ORAL ARGUMENT MAY 24, 2013

2011-3207

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.

Petition for Review of the Merit Systems Protection Board in consolidated case nos. CH0752090925-R-1 and AT0752100184-R-1.

CORRECTED EN BANC REPLY BRIEF BY RHONDA K. CONYERS AND DEVON HAUGHTON NORTHOVER

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CERTIFICATE OF INTEREST FOR RHONDA K. CONYERS AND DEVON HAUGHTON NORTHOVER

Counsel for respondents Rhonda K. Conyers ("Conyers") and Devon Haughton Northover ("Northover") certifies the following:

1. The full name of every party or amicus represented by me is: Rhonda K. Conyers and Devon Haughton Northover.

2. The name of the real parties 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 parties or amicus curiae represented by me are: None.

4. The names of all law firms and partners or associates that appeared for the parties or amicus now represented by me in the trial court or are expected to appear before this court are:

   The undersigned attorney represented Conyers and Northover before the U.S. Merit Systems Protection Board ("Board") and remains the principal attorney for each of them in this Court. American Federation of Government Employees ("AFGE") General Counsel David A. Borer and AFGE Deputy General Counsel Joseph F. Henderson are on this reply on behalf of Conyers and Northover, and

appeared on respondents' previous briefs before the Court. Former AFGE General Counsel Mark D. Roth entered an appearance on behalf of respondent Northover before the Board.

Date: May 20, 2013

Respectfully submitted,

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SUMMARY OF ARGUMENT

The demand for total deference made by the Director of the United States Office of Personnel Management ("OPM") in this case is as broad as it is wrong.[1] The Supreme Court's decision in *Department of the Navy v. Egan*, 484 U.S. 518 (1988), ("*Egan*") created a narrowly tailored exception that was dependent on access to classified information. *Egan* should therefore be confined to security clearance cases.

The Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, ("CSRA") is, moreover, a controlling and comprehensive statutory scheme that requires merits review by the United States Merit Systems Protection Board ("Board") in adverse action appeals arising from the denial or loss of eligibility to occupy a sensitive position that does not require the possession of a security clearance or access to classified information. The Supreme Court's decision in *Egan* excised with precision a small portion of the Board's scope of review solely in security clearances cases due to separation of powers concerns arising from the President's power to classify information. When these same concerns are applied to non-security clearance cases, such as those of Rhonda K. Conyers ("Conyers") and Devon Haughton Northover ("Northover") they are insufficient to justify invading the carefully crafted framework for Board review that Congress

[1] John Berry is no longer the Director of OPM. Elaine Kaplan is now the Acting Director of OPM.

established in the CSRA. The Court should, consequently, deny OPM's petition for review and affirm the Board.

ARGUMENT

I. THE CSRA REQUIRES THAT THE LIMITING RULE OF *EGAN* BE CONFINED TO SECURITY CLEARANCE CASES

OPM's proffered interpretation of the CSRA and, in particular, of provisions of the CSRA that OPM is not responsible for enforcing, cannot be sustained. In OPM's view, all that is required to deprive tens of thousands of tenured federal employees of the right to a meaningful hearing in an adverse action appeal, a right granted to them by Congress, is that an agency assert essentially any connection between an employee's job and national security. It is irrelevant to OPM whether the employee holds a security clearance or accesses classified information. It is irrelevant to OPM that Congress created a comprehensive statutory scheme to govern the rights and obligations of federal employees, as part of a tapestry of statutes the primary intent of which is to protect federal employees from arbitrary or capricious government action. *See e.g. U.S. v. Fausto*, 484 U.S. 439, 455 (1988); *Karahalios v. National Federation of Federal Employees*, 489 U.S. 527, 531 (1989); *Bush v. Lucas*, 462 U.S. 367 (1983).

It is most especially irrelevant to OPM, because it must be in order for its demand for deference to function, that Congress took great care when crafting the

CSRA to specifically provide federal agencies with a highly formidable weapon to suspend or remove an employee without the possibility of external review whenever an agency determines that suspension or removal is necessary in the interests of national security. 5 U.S.C. § 7532.

No matter how emphatic OPM's plea for total deference may be, however, its plea cannot be reconciled with the CSRA or with the Supreme Court's decision in *Egan*. The Court should therefore affirm the decisions of the Board in this case, where it is undisputed that neither Conyers nor Northover held a security clearance or had access to classified information.

The CSRA and, in particular, section 7532 should not be jettisoned merely because the result sought by OPM may be preferable to the Executive or even, possibly, to this Court. No amount of contorted interpretation of the CSRA may alter the inescapable fact that if Congress put section 7532 into the CSRA, which it did, it must have done so with the intention that section 7532 serve a purpose; i.e. that it function as a working safeguard. Section 7532 thus provides, with the benefit of Congressional imprimatur, an exception to the fullness of Board review required by sections 7513(d) and 7701 when a suspension or removal is necessary in the interests of national security.

If the Court were to adopt the Executive's reading of the CSRA and of *Egan*, this Court would collapse the CSRA's carefully crafted framework. Removals

pursuant to section 7513 would become fundamentally indistinguishable from removals pursuant 7532.[2] Both avenues would foreclose external review of the merits of an agency decision in favor of solely procedural steps leading up to nothing more than a fait accompli.

The inconsistency of OPM's arguments with the CSRA is further demonstrated by the staggering scope of the exception from meaningful review that OPM seeks; OPM's claim that it is the respondents who seek a broad rule notwithstanding. OPM contends that it is the respondents who present a sweeping argument to the Court because they argue that the Board may review the merits of an agency's decision to remove an employee from a sensitive position regardless of the particular case circumstances. OPM Sup. pg. 3. This contention, however, is nothing more than an attempt at misdirection.

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[2] OPM's reliance on 5 U.S.C. § 7312 as creating a distinction between removals under section 7532 and removals under section 7513 is misplaced. OPM's Supplemental Brief (hereinafter "OPM Sup") p. 33. For example, OPM's observation that removal under section 7532 does not allow for demotion or transfer is unpersuasive because, while *Egan* may allow the Board to consider whether such a change in position was feasible in a particular security clearance case, neither *Egan* nor section 7513 require an agency to consider the feasibility of a change in position in the first instance. *See Griffin v. Defense Mapping Agency*, 864 F.2d 1579, 1580-81 (Fed. Cir. 1989). That section 7312 requires OPM approval before an individual previously removed pursuant to section 7532 may be appointed to a position in another agency is also not a compelling difference. All appointments in the federal civil service are already subject to a suitability determination by OPM. *See e.g.* 5 C.F.R. Part 731.

To begin with, OPM conflates allowing Board review of the merits of an agency decision to remove an employee from a sensitive position with prohibiting an agency from effectuating a removal action at all. Put another way, an agency is not prevented from removing an employee from a sensitive position simply because the Board may review the merits of the agency's decision to do so. An agency may remove an employee pursuant to section 7513 and the Board will uphold that removal upon a showing that the removal promotes the efficiency of the service. *See e.g. Hoofman v. Dep't of the Army*, 118 M.S.P.R. 532, 540 (2012), *aff'd* --- Fed. Appx. ---, 2013 WL 1943314 (Fed. Cir. 2013) (upholding removal of employee for operating government vehicle under the influence of alcohol while off duty); *Brown v. Social Security Administration*, 118 M.S.P.R. 128, 131 (2012) (upholding suitability removal and 3-year debarment based on dishonest conduct, including conduct related to a delinquent debt); *Zazueta v. Dep't of Justice*, 94 M.S.P.R. 493 (2003) (upholding removal of border patrol agent based on off-duty drug use).

Further, while OPM focuses at length on adverse actions initiated by the Department of Defense ("DoD"), it neglects to address the true reach of the expanded exception from review that it urges upon the Court. OPM Sup. pgs. 15, 34-35. In addition to DoD, the rule advanced by OPM would extend to nearly every other federal agency, including: the Department of Agriculture, the

Department of Commerce, the Department of Energy, the Department of Health and Human Services, the Department of Housing and Urban Development, the Department of Labor, the Department of State, the Department of the Interior, the Department of Veterans Affairs, the Environmental Protection Agency, the Federal Communications Commission, the National Aeronautics and Space Administration, the National Science Foundation, the National Transportation Safety Board, and the Social Security Administration. But the record lacks information concerning these agencies. This absence of concrete information shows, again, why Congress is the proper body to resolve OPM's, or DoD's, dissatisfaction with the extent of review that the CSRA grants to the Board in non-security clearance cases.

And, even though the record is devoid of any evidence as to how the above non-DoD agencies handle the designation of sensitive positions or how they process the types of eligibility determinations at issue here, one thing is also clear: all federal agencies have the unreviewable power to designate a position as sensitive. *Skees v. Dep't of the Navy*, 864 F.2d 1576, 1578 (Fed. Cir. 1989). This means that if the Court were to adopt the rule advanced by OPM based on evidence pertaining to a single department, not only would the Court diminish the rights of

employees far beyond that one department, it would grant agencies a power that Congress did not provide to them in the CSRA.[3]

Indeed, while OPM asserts that only "agency officials" are qualified to evaluate questions of "susceptibility to coercion, loyalty, and trustworthiness," OPM Sup. p. 7, there is scant evidence in the record to support this proposition. There is, for example, little evidence, if any, concerning exactly which agency officials are authorized agency officials, how such officials are selected, how far down authorization may be delegated, or how they are trained in such a way that makes them especially suited to making credibility determinations in non-security clearance eligibility matters, more so than the Board's administrative judges whose primary and day-to-day task it is to make determinations that are, for all intents and purposes, identical. *Compare* 32 C.F.R. § 154.40(b) (describing the DoD adjudication process as "invariably subjective") and 32 C.F.R. Pt. 154, App. E, ¶ G (allowing unlimited delegation of DoD agency head authority to designate positions as sensitive) *with Sheffler v. Dep't of the Army*, 117 M.S.P.R. 499, 506 (2012) (recognizing that "removal for falsification and dishonest activity promotes the efficiency of the service since such behavior raises serious doubts regarding the appellant's reliability, trustworthiness, and continued fitness for employment.");

[3] OPM's reliance on *Hegab v. Long*, --- F.3d ---, 2013 WL 1767628 (4th Cir. 2013) is likewise inapposite. OPM Sup. p. 30. The plaintiff there was required to hold a top secret security clearance. 2013 WL 1767628 at *1.

Hillen v. Dep't of the Army, 35 M.S.P.R. 453 (1987) (requiring the Board's administrative judges to resolve issues of credibility and providing specific guidance); *Howard v. FAA*, 16 M.S.P.R. 666, 668-69 (1983) (analyzing and rejecting appellant's defense of coercion).

Further, if Congress had intended to grant DoD the power it seeks to obtain here through the expansion of *Egan*, Congress could have provided the Secretary of Defense with a third removal option as it did for removals at the National Security Agency. Congress could have, for example, stated in the CSRA that "notwithstanding sections 7512 or 7532 of title 5, or any other provision of law, the Secretary of Defense may remove an employee when other provisions of law cannot be invoked consistently with the national security." *See Carlucci v. Doe*, 488 U.S. 93, 109 S.Ct. 407, 411 (1988). But Congress did not include any such delimiting exception in the CSRA. Congress instead gave agencies a choice between removing an employee pursuant to section 7513 or pursuant to section 7532; being bound by the requirements of whichever section an agency chooses to proceed under. *Carlucci*, 109 S.Ct. at 412; *see also Lisiecki v. Merit Sys. Protection Bd.*, 769 F.2d 1558, 1567 (Fed. Cir. 1985) (agency may choose to proceed under Chapter 43 or Chapter 75 but is bound by the substantive standards and procedural requirements of its choice).

Carlucci does not, as OPM seems to suggest, stand for the proposition that the structural differences between section 7532 and section 7513 themselves provide a basis for restricting the Board's scope of review in removals under section 7513 when an employee is removed as ineligible from a sensitive position that requires neither a security clearance nor access to classified information.[4] OPM Sup. p. 32. *Carlucci* does, however, lend additional weight to the conclusion that if the President is unhappy with the CSRA as applied to non-security clearance, eligibility cases, he can bring his concerns to Congress.

Finally, OPM's argument with respect to the *Jacob* and *Adams* cases is also not well-taken. OPM Sup. p. 54; *Jacobs v. Dep't of the Army*, 62 M.S.P.R. 688 (1994) ("*Jacobs*"); *Adams v. Dep't of the Army*, 105 M.S.P.R. 50 (2007), *aff'd*, 273 Fed. Appx. 947 (Fed. Cir. 2008) (unpublished) ("*Adams*"). OPM argues, for example, that *Jacobs* and *Adams* are not probative because neither case involved an eligibility determination. OPM makes no effort, however, to explain how the employee's "failure to remain eligible for the Chemical Personnel Reliability Program" in *Jacobs* is substantively distinguishable from the eligibility determinations here. OPM Sup. p. 54.

[4] Another reason why *Carlucci* is not up to the task to which OPM seeks to put it is because it is implausible that Justice White, who dissented in *Egan*, went on to write the majority opinion in *Carlucci* roughly nine months later with the intent of expanding *Egan's* newly minted exception.

OPM's assertion that Congress should be presumed to be aware of *Egan*, but not of *Jacobs* and *Adams* is, furthermore, internally inconsistent. OPM Sup. p. 54, n. 18. OPM does not explain why Congress should be presumed to be aware of *Egan's* enlarged exception to Board review based on Congressional inaction following *Egan* (as there are no other cases extending *Egan* outside the security clearance arena) but should not be presumed to be aware of the *Jacobs* and *Adams* decisions, which were published cases as well. The better reading is Congress was aware of all three and saw no inconsistency because *Egan* was confined to security clearances cases, while *Jacobs* and *Adams* were not. This, in turn, supports the interpretation of the CSRA put forth by Conyers and Northover.

Consequently, the Court should affirm the Board.

II. THE RATIONALE UNDERLYING *EGAN* CANNOT BE STRETCHED TO COVER NON-SECURITY CLEARANCE CASES

The reading of *Carlucci* above also brings *Egan* into sharper focus. Viewed together, *Carlucci* highlights *Egan* for what it truly is: a narrow, judicially-crafted exception to the statutory scheme created by the CSRA in order to accommodate the Executive's role in protecting classified information. *Egan*, 484 U.S. at 529 ("[T]he protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to

determine who may have access to it."). Such a rare and limited judicial incursion into an act of Congress should not be expanded when the motivating concern that generated the incursion in the first place, access to classified information, is lacking. Consequently, and because the absence of security clearances and classified information in this matter shifts the separation of powers balance away from *Egan*, the Court should deny OPM's petition and affirm the Board.

Conyers and Northover do not argue, moreover, that classifying information is the only relevant means of protecting national security. The respondents argue instead, and as they have from the start, that the President's power to classify information is the key to understanding *Egan* and its application under the CSRA. If *Egan's* reasoning could be understood as applying broadly to any adverse employment action arising from an agency eligibility determination regardless of whether a security clearance was involved, it defies comprehension why the *Egan* Court would preface its entire opinion by defining the question before it as a narrow one pertaining specifically to the Board's scope of review of security clearance determinations. *Egan*, 484 U.S. at 520 ("The narrow question presented by this case is 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.").

Court opinions may contain dicta or phrases that may be explained away as not being integral to the court's holding, but when the Supreme Court begins an opinion by setting forth the specific question it intends to answer, it is fair to conclude that what the Court has done is set forth the outer parameters of its holding. Such a critical limitation cannot be converted into excess verbiage by ignoring it.

Conyers and Northover further submit that the Supreme Court implicitly recognized in *Egan*, when it focused explicitly on security clearance determinations, that access to classified information in the form of a security clearance is the better tool for the determining the Board's scope of review. It is narrow enough that it respects the separation of powers while preserving checks and balances. It is also definite enough that the basis for its application may be easily ascertained. By concentrating the scope of the Board's review on access to classified information, i.e. information that requires a security clearance, the inherently speculative nature of OPM's preferred rule is avoided and the narrow question answered by *Egan* once again makes sense.

Unlike the unclassified and generic class of "sensitive" information which OPM relies on in its attempt to blur the distinction between the security clearance considerations in *Egan* and the non-security clearance considerations here, classified information is subject to an extensive apparatus that controls its

designation and distribution. *See* Exec. Order 13526, 75 Fed. Reg. 707 (December 29, 2009). This apparatus defines classified information and provides a clear process for classifying information the unauthorized disclosure of which "reasonably could be expected to result in damage to the national security." *Id*, § 1.1(4); *see also* 32 C.F.R. § 154.3(d) (defining classified information as "[o]fficial information or material that requires protection in the interests of national security and that is classified for such purpose by appropriate classifying authority in accordance with the provisions of Executive Order 12356 [replaced by Executive Order 13526]" but failing to define sensitive information). The apparatus created by Executive Order 13526 even goes so far as to provide a process whereby the classification status of information may be challenged, a mechanism lacking for so-called "sensitive" information.

It is likewise entirely unsurprising and not at all probative that DoD has internal procedures that reinforce its own position. One would hardly expect it to do otherwise, given that DoD clearly takes the view that only total deference will suffice. In other words, it is entirely self-serving and circular for DoD to assert that the limitation on review required by *Egan* for security clearance cases must apply in non-security clearance cases arising from an eligibility determination because DoD uses comparable guidelines to adjudicate each type of case. OPM Sup. p. 25.

It is similarly unpersuasive for OPM to hinge its argument that *Egan* should apply on speculation that employees without security clearances may, in some far-fetched scenario, "pose a more immediate and direct risk to national security than some employees who have security clearances." OPM Sup. p. 26. It may also rain tomorrow, or it may not. No one would conclude from such a trite observation that every federal employee across the country should therefore be required to wear a raincoat, especially in the absence of a reliable weather report.

Thus, under the rule correctly espoused by the Board, continuing to confine *Egan* to security clearance cases harmonizes the CSRA with the Executive's power as Commander-in-Chief, as well as with the Supreme Court's decision itself. If an agency determines that the unauthorized disclosure of information accessed by a particular position reasonably could be expected to result in identifiable damage to the national security, the agency may classify that information and thereby require a security clearance for its access. This, in turn, would activate *Egan* and foreclose merits review in an adverse action pursuant to section 7513 arising from the loss or denial of a security clearance.

On the other hand, the Board's scope of review would remain as Congress intended in adverse actions arising from the loss of eligibility to occupy a sensitive position that lacks access to classified information or possession of a security clearance, subject to two important safeguards. First, an adverse action of the type

that would ordinarily be reviewable by the Board under section 7513 (subject to *Egan* or not) may still be pursued under the alternate procedure set forth by section 7532 regardless of whether a security clearance is involved. This means that if national security requires it, an agency head may always remove an employee under section 7532 and thereby prevent merits review by any outside body. An agency is also not prohibited from reassigning an employee suspended under section 7532 to a non-sensitive position in lieu of removal.

The second important safeguard is that when an agency elects to proceed under section 7513 but believes that either its evidence or its eligibility calculus must be protected from disclosure, the agency may move to seal all or part of the record before the Board. *Hoback v. Dep't of the Treasury*, 86 M.S.P.R. 425, 432-3 (2000) ("If the appellants are seeking an order to protect sensitive or confidential information within documents that they wish to submit to the Board, they may do so by requesting that the administrative judge place certain parts of the record under seal."); *see also* 5 C.F.R. § 1201.52 (authorizing Board judges to close hearings to the public).

In this regard, the reason that sealing the record would protect an agency's national security interests, to the extent they might be present in an appeal, is because sealing the record or closing the hearing limits consideration of the action to the parties before the Board. Closing the hearing and sealing the record each

prevents public scrutiny of an agency's action, evidence or reasoning. This in turn ensures that agencies need not be reluctant to take an eligibility-based action for fear that the specifics of their analyses would then become publicly available (not that there is evidence in the record of such an inhibition on the part of agencies). Consequently, the Court should affirm the Board.

CONCLUSION

Based on all of the above, the Court should deny OPM's petition for review and affirm the decisions of the Board.

Respectfully submitted,

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I, hereby certify that on this 19th day of May, 2013, I caused copies of the CORRECTED EN BANC REPLY BRIEF FOR RESPONDENTS RHONDA K. CONYERS AND DEVON HAUGHTON NORTHOVER to be filed with the Court and to be served on the following via the Court's electronic case-filing system (CM/ECF):

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

1. Pursuant to Fed. R. App. P. 32(a)(7), I certify that the attached brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). The brief contains 4,800 words, as counted by Microsoft Word 2010, including the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Federal Circuit Rule 32(b).
2. I also certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). The brief has been prepared in proportionally-spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

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