CORRECTED REPLY BRIEF FOR RESPONDENT MERIT SYSTEMS PROTECTION BOARD ON REHEARING EN BANC

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

NO. 2011-3207

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

v.

RHONDA K. CONYERS and DEVON HAUGHTON NORTHOVER,
Respondents,

and

MERIT SYSTEMS PROTECTION BOARD,
Respondent.

PETITION FOR REVIEW FROM THE DECISIONS OF THE MERIT SYSTEMS PROTECTION BOARD IN CH-0752-09-0925-R-1 AND AT-0752-10-0184-R-1

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SUMMARY OF ARGUMENT

In arguing for an expansion of the holding in Dep't of the Navy v. Egan, 484 U.S. 518, 530-31 (1988), the Director of the Office of Personnel Management ("OPM") presents a flawed, unworkable analogy that compares the denial or revocation of a security clearance to the eligibility to occupy a non-critical sensitive position. The analogy does not work for several

reasons. First, the employee in Egan held a non-critical sensitive position, yet the Supreme Court clearly did not base its decision on that designation. Instead, Egan's holding was based on the need to protect classified information from unauthorized persons in the course of executive business. Second, the Court in Egan signaled that its holding was a narrow one by stating that it was answering only the "narrow question" before it: whether the Merit Systems Protection Board ("MSPB" or "Board") has authority to review the substance of an underlying decision to deny or revoke a security clearance in the course of reviewing an adverse action. This Court and every federal circuit court that has considered the question has held that Egan concerns only security clearance determinations. Third, unlike review of security clearance determinations, the instant cases do not involve classified information and a review of the merits poses no threat of disclosure of national security information. Fourth, unlike access to classified information, which is tightly controlled by executive order, there is no limit on the number of positions that could be designated as "sensitive."

Perhaps in acknowledgement of the breadth of its theory, OPM has backpedaled from its own analogy. OPM states that expanding Egan would not preclude the Board from reviewing adverse actions based on misconduct

or performance. If OPM's theory of Egan were adopted, however, a supervisor could circumvent MSPB merits review by simply referring misconduct and performance matters involving a "sensitive" employee to the agency's internal security process, rather than proceeding through the adverse action procedures set forth by the Civil Service Reform Act ("CSRA"). Certainly, security clearance determinations frequently encompass matters involving employee misconduct and poor performance. In addition, OPM asserts that expanding Egan would not necessarily curtail whistleblower protections, despite clear Federal Circuit precedent to the contrary.

Finally, OPM emphasizes at every turn that federal employees do sensitive, and sometimes dangerous, work. Congress is unquestionably aware, however, that federal employees perform sensitive duties and yet, in most cases not involving classified information or intelligence work, it has provided for MSPB review anyway. In sum, OPM's position is not consistent with the CSRA or any other statute, and it is not supported by Egan itself. This Court should decline OPM's invitation to expand Egan outside of the security clearance context.[1]

[1] OPM's 58-page brief largely disregards the jurisdictional issues. For example, OPM states that Kloeckner v. Solis, 133 S.Ct. 596 (2012), "has no bearing on the Director's statutory authority to petition this Court for

ARGUMENT

I. THIS COURT SHOULD DECLINE OPM'S INVITATION TO EXTEND *EGAN* BEYOND DETERMINATIONS CONCERNING WHO IS ELIGIBLE TO ACCESS CLASSIFIED INFORMATION

In its brief, OPM states that the respondents' and amici's "arguments amount, at base, to a quarrel with the Supreme Court's conclusion in Egan...." This statement is surprising since it is OPM, not the respondents or amici, that is actually quarrelling with the Court's conclusion in Egan. In so doing, OPM takes a position that is at odds with the conclusion of this Court and every other circuit that has considered Egan's reach. As the U.S. Court of Appeals for the Fifth Circuit recently noted, "[n]o court has extended Egan beyond security clearances...." Toy v. Holder, No. 12-20471,

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review." Brief for the Acting Director, Office of Personnel Management, on Rehearing En Banc ("OPM Br.") 9, n.3. OPM does not even attempt to explain how the Court can take jurisdiction over Mr. Northover's mixed case given the Supreme Court's holding in Kloeckner that the proper venue for mixed cases is United States District Court. 133 S.Ct. at 607. See also Conforto v. Merit Sys. Prot. Bd., No. 2012-3119, 2013 U.S. App. LEXIS 7767, *8 (Fed. Cir. April 18, 2013) (After Kloeckner, it is clear that the district court's review is not limited to the merits of mixed cases, but extends to mixed cases dismissed by the Board on procedural grounds.). For the reasons stated in the Board's principal brief, the Director's petition should be dismissed for lack of jurisdiction.

2013 U.S. App. LEXIS 8673, *9 (5th Cir. April 29, 2013). This Court should decline OPM's invitation to do so.

A. *Egan* Extends Only To The Merits Of A Security Clearance Determination

For nearly 25 years, this Court has articulated a clear understanding that the Supreme Court in Egan addressed the "narrow question" of whether the Board has authority by statute to review the substance of an underlying decision to deny or revoke a security clearance in the course of reviewing an adverse action. 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 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.); Drumheller v. Dep't of the Army, 49 F.3d 1566, 1573 (Fed. Cir. 1995) (same); Griffin v. Def. Mapping Agency, 864 F.2d 1579, 1580 (Fed. Cir. 1989) (same); and Skees v. Dep't of the Navy, 864 F.2d at 1577-78 (Fed. Cir. 1989) (same). This Court's interpretation of Egan has been consistent with rulings by other circuits. See, e.g., Rattigan v. Holder, 689 F.3d 764, 768 (D.C. Cir. 2012) ("Egan's absolute bar on judicial review coves *only* security clearance-related decisions . . .")(emphasis added); Zeinali v. Raytheon Co., 636 F.3d 544, 549-50 (9th Cir. 2011) ("The core holding[] of Egan . . . [is] that federal courts may not review the merits of

the executive's decision to grant or deny a security clearance."); Makky v. Chertoff, 541 F.3d 205, 213 (3rd Cir. 2008) (same); Duane v. U.S. Dep't of Defense, 275 F.3d 988, 993 (10th Cir. 2002) (same).[2]

In analyzing Egan, the Board correctly determined that, although Mr. Egan held a non-critical sensitive position, the Court's limitation of Board review was not based on the sensitivity designation of his position but rather "the requirement that he hold a security clearance and on the government's need to protect the classified information to which he had access." JA 10 (citing Egan, 484 U.S. at 527-530). OPM continues to take issue with that interpretation of Egan, even though the Supreme Court could hardly have been more explicit when stating that it was answering only the "narrow question ... whether the Merit Systems Protection 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." Egan, 484 U.S. at 520. In holding that the Board lacked such review authority, the Court explained that its holding was based on the government's "compelling

[2] The Board notes that a recent district court decision applied Egan to a case involving an applicant for a position involving "the equivalent of a Top Secret security clearance." Foote v. Chu, No.11-1351. 2013 U.S. Dist. LEXIS 29296, *11 (D.D.C. March 5, 2013). The case does not represent an extension of Egan in the sense that OPM is advocating here.

interest in withholding national security information[3] from unauthorized persons in the course of executive business." Id. at 527 (internal quotation marks omitted).

Even prior to Egan, the Supreme Court explained that control of classified information presents a special case. "[W]e will not lightly assume that Congress intended to take away those [procedural] safeguards in the absence of some overriding necessity, such as exists in the case of employees handling defense secrets." Cole v. Young, 351 U.S. 536, 546-47 (1956). The Court in Cole further warned against construing "national security" so expansively as to effectively supersede civil service law. Id. at 547. OPM's theory is inconsistent with both the narrow holding of Egan and Cole's admonishment that "national security" should not be construed so expansively as to effectively override laws.

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[3] We agree with respondents Conyers and Northover that when the Court used the phrase "national security information" in Egan, it was merely using that phrase as a synonym for classified information. Brief for Respondents Conyers and Northover 28. "Classified national security information" or "classified information" is defined by executive order as "information that has been determined pursuant to this order or any predecessor order to require protection against unauthorized disclosure and is marked to indicate its classified status when in documentary form." Executive Order 13,526, § 6.1(i), 75 Fed. Reg. 707, 727 (Dec. 29, 2009).

B. Contrary To OPM's Assertions, An Expansion Of *Egan* Would Affect Adverse Actions Based On Misconduct And Performance

In its brief, OPM attempts to distance itself from the breadth of its own analogy. OPM states that "[i]f an employee is removed for misconduct or poor performance, for example, and the employee is covered by the relevant provisions of the CSRA, the Board may review the adverse action." OPM Br. 43. This Court's own experience in applying Egan demonstrates that security clearance determinations often encompass allegations of misconduct or poor performance. See, e.g., Robinson v. Dep't of Homeland Sec., 498 F.3d 1361, 1362 (Fed. Cir. 2007) (employee's security clearance revoked because the activities and work hours he claimed could not be reconciled with agency records); Cheney v. Dep't of Justice, 479 F.3d 1343, 1345-46 (Fed. Cir. 2007) (employee's security clearance suspended based on allegations of "abuse of authority" and "derogatory personal conduct"); Lyles v. Dep't of the Army, 864 F.2d 1581, 1582 (Fed. Cir. 1989) (employee's security clearance revoked because he was sleeping on duty, inattentive to the performance of his assigned duties, and absent without leave). Furthermore, OPM's assertion that "an individual supervisor is not in a position to use an eligibility determination as a means to be rid of a troublesome employee," OPM Br. 37, is also at odds with nearly 25 years of experience with Egan. In fact, if OPM's theory of Egan were adopted, an

individual supervisor could circumvent MSPB merits review by simply referring misconduct and performance matters involving a "sensitive" employee to the agency's internal security process rather than proceeding through normal adverse action procedures. OPM's view of Egan would mean that employees could be deemed ineligible for their "sensitive" positions based on misconduct or performance issues and would receive no MSPB merits review on those issues, contrary to the mandate of the CSRA.

C. Under OPM's View, Whistleblower Reprisal and Discrimination Claims Would Be Barred

Similarly, OPM suggests that an expansion of Egan would not necessarily affect claims under the Whistleblower Protection Act ("WPA"), stating that "[t]his Court has not had the occasion to address whether th[e] definition [of a "personnel action" at 5 U.S.C. § 2302(b)(8)] includes a determination regarding an employee's eligibility for a national security sensitive position...." OPM Br. 42, n.15. This suggestion plainly ignores this Court's holding that Egan precludes Board and judicial review of whistleblower claims. Hesse v. Dep't of State, 217 F.2d 1372, 1377 (Fed. Cir. 2000) (denying review of employee's claim that revocation of his security clearance was in retaliation for whistleblowing). As the amici correctly point out, if this Court adopts OPM's views on Egan, whistleblowers will be precluded from raising claims of reprisal in

connection with their eligibility to occupy a sensitive position. See Brief for Amicus Curiae Office of Special Counsel ("OSC Br.") at 4 (explaining that OPM's theory would entail carving out an exception from the CSRA and the WPA when an agency bases an adverse action on an eligibility determination); Brief for Amici Curiae National Treasury Employees Union and American Civil Liberties Union 11 (arguing that under OPM's interpretation of Egan, retaliatory adverse actions made under the guise of "ineligibility" would be insulated from Board and judicial review.).

As the Office of Special Counsel states in its brief, the holding in Egan as it has previously been interpreted by this Court sets forth "a concretely-defined and well-understood limitation." OSC Br. 4. We agree with the OSC that "[a] sweeping extension of this narrow exception to all sensitive positions, even those that do not require access to classified information, would endanger the rights of federal employees." Id. Egan struck the correct balance by limiting its holding to determinations involving which employees may access classified information.

In addition to barring whistleblower claims, OPM's interpretation of Egan would also bar claims under Title VII of the Civil Rights Act -- such as Mr. Northover's allegations of race and sex discrimination and retaliation for equal employment opportunity ("EEO") activity -- as well as claims

brought under the Rehabilitation Act and the Age Discrimination in Employment Act. See, e.g., Rattigan, 689 F.3d at 765 (Under Egan, employment actions based on denial of a security clearance are not actionable under Title VII). Thus, if the Court adopts OPM's view, Mr. Northover's discrimination claims will not be heard by the Board, the Equal Employment Opportunity Commission ("EEOC"), or in United States District Court.[4]

II. CONGRESS IS AWARE THAT FEDERAL EMPLOYEES PERFORM SENSITIVE AND SOMETIMES DANGEROUS DUTIES, AND IT NEVERTHELESS PROVIDED MSPB APPEAL RIGHTS FOR MOST EMPLOYEES

A. When Congress Wishes To Exclude Federal Employees From The Protections of Title 5, It Does So Explicitly

OPM argues that federal employees should be denied merits review of adverse actions taken against them because their duties include "protect[ing] our nation's borders, our interests abroad, and our nation's people from threats to national security." OPM Br. 1. Congress is unquestionably aware of agencies' missions and the sensitive, and sometimes dangerous, work of their employees yet, in most cases not involving classified information or intelligence work, it has provided for MSPB review anyway.

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[4] In light of this implication, the EEOC filed an amicus brief when this case was before the Board urging that Egan should not be expanded beyond its application to security clearance determinations. See JA 4 n.6.

As the Board noted in its opening brief, when Congress has chosen to exclude federal employees who perform sensitive duties -- for example, employees at the Central Intelligence Agency and non-preference eligible employees at Department of Defense ("DoD") intelligence agencies[5] -- it has articulated those exclusions in the plain language of the CSRA. See 5 U.S.C. § 7511(b)(7), (8). OPM asserts that such exclusions "demonstrate[] nothing," OPM Br. 31, and maintains that "nothing short of an express rejection by Congress of the Supreme Court's reasoning in Egan would lead to a different analysis" by OPM. OPM Br. 39-40. As OSC demonstrates in its brief, however, Congress's understanding of Egan – consistent with that of the courts – is that Egan is concerned with determinations regarding access to classified information. See, e.g., OSC Br. 23-24 (Noting that in proposing legislation to extend whistleblower protections, "Congress recognized a gap in protection for employees facing retaliatory security clearance determinations, but no corresponding gap in protections for employees facing retaliatory determinations regarding their eligibility to hold a sensitive position.").

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[5] Even while excluding DoD intelligence agencies, Congress preserved the MSPB appeal rights of preference eligible veterans at those agencies. See Rice v. Merit Sys. Prot. Bd., 522 F.3d 1311, 1319 (Fed. Cir. 2008) (Congress amended § 7511(b)(8) in 1996 to deny Board appeal rights to all employees of DoD intelligence components except for preference eligibles).

B. If OPM Deems § 7532 To Be An Undesirable Alternative Procedure, It Should Direct Its Concerns To Congress, Not This Court

OPM argues that an expansion of Egan is necessary because § 7532 procedures are too harsh. See OPM Br. 32-33. This argument turns the statutory scheme on its head. DoD requested and drafted the original legislation that became § 7532 in order to create an alternative procedure to the for-cause "efficiency of the service" standard when deemed necessary in the interests of national security. See Cole, 351 U.S. at 550. In essence, OPM is now requesting that the Court create a new alternative procedure to § 7532, one that permits agencies to avoid both § 7532 and merits review before the Board.

In this regard, OPM misconstrues Cole. There, the Court stated that "[i]n the absence of an immediate threat of harm to the 'national security,' the normal dismissal procedures seem fully adequate and the justification for summary powers [of § 7532] disappears." Cole, 351 U.S. at 546. The "normal dismissal procedures" of the CSRA include an MSPB hearing and review of the merits under the efficiency of the service standard. 5 U.S.C. §§ 7513, 7701(a). If OPM believes that § 7532 is too harsh,[6] it should

[6] OPM is correct that an employee removed under § 7532 cannot be reappointed unless the head of the agency concerned consults with OPM. 5 U.S.C. § 7312. OPM seems oblivious, however, to the stigma that attaches to an employee who has been terminated "in the interests of national

address those concerns to Congress rather than devising a legal theory that disregards the plain language of the CSRA.

C. By Repealing The National Security Personnel System, Congress Determined that a Broad Exemption from Board Appeal Rights Was Unwise

OPM insists that the granting and revoking of DoD's special authority to create a National Security Personnel System ("NSPS") has "no bearing on issues in this case." OPM Br. 42. OPM's advocacy for an expanded Egan, however, mirrors the special authority that DoD was granted by Congress to create its own appellate rules that could bypass MSPB merits review if DoD so chose. See NSPS Proposed Rule, 70 Fed. Reg. 7552, 7565 (Feb. 14, 2005). It would be hard to find clearer evidence of Congress's intent than its decision to repeal the NSPS authority after four years of consideration. See National Defense Authorization Act, Pub. L. 110-181, § 1106(a), (b)(3), 122 Stat. 3, 349, 356-57 (2008). The repeal demonstrates that Congress quite recently experimented with a broader exemption from MSPB review based on DoD's national security mission but ultimately decided to retain MSPB review for all DoD employees in non-intelligence components and for preference-eligible employees in DoD intelligence components.

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security" and the effect that stigma may have on future employment prospects. As the Supreme Court stated in Cole, "in view of the stigma attached to persons dismissed on loyalty grounds, the need for procedural safeguards seems even greater than in other cases...." 351 U.S. at 546.

Furthermore, the NSPS legislation is an example of Congress exercising its exclusive constitutional authority to make laws "necessary and proper" to carry out the powers vested by the Constitution, see U.S. Const. Art. I, § 8, in areas of civil service law that involve national security. OPM relies heavily on the President's constitutional authority as Commander in Chief, but as the Supreme Court made clear in its seminal decision on national security law, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), such presidential power is not without limits. Justice Jackson explained in his concurring opinion in Youngstown that the President's "command power is not such an absolute as might be implied from that office in a militaristic system but is subject to limitations consistent with a constitutional Republic whose law and policy-making branch is a representative Congress." Id. at 645-46 (Jackson, J., concurring). Here, the President's authority to override MSPB review is limited to "the case of employees handling defense secrets." Cole, 351 U.S. at 546-47. Consistent with Cole, the Supreme Court struck the proper balance in Egan by reconciling the constitutional authorities of the President and Congress and truncating MSPB review solely on the basis of the President's control over access to classified national security information.

III. DOD HAS DISCRETION TO CRAFT ITS OWN INTERNAL PROCEDURES WITH RESPECT TO ELIGIBILITY TO OCCUPY "SENSITIVE" POSITIONS, BUT THOSE PROCEDURES DO NOT TRUMP EMPLOYEES' STATUTORY MSPB REVIEW RIGHTS

As the government conceded at oral argument before the panel, the President has not issued any executive order that excludes employees who do not hold security clearances or have access to classified information from appealing adverse actions based on eligibility determinations. See Panel Oral Argument at 31:51-57, Berry v. Conyers, 2011-3207, available at http://www.cafc.uscourts.gov/oral-argument-recordings/search/audio.html.

In its brief, OPM relies heavily on Executive Order 10,450, but nothing in that order purports to override MSPB review. Rather, Executive Order 10,450 was issued to implement the Summary Suspension Act, which is now codified at 5 U.S.C. § 7532. "[I]t is clear from the face of the Executive Order [10,450] that the President did not intend to override statutory limitations on the dismissal of employees, and promulgated the Order solely as an implementation of the 1950 Act [5 U.S.C. § 7532]." Cole, 351 U.S. at 558, n.20. Moreover, as OPM itself acknowledged in an advisory opinion requested by the Board, the regulations promulgated by

OPM pursuant to Executive Order 10,450, see 5 C.F.R., Part 732, do not "affect any appeal right under law." See JA 288.

Additionally, while OPM treats Executive Order 12,968 (entitled "Classified National Security Information") as if it is applicable here, see OPM Br. 44, that executive order is expressly limited to employees who will be considered for initial or continued access to classified information. It does not apply, therefore, to Ms. Conyers or Mr. Northover, as it is undisputed that neither had access to classified information. Executive Order 12,968 was revoked and replaced by Executive Order 13,526 on December 29, 2009. That order is also titled "Classified National Security Information," and it similarly deals with "classifying, safeguarding, and declassifying national security information." Executive Order 13,526 (Preamble). Neither Executive Order 12,968 nor Executive Order 13,526 purports to override MSPB review.

In addition, neither executive order establishes procedures that are applicable to employees such as Ms. Conyers and Mr. Northover who, as stated above, do not have access to classified information. Cf. Toy, 2013 U.S. App. LEXIS 8673, *9-10 (noting that building access determinations are not governed by the security clearance procedures of Executive Order 12,968 and concluding that Egan does not apply to such determinations).

Indeed, DoD has conceded that "determinations whether to grant an individual a security clearance and whether an individual is eligible to occupy a national security sensitive position are separate inquiries." JA 10-11 (emphasis supplied). Despite this concession, OPM nevertheless argues that there is a "symmetry" between the two types of determinations, OPM Br. 45, and asserts that DoD applies security clearance procedures to employees such as Ms. Conyers and Mr. Northover. See OPM Br. 47. Significantly, OPM does not state that DoD is in anyway bound to apply the same procedures to these "separate inquiries." Moreover, if simply placing the employees in question into the security clearance process were sufficient to override MSPB review, agencies – unilaterally and without congressional approval – could eliminate MSPB review over all kinds of determinations that are wholly unrelated to access to classified information.

Finally, OPM concedes that agency officials make sensitivity designation determinations, OPM Br. 37, and therefore they have unfettered discretion to transfer employees from nonsensitive positions into sensitive positions or to simply redesignate a nonsensitive position as sensitive. Such a designation or redesignation necessarily entails a security investigation which, as the instant cases demonstrate, may lead to adverse personnel actions. OPM does not cite any safeguards to prevent abuse in the

designation process, but instead cites the "presumption of regularity that attaches to government action." OPM Br. 4. MSPB review of appealable adverse actions that result from background investigations protects the merit systems from such abuse. Indeed, Congress created the MSPB "in order to insure that those who are responsible for administering the civil service system will not have the primary responsibility of determining whether that system is free from abuse." S. Rep. No. 95-969 at 24, reprinted in 1978 U.S.C.C.A.N at 2746. See also Lachance v. Devall, 178 F.3d 1246, 1255 (Fed. Cir. 1999) (describing this principle as the "cornerstone" of the CSRA). OPM's contention that the Board is without authority to review the merits of appealable adverse actions taken against employees who do not access classified information is counter to the principles underlying the CSRA.

IV. THE BOARD IS COMPETENT TO DECIDE THE FACTUAL ISSUES UNDERLYING AN AGENCY DETERMINATION THAT AN EMPLOYEE IS INELIGIBLE TO HOLD A "SENSITIVE" POSITION

A. Board And Court Review Of These Cases Does Not Risk Disclosure Of Classified Information

In Egan, the government argued that MSPB review of security clearance determinations would threaten disclosure of classified information. See Brief for Petitioner at 38, 1987 WL 880362. Notably, OPM is unable to

formulate a similar argument here. Simply stated, in these cases MSPB review poses no threat whatsoever of the disclosure of classified information.

Ms. Conyers and Mr. Northover do not have security clearances and their duties do not involve access to classified information. JA 376, 1316, 1432. If their cases were heard on the merits by the Board, no national security secrets would be disclosed. Indeed, the merits of their cases involve their own personal finances rather than government information. Significantly, DoD did not find it necessary to request that the Board administrative judges seal the record in these cases. See Social Sec. Admin v. Doyle, 45 M.S.P.R. 258, 262 (1990) (To protect the confidentiality of certain records, an administrative judge may grant a party's request to seal an appeal file or a portion thereof). Nor did DoD request that any hearing in these cases be closed to the public.[7] Stated simply, these are not Egan cases.

The most sensitive cases that the Board currently handles involve Sensitive Security Information ("SSI"), transportation security information that is unclassified but nevertheless protected from public disclosure

[7] In fact, MSPB administrative judges have held public hearings in Conyers/Northover type cases in the absence of requests for a closed hearing. See, e.g., Brown v. Dep't of Defense, MSPB Docket No. CH-0752-10-0294-I-2, 2011 WL 6393194 (Initial Decision, Aug. 18, 2011).

pursuant to regulation. See 49 C.F.R. Parts 15 and 1520. See also MacLean v. Dep't of Homeland Sec., No. 2011-3231, 2013 U.S. App. LEXIS 8485, *16 (Fed. Cir. April 26, 2013) (The agency is authorized by statute to prescribe regulations prohibiting disclosure of SSI if such disclosure would be detrimental to public safety). The Board has adopted procedures specific to SSI cases that include, among other things, closed hearings, sealed records, the return or destruction of records containing SSI at the conclusion of the proceedings, and a "need-to-know" requirement with respect to MSPB personnel authorized to access SSI. MSPB SSI Directive (May 23, 2011).[8]

The merits of the appeals filed by Ms. Conyers and Mr. Northover do not involve such sensitive information. Indeed, the merits of their cases are similar to Futrell v. Dep't of Justice, 57 M.S.P.R. 640 (1993), aff'd-in-part, rev'd-in-part, 31 F.3d 1177 (Fed. Cir. 1994) (Table). In Futrell, the Department of Justice terminated Mr. Futrell from his GS-7 Correctional Officer position at a federal prison after a background security investigation revealed a judgment against him for $56.20 plus court costs in favor of a hospital. Futrell, 57 M.S.P.R. at 642. The Board sustained Mr. Futrell's removal based on the fact that he failed to disclose his debt on Standard

[8] The MSPB will provide this document to the Court upon request.

Form 86, OPM's Questionnaire for National Security Positions. Id. at 645-47. On review, this Court determined that the penalty of removal was inappropriate. Futrell, 31 F.3d 1177, 1994 WL 374525 (Fed. Cir. 1994) (Nonprecedential Opinion). The Court stated: "We cannot overemphasize that the amount at issue here was a mere $56.20 as to which there may have been good grounds for alleging he was not personally responsible for it." Id. at *3. As Futrell demonstrates, the merits of cases such as Ms. Conyers' and Mr. Northover's simply do not involve classified information or, for that matter, determinations that in anyway impact national security.

B. OPM Has Failed To Justify Its Objections To The Board's Competence Or Support Its Argument Regarding The Reinstatement Of Employees Such As Conyers And Northover

OPM's demand for "total deference," see OPM Br. 7, 56, is wholly without justification. The fact is that agencies already have great control over how cases involving employees in "sensitive" positions are handled. As OPM itself notes, OPM Br. 29, agencies can determine whether to take an adverse action or to transfer an employee to a nonsensitive position at the same grade and pay, an action that is generally not appealable. If an agency decides to take a personnel action that would normally be appealable to the Board, it has the option of bypassing such review by electing the procedures set forth at 5 U.S.C. § 7532. If, on the other hand, an agency decides to

proceed with MSPB review, it can draft the charge to focus solely on an employee's lack of eligibility for a position. Again, all of these decisions are made by the agency.

OPM also attacks the Board's competence to review determinations that are based on the probability of future behavior. OPM Br. 4. This argument is without merit. As the Board noted in its decisions, when it reviews a penalty, it is required by its statutory mandate to evaluate the propriety of an agency's "predictive judgments." JA13. "[T]he Board's case law is replete with decisions in which the Board has reviewed an agency's predictions regarding an employee's future conduct and potential for rehabilitation." Id.

OPM further contends that the Board could not reinstate an employee because to do so would violate Executive Order 10,450. OPM Br. 55-56. This argument disregards Cole, which explicitly determined that Executive Order 10,450 does not "override statutory limitations on the dismissal of employees, and [was] promulgated ... solely as an implementation of the 1950 Act [5 U.S.C. § 7532]. 351 U.S. at 558, n.20.

OPM's argument concerning reinstatement is particularly undermined by the facts of Northover. On March 6, 2009, DoD denied Mr. Northover's eligibility to occupy a sensitive position. JA 995-96. In other words, DoD,

invoking Executive Order 10,450, concluded that Mr. Northover's continued employment in the Commissary Management Specialist position was not clearly consistent with national security. See also 32 C.F.R. § 154.13(a) (a sensitive position should not be encumbered by an employee whose "misconduct, malfeasance, or nonfeasance could result in an unacceptably adverse impact upon the national security."). Yet a mere year and a half later, DoD reversed course and determined that "it is unlikely that Mr. Northover's assignment to the subject position would result in a material adverse effect on national security" and reassigned him to the Commissary Management Specialist position. JA 1412. At the Board's oral argument, DoD counsel conceded that Mr. Northover's reinstatement was based on "litigation." JA 1475. Needless to say, if DoD can reinstate an employee due to "litigation," then there is no reason it could not comply with a reinstatement order issued by the Board.

Even if one were to conjure up a hypothetical worst case scenario, an agency still has an "out" when national security is involved. For example, if the Board erroneously ordered an employee to be reinstated and the head of an agency believed that the employee remained a threat to national security, the agency could place that employee on administrative leave and begin summary proceedings under 5 U.S.C. § 7532. Unlike OPM's expanded

theory of Egan, this course of action has the advantage of being permissible under the statutory framework of the CSRA.

CONCLUSION

For the reasons set forth above, the Court should dismiss OPM's petition for judicial review for lack of jurisdiction or, alternatively, affirm the interlocutory orders of the Merit Systems Protection Board.

Respectfully submitted,

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DATE: May 18, 2013

CERTIFICATE OF SERVICE

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