agency determination that an employee should not have access to a command computer system with sensitive (but unclassified) information because the employee's background investigation revealed unpaid debts. Similarly, in Jacobs v. Department of the Army, 62 M.S.P.R. 688 (1994), 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.[4]

In Adams and Jacobs, the Board considered, and rejected, the contention that its review should be limited consistent with Egan. The Board read Egan as narrow in scope and specifically limited to removals based on the denial of a security clearance. See Adams, 50 M.S.P.R. at 55; Jacobs, 62 M.S.P.R. at 695. The Board refused to expand Egan to situations where the government assesses the dependability, stability, social adjustment, or judgment of the incumbents. As it pointed out in Jacobs, there are countless government jobs that require such qualities. In order to guard its role as "protector of the government's merit systems," the Board declined to expand the scope of Egan to "divest federal employees whose positions do not require a security clearance of basic protections against non-meritorious agency actions"--even, the Board held, when the position involved the protection of a national chemical weapons program. Jacobs, 62 M.S.P.R. at 695.

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[4] See also Thompson v. Dep't of the Air Force, 2007 MSPB LEXIS 8504 (2007) (AJ Decision) (Air Force civilian employee removed for failure to maintain an Air Traffic Control Specialist certificate), review denied, 108 M.S.P.R. 577 (2008), aff'd, 289 Fed. Appx. 406 (Fed. Cir. 2008); Dodson v. Dep't of the Army, 35 M.S.P.R. 562 (1987) (Quality Assurance Specialist (Ammunition) disqualified from Army's Personnel Reliability Program).

Such reasoning applies with equal force here. Just as the Board exercised its authority to review agency determinations that an employee was "unfit" for reasons such as financial problems or incidents that suggested poor judgment, it can also review the underlying basis for a determination that the employee is "ineligible" to hold a sensitive position. Indeed, the Board's experience in these fitness cases demonstrates that it is appropriately attentive to the agency's security concerns and findings while providing vital neutral third-party review of the underlying factual allegations. See id.; see also Part III.B infra.

The Civil Service Reform Act, which 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, the Executive made no attempt to deprive sensitive employees of their statutory due process rights. OPM provides no justification for this abrupt change in course. It cites no change in applicable law and describes no differences between the employment circumstances of current sensitive employees and those of their predecessors.

C. Egan Carves Out a Very Limited Exception to the Board's Jurisdiction That Extends Only to Security Clearance Determinations Underlying Adverse Actions; It Should Not be Expanded

OPM argues at length that an agency's determination that an employee is ineligible to occupy a sensitive position is not itself an adverse action subject to Board review. See Brief for Director, Office of Personnel Management (OPM Br.) at 39-42. That argument, of course, is a straw man, for no one is arguing that this eligibility determination is itself an adverse action. It is the removal, suspension, or demotion that follows the eligibility determination that is an adverse action.

The issue here is whether Egan should be expanded to preclude Board review of an adverse action resulting from an unfavorable eligibility determination. And as the Board properly held, Egan does not constrain the scope of its review of adverse actions unless the adverse action resulted from a denial, revocation, or suspension of a security clearance. See Conyers at 7-9 ¶¶ 12-13; Northover at 7-8 ¶¶ 12-13.

1. Egan is a narrow decision that is inapplicable here

In Egan, the Supreme Court held that in an appeal of a removal based on the revocation or denial of a security clearance, the Board did not have the authority to examine the substance of a security clearance determination, or to require the agency to support its decision to revoke or deny a security

clearance by a preponderance of the evidence. 484 U.S. at 530-31. The Egan Court made clear, however, that it was addressing only the "narrow question" of whether the Board could review the substance of an underlying decision to deny a security clearance. Id. at 520 (emphasis added). It framed the issue as follows:

> [M]ay the Board, when § 7513 is pursued, examine the merits of the security-clearance denial, or does its authority stop short of that point, that is, upon review of the fact of denial, of the position's requirement of security clearance, and of the satisfactory provision of the requisite procedural protections?

Id. at 526 (emphases added). In ruling on this narrow question, the Court took great care to stress its concerns about interfering with the President's vital ability to protect the Nation's 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 Egan, 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 that the Board did not have jurisdiction to review a security clearance determination underlying an adverse action.

Egan does not apply to the adverse actions to which Respondents Conyers and Northover were subjected, as the parties stipulated during the Board proceedings that neither Conyers nor Northover had a security clearance or access to classified information. See Conyers at 8-9 ¶ 13; Northover at 7-8 ¶ 13. Thus, the narrow exception to the scope of the Board's review that Egan carved out is inapplicable here.

2. For twenty-four years, both this Court and the Board have consistently interpreted Egan narrowly

This Court and the Board have been consistent in narrowly interpreting Egan for twenty-four years since it was decided. Indeed, this Court has repeatedly couched Egan in terms of its "narrow" security clearance-related holding, illustrating the decision's limited scope. 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. Defense Mapping Agency, 864 F.2d 1579, 1580 (Fed. Cir. 1989) (same framing of the "narrow question" that Egan

addressed).[5] As this Court has stated, "[t]he teaching we glean from Egan, Alston, and Hesse 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). Egan and its progeny stand for no more.

Likewise, the Board has "long considered Egan's restriction on its statutory review as confined to adverse actions based on

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[5] See also Read v. United States, 254 F.3d 1064, 1065 (Fed. Cir. 2001) ("[U]nder Department of the Navy v. Egan, 484 U.S. 518, 98 L. Ed. 2d 918, 108 S. Ct. 818 (1988), 'the Board lacks authority to review the substance of a security clearance determination.'") (emphasis added); Briley v. National Archives & Records Admin., 236 F.3d 1373, 1379 (Fed. Cir. 2001) ("In Egan, the Supreme Court held that the Board does not have authority to review the substantive merits of the agency's decision to deny security clearance to the employee.") (emphasis added); 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); Drumheller v. Dep't of the Army, 49 F.3d 1566, 1569 (Fed. Cir. 1995) ("In Department of Navy v. Egan, 484 U.S. 518, 98 L. Ed. 2d 918, 108 S. Ct. 818 (1988), the Court considered the extent to which the Board, while reviewing an adverse action under 5 U.S.C. § 7513, may evaluate an agency's decision to deny or revoke a security clearance.") (emphasis added).

security clearance revocation and refused to extend the restriction to non-security clearance appeals where the actions arguably implicated national security." Conyers at 12-14 ¶¶ 19-22 (discussing Board decisions construing Egan narrowly); Northover at 11-13 ¶¶ 19-22 (same). For decades, it has held that it has jurisdiction to review the merits of agency determinations regarding employee fitness in instances where the agency withdrew or revoked its certification or other approval of the employee's qualifications to hold a position that implicated important security concerns. See, e.g., Adams, 50 M.S.P.R. at 55; Jacobs, 62 M.S.P.R. at 695; Dodson, 35 M.S.P.R. 562.

3. Egan should not be expanded

This Court should reject OPM's invitation to expand the Egan doctrine and obstruct the Board's ability to protect the government's workforce and, in turn, deprive federal government employees of basic rights.

OPM argues 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 put our Nation severely at risk. As the Egan Court understood, the Executive makes an affirmative determination as to whether or not 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."). The Egan Court recognized this distinction and deferred in the security clearance context while otherwise leaving intact the Board's broad statutory jurisdiction. This Court should do the same.

Further, OPM cannot rely on its own regulations to conceal 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 (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 regulations to make any situation "on all fours with Egan." See Part II infra. It is axiomatic that "[a] regulation which . . . operates to create a rule out of harmony with the statute, is a mere nullity." Dixon v. United States, 381 U.S. 68, 74 (1965). Such self-serving interpretation of its own regulations, in any event, cannot limit the Board's statutory jurisdiction. See Aguzie, 116 M.S.P.R. at 71, 74; Siegert, 38 M.S.P.R. at 691.

There is simply no statutory, regulatory, precedent-based, or policy basis for concluding that the mere fact that petitioners' positions are designated "non-critical sensitive" demonstrates a "compelling interest" (see Egan, 484 U.S. at 527) that justifies stripping the Board of its normal jurisdiction over adverse actions. The granting of a clearance clearly and directly involves "compelling" national security interests because that action gives access to the Nation's secrets. And it is this tightly controlled access to classified information, coupled with the Executive's special role in protecting that information, that led the Egan Court to create a narrow exception restricting the normal scope of the Board's jurisdiction.

II. REVERSING THE BOARD WOULD HAVE DIRE CONSEQUENCES FOR THOUSANDS OF FEDERAL EMPLOYEES

Reversing the Board and extending Egan beyond its decades-long interpretation 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." See Conyers at 17 ¶ 24; Northover at 16-17 ¶ 24. This is particularly troublesome given the ever-expanding categorization of federal sector positions as "sensitive" and the opacity of the criteria for such determinations. Although NTEU does not know precisely how many federal employees without security clearances are classified as "sensitive," it has reason to believe that they could easily include half of the federal workforce or more.

By OPM regulation, each agency is required to designate any position as "sensitive" if the occupant could have "a material adverse effect on the national security." 5 C.F.R. 732.201(a).[6] While many employees government-wide are designated "non-sensitive," the trend is to classify increasing numbers as

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[6] OPM relies on a proposed rule in arguing that the "material adverse effect" can extend beyond access to classified information to include "protection of borders and ports, critical infrastructure, or key resources" (OPM Br. at 9, 29), thus illustrating the potential for "sensitive" positions to become the norm in federal employment--a potential that will only be encouraged if this Court rules that all "sensitive" employees are exempt from basic civil service protections.

"sensitive" to some degree: either non-critical sensitive, critical-sensitive, or special-sensitive. OPM acknowledges that there are approximately 500,000 civilian employees within DOD alone who occupy sensitive positions. OPM Br. at 10 n.7. It is unclear how many do not have security clearances, but, since relatively few employees hold clearances, it is likely in the hundreds of thousands. In addition, NTEU is aware that virtually every single position at Customs and Border Protection is designated as at least "non-critical sensitive," although very few positions require a security clearance. As a consequence, the approximately 24,000 CBP employees that NTEU represents (and an unknown number of non-bargaining unit employees) would be subject to removal for "ineligibility to hold a sensitive position" with only minimal Board review, should Egan be extended to this context.

As the sheer number of "sensitive" employees suggests, many of them are likely to have only an attenuated connection to national security. Tellingly, OPM omits any substantive discussion of Respondents Conyers and Northover's job descriptions in its brief. See generally OPM Br. at 18-21. Respondent Northover was a GS-07 Commissary Management Specialist at a military commissary who had no access to classified information and, accordingly, no security clearance. He is thus closely analogous to Jeanell Brown, the appellant in

Brown v. Department of Defense, 110 M.S.P.R. 593 (2009), who was a GS-05 Commissary Contractor Monitor. A DOD representative cited the need to protect the commissary's valuable inventory in support of Brown's "non-critical sensitive" status. He pointed out that Brown worked at the commissary when it was closed to the public and was responsible for ensuring that the doors were locked and that only authorized personnel were permitted to enter. Respondent Conyers was a GS-05 Accounting Technician. OPM Br. at 18. Both Respondents had positions dramatically different than those filled by the employees discussed in OPM's brief, such as Department of Homeland Security employees "responsible for preventing the entry into the United States of organisms and other matter that could be used for biological warfare or terrorism." OPM Br. at 30.

A decision limiting Board review of ineligibility determinations would permit agencies to remove large numbers of employees virtually at will, merely by declaring that they are "ineligible" to hold a "sensitive" position. The sensitivity rating process is shrouded in mystery, although it is obviously broad and elastic. Unlike for positions requiring security clearances, there is no public guidance on how agencies are to determine which positions are "non-critical sensitive," as opposed to "critical sensitive" or "special sensitive." Moreover, the "investigative requirements" for each sensitivity

level are contained in "OPM issuances" that are not made public. See 5 C.F.R. 732.201(b). Not only is there no transparency in the sensitivity designation process, but the resulting designations are also immune from Board review. Skees v. Dep't of the Navy, 864 F.2d 1576, 1578 (Fed. Cir. 1998).

If this Court reverses the Board and accepts the radical expansion of Egan that OPM proposes, there is a very real possibility that agencies will evade the substantive adverse action protections specified by statute through "sensitivity" designations and removals couched as eligibility determinations. Indeed, NTEU has seen first-hand an agency attempt to circumvent the adverse action appeal process using this method. NTEU represented an employee who successfully challenged his removal before an arbitrator but who was then subjected to a second proposed removal for his alleged failure to satisfy the investigative requirements associated with his "national security position." Tellingly, the employee's alleged "ineligibility" was based on the very same evidence that the arbitrator had rejected as not warranting the employee's initial removal. Although that case ultimately settled, it illustrates how sensitivity determinations can be abused and why, in turn, they should not be insulated from Board review. At bottom, if the Board is reversed, an agency gets a second bite at the apple if it wants to demote, suspend or remove an employee who

occupies a "sensitive" position, and the agency's second determination is effectively unreviewable. That result cannot be consistent with Congress's intent when it granted the Board broad authority to review adverse actions.

This is particularly true in the context of whistleblowers. See Wren v. Merit Sys. Protection Bd., 681 F.2d 867, 873 (D.C. Cir. 1982) ("Congress designated the MSPB and the OSC to protect whistleblowers against reprisal."). Under OPM's unduly 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 review and, consequently, any judicial review. See Conyers at 17 ¶ 24; Northover at 16-17 ¶ 24. Neither Egan nor any statute or regulation prescribes such an invidious result. And such a result would be directly contrary to Congress's intent when it designated the Board to protect whistleblowers.

III. AFFIRMING THE BOARD WILL NOT LEAD TO THE PARADE OF HORRIBLES THAT OPM SUGGESTS

OPM discusses at length its qualms with the Board's application of a preponderance of the evidence standard and the factors set forth in Douglas v. Veterans Administration, 5 M.S.P.R. 280 (1991), in reviewing adverse actions against employees in sensitive positions who do not have security

clearances. OPM Br. at 42-46, 49-51. At bottom, OPM contends that affirming the Board here will undermine national security. See id. There is no reason to expect such dire consequences.

A. Section 7532 Renders OPM's Exaggerated Arguments Beside the Point

OPM spends pages of its brief discussing hypothetical pitfalls of Board review of adverse actions affecting employees in sensitive positions who do not have access to classified information, including the possibility that an agency might be forced to retain such an employee even though he or she is perceived to be a threat to national security. See, e.g., OPM Br. at 42-49. These concerns are overblown, as discussed below, and they are also largely beside the point due to the existence of 5 U.S.C. § 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 Defense, 658 F.3d 1372, 1377 (Fed. Cir. 2011); King v. Alston, 75 F.3d 657, 659 n.2 (Fed. Cir. 1996) (noting, in Section 7513 matter, that "[t]he agency presumably could also have acted pursuant to 5 U.S.C. § 7532"); 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).

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.[7] 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."). An employee so removed is ineligible for 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

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[7] Section 7532's applicability is limited to certain federal agencies and "such other agency of the Government of the United States as the President designates in the best interests of national security." 5 U.S.C. § 7531. By specifying only certain agencies and requiring a Presidential determination in order to make Section 7532 available to others, Congress manifested its intent that this authority not be used indiscriminately.

'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); see also Cole v. Young, 351 U.S. 536, 548 (1956) ("[T]he conclusion we draw from the face of the Act that 'national security' was used in a limited and definite sense is amply supported by the legislative history of the Act."); Doe v. Cheney, 885 F.2d 898, 906 (D.C. Cir. 1989) (noting that Carlucci limited Section 7532's definition of "national security" to "only those activities which are directly concerned with the Nation's safety, as distinguished from the general welfare").

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." Carlucci, 488 U.S. at 103-04. This narrow, but virtually unreviewable agency authority should alleviate any concerns that this Court has about the impact of keeping intact

the Board's jurisdiction to review actions taken under Section 7513.

B. The Board Has Been Suitably Deferential and Sensitive to National Security Concerns

OPM's arguments also ignore the Board's long experience in reviewing adverse actions based on agency determinations of employee fitness. OPM Br. at 42-46, 49-51. For decades, the Board's review of adverse actions to which such employees have been subjected has been suitably deferential to the agency's national security concerns even under the preponderance of the evidence standard prescribed by 5 U.S.C. § 7701(c)(1)(B). There is no reason to believe that that will change.

In Adams, for example, the Board 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. 105 M.S.P.R. at 52, 56.[8] 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

[8] Board Member Rose, who dissented in the Board's Conyers and Northover decisions, was in the Adams majority that capably reviewed the adverse action at hand and rejected the agency's argument that Egan should apply.

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 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).

Adams exemplifies the Board's sensitivity to national security concerns and its experience in dealing with them in a thoughtful and deferential manner. OPM argues, nevertheless, that certain recent initial decisions issued by administrative judges illustrate that Board review is "not compatible" with adverse actions by agencies against employees in sensitive positions who do not have security clearances. OPM Br. at 51-53. The initial decisions that OPM discusses have yet to receive Board scrutiny and there are undoubtedly other initial decisions that cut the other way. See, e.g., Woods v. Dep't of Defense, No. CH-0752-11-0047-I-2 (May 20, 2011) (ruling that agency's removal of non-critical sensitive employee was supported by preponderant evidence due to employee's failure to

meet financial obligations and satisfy debts). If an administrative judge is not appropriately deferential in his or her review, the Board can reverse that judge's initial ruling, as the Board did in Adams. 105 M.S.P.R. at 52. And if the Board, in turn, is not suitably deferential, OPM can seek reconsideration and petition this Court for review.

OPM also baldly asserts that "the power to evaluate an employee's trustworthiness and loyalty lies with the President and has been delegated to agency heads; it does not belong to an outside body." OPM Br. at 48-49. This is not so. Consistent with its statutory mandate and role as the "'vigorous protector' of the merit system" (Hagmeyer, 852 F.2d at 538), the Board routinely evaluates such factors as loyalty, trustworthiness, and judgment in determining whether an employee's discharge will "promote the efficiency of the service." See Jacobs, 62 M.S.P.R. at 695 ("[T]here are countless positions throughout government requiring that the incumbents be dependable, stable, socially adjusted, of sound judgment, and positive in attitude."); see also Part I.B supra. The Board, moreover, surely is well-equipped to review the facts underlying the eligibility determination and the agency's application of its own criteria in determining the propriety of the adverse action.

C. The Board's Use of Douglas Factors Is Appropriate

OPM further argues that the Board's proposed evaluation of the Douglas factors in reviewing adverse actions to which sensitive employees have been subjected demonstrates the impropriety of Board review. See OPM Br. at 50-51. That argument is meritless.

The twelve Douglas factors used to assess the reasonableness of the penalty imposed on an employee include, among others: the nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities; the employee's work record, including length of service and job performance; and the consistency of the penalty with those imposed upon other employees for the same or similar offenses. Douglas, 5 M.S.P.R. at 305-06. These factors can indeed be weighed in assessing an adverse action in this context.

In Jacobs, for example, the Board reviewed a removal of security guard for a Department of the Army chemical weapons program due to an alleged verbal assault on a Security Officer, which the agency asserted demonstrated poor judgment, contempt for authority, and an unprofessional attitude meriting his removal. 62 M.S.P.R. at 690, 694. Like OPM, the agency in Jacobs argued that the Board "should not second-guess" the agency's attempts to "predict the appellant's future behavior."

See OPM Br. at 50 (arguing "the national security determinations at issue" are not "penalties, but instead "attempt[s] to predict [an employee's] possible future behavior"); Jacobs, 62 M.S.P.R. at 695. The Board rejected this argument, reasoning that "most" removal actions "are based at least in part on an attempt to predict an employee's future behavior," and that "[w]hen an agency acts based on such predictions in imposing a penalty, the Board is required by its statutory mandate to review the propriety of those agency judgments." Id.

Such Board review necessarily involves "second-guessing" agency predictions of future employee conduct (see id.): that is simply the system that Congress created. The "second-guessing" in this context, however, is different from the "second-guessing" that concerned the Egan Court. Here, the Board's prediction of future behavior is based on the employee's past conduct. See id. In Egan, in contrast, the Court was concerned about the Board second-guessing more amorphous agency "concerns completely unrelated to conduct" that were related to "outside and unknown influences," such as "having close relatives residing in a country hostile to the United States." 484 U.S. at 528-29. Such concerns are not present here.

In sum, here, since Egan does not apply, there is no basis for prohibiting the Board from applying the Douglas factors, as it has for decades.

CONCLUSION

For the foregoing reasons, NTEU and the ACLU urge the Court to affirm the Board's rulings 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 suspension or revocation of a security clearance.

Respectfully submitted,

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February 10, 2012

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

I certify that the Brief of the National Treasury Employees Union and the American Civil Liberties Union of the Nation's Capital as Amici Curiae complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief contains 6929 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.

2/10/2012
DATE

PARAS N. SHAH
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Treasury Employees Union

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 was sent by regular U.S. Mail this 10th day of February, 2012 to:

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ADDENDUM

Pursuant to Federal Rule of Appellate Procedure 32.1(b), NTEU provides a copy of the following MSPB initial decision, which is cited in the foregoing brief but not available in a publicly accessible electronic database: Woods v. Department of Defense, No. CH-0752-11-0047-I-2 (May 20, 2011).

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CENTRAL REGIONAL OFFICE

TRENIA S. WOODS,
Appellant,

v.

DEPARTMENT OF DEFENSE,
Agency.

DOCKET NUMBER
CH-0752-11-0047-I-2

DATE: May 20, 2011

Frank Rock, Indianapolis, Indiana, for the appellant.

Thomas S. Tyler, Esquire, Indianapolis, Indiana, for the agency.

BEFORE
Stephen E. Manrose
Administrative Judge

INITIAL DECISION

INTRODUCTION

On January 18, 2011, the appellant refiled an appeal from an action removing her on October 8, 2010, from the position of Financial Management Specialist, GS-09, with the Department of Defense, Defense Finance and Accounting Service, Indianapolis, Indiana. I held a hearing on May 19, 2011.

The appeal falls within the Board's appellate jurisdiction. *See* 5 U.S.C.A. §§ 7511-7513 (West 2007). For the reasons stated below, the agency's action is AFFIRMED.

ANALYSIS AND FINDINGS

Merits - The parties agree that the position held by the appellant was designated as "non-critical sensitive." The appellant's removal was based on a charge she was ineligible to occupy that position.

Action leading to the appellant's removal began with issuance of a March 14, 2007 "Statement of Reasons" to deny eligibility to occupy a sensitive position (Agency Prehearing Submission - MSPB Record, Tab 11, pp. 31-35). This document alleged the appellant had a history of not meeting her financial obligations and an inability or unwillingness to satisfy her debts. In particular, an Equifax Credit Bureau Report found: (1) a judgment for an unpaid amount of $1,509; (2) an unpaid collection of $2,233; (3) an unpaid collection for $1,402; (4) an unpaid collection of $1,211; (5) a "charged off" debt of $1,207; (6) another unpaid collection of $520; (7) an unpaid collection of $350; (8) an unpaid collection of $329; (9) an unpaid collection of $147; (10) an unpaid collection of $140; (11) an unpaid collection of $139; (12) an unpaid collection of $135; and (13) two accounts past due, one account in collection, and four accounts charged off for delinquent debts totaling more than $2,400.

The statement of reasons also alleged an issue of "personal conduct" in that the appellant "deliberately omitted, concealed, or falsified" relevant and material facts on a form SF-85P (Questionnaire for Public Trust Positions) that she signed on November 3, 2006. In particular, she failed to list the legal judgment for $1,509 in response to a question and did not list the full extent of her financial problems in response to another question.

The appellant submitted a reply to the agency's Consolidated Adjudications Facility (CAF) and, following consideration of the reply, the CAF issued a January 25, 2010 decision that the appellant's financial situation and personal conduct remained a "security concern" and thus warranted a decision denying her eligibility to occupy a sensitive position (Tab 11, pages 37-42). The appellant's appeal of the CAF decision to the agency's Clearance Appeal Board (CAB) was

denied on June 22, 2010 (Agency Response File, pages 34-35) and the agency thereafter removed her.

The appellant testified she does not dispute the cited instances of financial problems contained in the statement of reasons. She stated she has always carried debt and explained she had financial problems following a divorce. Susan B. Edenfield, CAF Deputy Director, filed an April 1, 2011 Declaration stating that on January 23, 2008, ten months after issuance of the March 2007 "statement of reasons," the appellant's account balances of unpaid debt "had either increased or remained the same" (Tab 11, page 20).

As stated in her position description, the appellant assists in the preparation of financial management reports and processes financial transactions and/or reviews contracts, obligations, and disbursements. Among other duties, she performs financial analysis and review of "security assistance financial management" (Response File: pp. 49-52). Robin Smith, Country Manager and the appellant's former supervisor, testified the appellant was responsible for reconciliation and closure of accounts pertaining to sales of military equipment to foreign countries. The appellant testified that different countries have "liaisons" coordinating the sales and that she was responsible for reconciling account information.

Undisputed evidence shows the appellant has a history of failing to meet her financial obligations. As reflected by Ms. Edenfield's Declaration, the appellant's financial difficulties did not lessen even after she was placed on notice by the statement of reasons of the unacceptability of her actions. An employee's action incurring excessive indebtedness raises a security concern under agency guidelines based in part on the risk the individual may engage in illegal acts to generate funds. The security risk can be lessened if the overextension of financial resources happened a long time ago or was isolated in nature, the conditions causing the indebtedness were largely beyond the

individual's control, and/or the debts have been, or will be, resolved (Tab 11, pp. 62, 63).

Here the appellant's indebtedness was not isolated in nature nor did it occur in the distant past. The indebtedness was not resolved nor did the appellant demonstrate it would be resolved. Further, the appellant's divorce does not demonstrate her history of excessive indebtedness was caused by factors largely beyond her control. The agency therefore correctly determined the appellant had not mitigated the security concern raised by her failure to meet her financial obligations. Accordingly, preponderant evidence supports this element of the agency's action.

As stated above, the agency also considered the appellant's "personal conduct" as a risk factor. In her Declaration, Ms. Edenfield stated the appellant omitted information from the SF-85P form she provided to the agency, including a false statement listing only two of the eleven delinquent accounts that were required to be reported (Tab 11, p. 19).

In her response to the statement of reasons, the appellant stated she was unaware of the financial judgment against her and "other debts" (Tab 11, p. 80). She repeated this explanation in her testimony, stating she was unaware of the information she omitted from the SF-85P. In her CAF decision, Ms. Edenfield found the appellant failed to provide a "substantive explanation" for her failure to list the full amount of her delinquent obligations as required (Tab 11, p. 42).

The appellant only listed two delinquent debts and omitted information about a financial judgment against her. Because of the large number of debts, well in excess of the number she listed, the appellant's explanation she was unaware of the debts is not credible. Even assuming the appellant was uncertain about some of the debts, she could have easily checked her record by obtaining a copy of her credit report. For these reasons, the agency reasonably determined the appellant deliberately failed to list the required information.

Agency guidelines provide that the deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire shows questionable judgment, a lack of candor, and untrustworthiness, and can raise a security concern by creating a vulnerability to exploitation, such as adversely affecting the individual's personal, professional, or community standing. The security concern can be mitigated by correction of the error, a showing the error was based on improper advice, that it was minor in nature, or that the individual took corrective action to reduce the harmful effects of the error (Tab 11, pp. 60, 61).

Ms. Edenfield stated the appellant's extensive omission of relevant facts was only discovered by the agency's action in obtaining a copy of the appellant's credit report (Tab 11, p. 19). The appellant therefore did not correct her error. Furthermore, the appellant did not show the error was based on incorrect advice, that the numerous omitted financial delinquencies were minor in nature, or that she took any corrective action to lessen the harmful effects of her error. The agency therefore properly determined, under its security guidelines, the appellant failed to mitigate the security risk presented under the "personal conduct" standard.

In summary, I find the agency's basis for terminating the appellant's eligibility to occupy a sensitive position is supported by preponderant evidence.

To support the adverse action, the agency must show the "efficiency of the service" is promoted. 5 U.S.C.A. § 7513(a) (West 2007). The government must show there is a nexus between the appellant's conduct and the efficiency of the service. It may do this by three means: (1) a rebuttable presumption of nexus in certain egregious circumstances; (2) preponderant evidence that the misconduct adversely affects the appellant's or co-workers' job performance or the agency's trust and confidence in the appellant's job performance; or (3) preponderant evidence that the misconduct interfered with or adversely affected the agency's

mission. *See Ellis v. Department of Defense*, 114 M.S.P.R. 407, 410 (2010), *citing, Kruger v. Department of Justice*, 32 M.S.P.R. 71 (1987).

As shown above, the appellant was involved in transactions pertaining to the sale of military equipment to foreign countries. She prepared financial reports and participated in the execution of financial transactions. The appellant's personal financial history shows her unwillingness or inability to responsibly manage her own personal financial affairs. This history, combined with the negative information discussed above under the "personal conduct" specification, shows questionable judgment and a lack of integrity and resulted in a finding she is ineligible to hold a sensitive position. I therefore find there is a relationship between the appellant's conduct and her position, thus establishing that a nexus exists between the agency's cause of action and the efficiency of the service. *See Adams v. Department of the Army*, 105 M.S.P.R. 50, 58 (2007), *aff'd,* 273 Fed. Appx. 947 (Fed. Cir. 2008).

Penalty - After it found the appellant was ineligible to occupy a sensitive position, the agency conducted a search to determine if the appellant could be reassigned to a non-sensitive position. Clifford Terry, Deputy Director of Security Cooperation Accounting and the deciding official in this case, testified the appellant was an outstanding employee but there were no non-sensitive positions to which she could be assigned. He testified he did not consider the "*Douglas* factors" in deciding she should be removed.

A failure to meet the requirements of a position justifies removal of an individual from the position. *See Benally v. Department of Interior*, 71 M.S.P.R. 537, 542 (1996) (removal of an employee who did not meet a job requirement to hold a driver's license). Because the appellant here failed to meet a requirement that she remain eligible to occupy a non-critical sensitive position, the agency properly removed her from that position even though her supervisors found her to be an outstanding employee. The appellant's argument that her position was reclassified in 2005 to non-critical sensitive is not within the Board's discretion

to review. *See Conyers*, 115 M.S.P.R. at 585 n. 22; *Brady v. Department of the Navy*, 50 M.S.P.R. 133, 138 (1991). Because there were no non-sensitive positions to which the appellant could be assigned, the agency's decision to remove her comports with applicable law. *See Adams v. Department of the Army*, 105 M.S.P.R. at 58. It does not, even assuming a "*Douglas* factors" analysis can be applied, exceed "tolerable limits of reasonableness." *See Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981).

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD: /S/
Stephen E. Manrose
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **June 23, 2011**, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board

or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.
Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by

the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.