OPENING 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

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

REGULATIONS

EXECUTIVE ORDERS

OTHER AUTHORITIES

STATEMENT OF RELATED CASES

Pursuant to Fed. Cir. R. 47.5, counsel for the respondent Merit Systems Protection Board ("MSPB" or "Board") states that he is unaware of any other appeals stemming from this action that were previously before this Court or any other appellate court under the same or similar title. The issue presented in this action was previously before the Court in Brown v. Dep't of Defense, Fed. Cir. No. 2009-3176. The Court did not have the opportunity to address the issues presented by that appeal because the parties settled the case. The Court granted Ms. Brown's motion for voluntary dismissal on July 12, 2010.

The outcome of this case could affect Doe v. Dep't of Justice, Fed. Cir. No. 2012-3204, which as of the date of this brief is pending before the Court. In Doe, the petitioner is seeking review of the Board's decision holding that the limited scope of review in Dep't of the Navy v. Egan, 484 U.S. 518 (1988) applies to positions requiring eligibility for access to classified information. Doe v. Dep't of Justice, 118 M.S.P.R. 434, 442 (2012).

Counsel is unaware of any other case pending before this or any other court that will directly affect or be directly affected by this Court's decision.

JURISDICTIONAL STATEMENT

Although this case presents significant issues, it also has serious jurisdictional defects: (1) The Board's interlocutory orders are not final and therefore are not reviewable; (2) Ms. Conyers' case no longer presents an actual case or controversy and must be dismissed as moot; (3) Pursuant to Kloeckner v. Solis, 133 S.Ct. 596 (2012), Mr. Northover's "mixed case" is reviewable only in United States District Court. Therefore, for the reasons stated in the Board's Answer filed on May 27, 2011, and as further explained here, the petition for judicial review filed by the Director of the Office of Personnel Management ("OPM") should be dismissed for lack of jurisdiction.

The Board's Decisions Are Not Final

The right of the Director of the OPM to seek review is explicitly limited to "final orders and decisions of the Board." 5 U.S.C. § 7703(d) (emphasis supplied). Under the Board's regulations, a final decision or order results only when the Board or administrative judge disposes of the entire action. Weed v. Soc. Sec. Admin., 571 F.3d 1359, 1362 (Fed. Cir. 2009). This occurs only when: (a) an initial decision becomes final 35 days after issuance; (b) the Board denies a petition for review; or (c) the Board grants a petition for review, or reopens or dismisses a case, and the Board's

decision disposes of the entire action. See 5 C.F.R. § 1201.113(c). Here, the Board's order does not fit any of those categories, and did not dispose of the entire matter. Rather, the Board issued interlocutory orders that remanded the case to administrative judges for further adjudication. "The Supreme Court has consistently held that as a general rule an order is final only when it ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Weed, 571 F.3d at 1361 (quotations and alterations omitted).

In granting OPM's petition for judicial review, the Court accepted the Director's argument that, despite the lack of finality of the Board's orders, the Court could take jurisdiction pursuant to the collateral order doctrine. See Berry v. Conyers, 435 Fed. Appx. 943, 945 (Fed. Cir., Aug. 17, 2011). The collateral order doctrine is a narrow, judicially-created exception to the final judgment rule. See Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978). To come within the "small class" of decisions excepted from the final judgment rule under the collateral order doctrine, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment. Id. The Board's interlocutory orders do not meet this criteria.

The Board's interlocutory orders in Conyers and Northover are not "completely separate from the merits of the action" and thus not immediately appealable under the collateral order doctrine. See Coopers & Lybrand, 437 U.S. at 468. The issues on the merits are whether Ms. Conyers' indefinite suspension and Mr. Northover's demotion were taken "only for such cause as will promote the efficiency of the service," 5 U.S.C. § 7513(a), and whether the actions were taken in accordance with the procedural protections of 5 U.S.C. § 7513(b). See Garcia v. Dep't of Homeland Sec., 437 F.3d 1322, 1341 (Fed. Cir. 2006) (while jurisdiction is established under 5 U.S.C. § 7512, the merits of the case are determined by the agency's compliance with § 7513(a)-(b)). OPM seeks to limit the Board's review in these cases to § 7513(b) only, pursuant to Dep't of the Navy v. Egan, 484 U.S. 518 (1988). Such a result necessarily affects matters of proof and the substance of the underlying disputes between the parties and therefore is not a question collateral to the merits.[1]

[1] The Supreme Court has held that even a forum non conveniens determination is entangled with the merits of the underlying dispute. Van Cauwenberghe v. Biard, 486 U.S. 517, 527-30 (1988). In reaching that conclusion, the Court noted that district courts deciding the question of convenience of the forum must consider, inter alia, the relative ease of access to sources of proof, which requires the courts to "scrutinize the substance of the dispute between the parties to evaluate what proof is required, and determine whether the pieces of evidence cited by the parties are critical, or even relevant, to the plaintiff's cause of action and to any

Additionally, the Board's interlocutory orders in these cases do not satisfy the requirement of the collateral order doctrine that the orders "be effectively unreviewable on appeal from final judgment." Coopers & Lybrand, 437 U.S. at 468. This Court has emphasized that the collateral order doctrine "is a 'narrow' one and its reach is limited to trial court orders affecting rights that will be 'irretrievably lost' in the absence of an immediate appeal." Jeannette Sheet Glass Corp. v. United States, 803 F.2d 1576, 1581 (Fed. Cir. 1986). Any concern that the issues here will be "irretrievably lost" absent immediate review is simply unfounded. There are several other cases currently pending before the Board with the same issues, and OPM has the opportunity to intervene or request reconsideration in those cases pursuant to 5 U.S.C. § 7703(d).

In granting OPM's petition for review, the Court stated that the Board's orders raised the issue of "whether the agency must disclose its determinations regarding what it classifies as issues of national security and must litigate the merits of such a determination, and thus are subject to immediate review." Berry, 435 Fed. Appx. at 945. The factual issue in these cases is whether the employees have poor credit histories, thereby

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potential defenses to the action." Id. at 528. That is precisely the type of inquiry that this Court would need to make in order to decide the issue presented by OPM's petition.

making them ineligible to occupy their sensitive positions. The Board does not have authority to determine whether their positions have been properly classified as sensitive positions, and therefore that is not an issue that would be litigated before the Board. In any event, the criteria that the Department of Defense uses to classify positions as sensitive is both publicly-available and part of the record. See 32 C.F.R. § 154.13; DoD Directive 5200.2-R. In sum, the collateral order doctrine is a narrow exception to the final judgment rule and is inapplicable to the Board's interlocutory orders in this case.

Conyers Does Not Present An Actual Case or Controversy

Subsequent to the Court's granting of OPM's petition, the Board issued a final decision in Conyers dismissing the appeal as moot based on the determination that Ms. Conyers has received all of the relief to which she would be entitled if her MSPB appeal had been fully adjudicated and she had prevailed. See Conyers v. Dep't of Defense, MSPB Docket No. CH-0752-09-0925-I-3 (Initial Decision, Sept. 29, 2011) (dismissing the appeal as moot). The Board's decision became final on November 3, 2011,

when neither party filed an administrative petition for review with the Board.[2]

The only reason that Conyers is before the Court is that OPM wishes to use it as a vehicle for obtaining an advisory opinion. "[I]t is quite clear that the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions." Flast v. Cohen, 392 U.S. 83, 96 (1968) (internal quotation marks omitted). To be sure, this Court has held that OPM may have legally cognizable interests separate from those of the other parties. See Horner v. Merit Sys. Prot. Bd., 815 F.2d 668, 671 (Fed. Cir. 1987). In Horner, however, the Court also recognized that there would be meaningful legal consequences to the employee if the Court overturned the Board's decision because such an outcome would nullify the disciplinary action taken against him. Id. Therefore, in Horner, the Court was not simply issuing an advisory opinion at the request of OPM. Here, regardless of the outcome of the matter presently before the Court, the result will have no legal consequences for Ms. Conyers. Indeed, given that she does not dispute the mootness of her

[2] To date, there has been no final Board decision in Northover. The administrative judge dismissed Mr. Northover's appeal without prejudice while this matter is being litigated before the Court. See Northover v. Dep't of Defense, MSPB Docket No. AT-0752-10-0184-I-2 (Initial Decision, Sept. 7, 2011).

case, there is no remedy that this Court could provide her. Therefore, Conyers should be dismissed as moot.

Northover Is A Mixed Case And Review Should Be In United States District Court

In the recently-decided Kloeckner v. Solis, 133 S.Ct. 596 (2012), the Supreme Court held that an employee appealing from a Board decision in a "mixed case," i.e., one involving both an adverse action and allegations of discrimination, must seek review in an appropriate United States District Court rather than in this Court. Id. at 607. "That is so whether the MSPB decided her case on procedural grounds or instead on the merits." Id.[3] Mr. Northover alleged that his demotion was based on race and sex discrimination, and was taken in reprisal for his prior discrimination complaints. Therefore, he has a mixed case, and under Kloeckner, his right to judicial review is in District Court.

While Kloeckner does not explicitly address this Court's jurisdiction under 5 U.S.C. § 7703(d), it is clear that granting review under § 7703(d) in

[3] As the MSPB has argued in Conforto v. Merit Sys. Prot. Bd., Fed. Cir. No. 2012-3119, the Supreme Court's holding in Kloeckner means that all mixed cases must be reviewed in District Court, with the exception of cases that the Board has dismissed for lack of jurisdiction. In the Board's view, a jurisdictional dismissal would still be reviewable by this Court because it is not truly a "mixed case" given the absence of an action appealable to the Board. See 5 U.S.C. § 7702(a)(1)(A). Here, however, it is indisputable that

mixed cases could lead to bifurcated review, i.e., OPM seeking review in this Court while the employee files a complaint in District Court pursuant to 5 U.S.C. § 7703(b)(2). As this Court has held in an analogous context, "where jurisdiction lies in the district court under 5 U.S.C. § 7703(b)(2), the entire action falls within the jurisdiction of that court and this court has no jurisdiction, under 5 U.S.C. § 7703(b)(1), over such cases." Williams v. Dep't of the Army, 715 F.2d 1485 (Fed. Cir. 1983) (en banc) (emphasis supplied). The same is true under 5 U.S.C. § 7703(d). If the Court were to exercise jurisdiction here, it could have the effect of impermissibly denying Mr. Northover his right to de novo review in District Court. Such a result would be inconsistent with Kloeckner.

For all of these reasons, the Director's petition should be dismissed for lack of jurisdiction.

Mr. Northover's demotion is an action appealable to the Board. Therefore, he has a mixed case which, under Kloeckner, must go to District Court.

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STATEMENT OF THE ISSUE

Whether this Court should in effect abrogate provisions of the Civil Service Reform Act ("CSRA") by holding that employing agencies, at their sole discretion, may rescind the statutory review rights of tenured federal employees who do not hold security clearances or occupy positions that require eligibility to access classified information.

STATEMENT OF THE CASE

A. Nature of the Case

The petitioner, the Director of OPM, is appealing from two interlocutory Board orders holding that the Supreme Court's decision in Dep't of the Navy v. Egan, 484 U.S. 518 (1988) does not apply to the adverse actions taken against Ms. Conyers and Mr. Northover because, as the parties stipulated, their positions did not require them to have a security clearance or access to classified information. JA 8, 47-48.

B. Statement of Facts and Disposition Below

1. Prior to Conyers/Northover

This case was precipitated by two recent developments. First, DoD and other agencies significantly expanded their designations of "sensitive" positions to include many formerly nonsensitive, low-level positions that do not require a security clearance or access to classified information. Employees in these newly-designated sensitive positions were asked to disclose, among other things, personal financial information. In some cases, these disclosures and the related background investigations led to adverse personnel actions against the employees.

The second development occurred when these employees appealed the adverse actions to the Board. DoD responded to the appeals by asserting

that the Board was not authorized to hear the merits of the actions. DoD based this argument on Egan, even though the employees did not hold security clearances and their positions did not require access to classified information. OPM has taken up DoD's argument in the instant petition for judicial review.

a. Expanded Designation of Sensitive Positions

In 1991, OPM promulgated regulations establishing procedures on position sensitivity designation, related investigative requirements, and periodic reinvestigation requirements. 56 Fed. Reg. 18,650 (April 23, 1991). The OPM regulation defines the term "national security position" to include:

> (1) Those positions that involve activities of the Government that are concerned with the protection of the nation from foreign aggression or espionage, including development of defense plans or policies, intelligence or counterintelligence activities, and related activities concerned with the preservation of the military strength of the United States; and
>
> (2) Positions that require regular use of, or access to, classified information.

5 C.F.R. § 732.102(a) (2012).[4] The regulation further sets forth three sensitivity levels: special-sensitive, critical sensitive, and non-critical

[4] We note that both OPM and DoD have attempted to clarify their regulations with respect to the designation of "sensitive" positions. In 2011, for example, DoD proposed revisions to its Personnel Security Program regulations that include the pronouncement that "[d]uties considered sensitive and critical to national security do not always involve classified activities or classified matters." 76 Fed. Reg. 5,729, 5,731 (Feb. 2, 2011)

sensitive.[5] Id. at § 732.201. The issue in this case concerns only positions that are designated "non-critical sensitive," the lowest level of sensitivity.

The sensitivity level affects the type of investigation or reinvestigation that OPM conducts. See JA 288-89. For example, OPM's Questionnaire for National Security Positions, SF-86, directs employees or applicants for sensitive positions to disclose personal financial information such as delinquency on debts and whether any bills or debts have been turned over to a collection agency. SF-86 (Revised July 2008)[6], accessible at http://archive.opm.gov/forms/html/SF.asp on March 1, 2013. By contrast, OPM's questionnaire for nonsensitive positions, SF-85, does not request such information. Consequently, as positions were converted from nonsensitive to sensitive, certain employees were disclosing personal financial information for the first time. In some cases, as in the instant cases involving Ms. Conyers and Mr. Northover, agencies took adverse

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(proposed 32 C.F.R. § 156.6). See also 75 Fed. Reg. 77,783 (Dec. 14, 2010) (OPM's proposed national security position regulations).

[5] These sensitivity levels existed prior to 1991, but guidance concerning the proper designation was found in OPM's Federal Personnel Manual, which was abolished in 1993, and in various agency publications. For example, in Egan the Supreme Court noted that the Chief of Naval Operations Instructions or "OPNAVINST" defined a non-critical sensitive position to include access to secret or confidential information. 484 U.S. at 521 n.1.

[6] OPM revised SF-86 again in December 2010. The 2010 version is 127 pages long.

actions against these employees based on their poor credit histories or for other reasons related to their personal finances.

b. Expanded Theory of Egan

Once these adverse actions were appealed to the Board, DoD and other agencies asserted that the Board was prohibited by Egan from reviewing the merits of these actions taken against the mostly low-level employees, even though none of them held security clearances or were required to access classified information. See, e.g., Brown v. Dep't of Defense, 110 M.S.P.R. 593, 595 (2009) (removal of employee from non-critical sensitive GS-5 Commissary Contractor Monitor position); Crumpler v. Dep't of Defense, 112 M.S.P.R. 636, 637 (2009) (removal of employee from non-critical sensitive GS-4 Store Associate position); Hanson v. Dep't of Defense, 2008 WL 4923475 (Initial Decision, Sept. 16, 2008) (CH-0752-08-0540-I-1) (removal of employee from non-critical sensitive GS-5 Accounting Technician position); and Prince v. Dep't of Defense, 2008 WL 4501659 (Initial Decision, July 23, 2008 (DE-0752-08-0238-I-1) (removal of employee from non-critical sensitive GS-10 Grocery Department Manager position). In an advisory letter requested by the Board in the instant case, OPM admitted that its Part 732 regulations "do not independently confer any appeal right or affect any appeal right under law."

JA 288 (emphasis supplied). Nevertheless, OPM has taken up the expansion-of-Egan argument before this Court.

2. Conyers: Statement of Facts and Procedural History

a. Facts

Ms. Conyers occupied the competitive service position of GS-525-05 Accounting Technician at the Defense Finance and Accounting Service ("DFAS"). JA 2, 136, 138. According to a DFAS "Position Sensitivity Designation Record," the Accounting Technician position was designated as non-critical sensitive solely on the basis of risk to security of information technology systems. JA 163-65. The position did not require access to top secret, secret, confidential, or sensitive compartmented classified information. JA 163, 374.

On June 27, 2007, DoD's Washington Headquarters Services, Consolidated Adjudications Facility ("CAF") made a tentative determination to deny Ms. Conyers' "eligibility for access to classified information and/or occupancy of a sensitive position." JA 159. Specifically, the CAF found derogatory financial information from an investigation of Ms. Conyers' personal history, her questionnaire for public trust positions, and a credit bureau report. Id. Ms. Conyers submitted a written reply explaining that her debts were related to her divorce and that she was currently in

consumer counseling. JA 154-55. After considering Ms. Conyers' reply, the CAF denied her eligibility to occupy her non-critical sensitive position. JA 149-152. The decision letter stated that "[y]our agency will take the appropriate administrative action." JA 152.

On April 19, 2009, DFAS proposed Ms. Conyers' indefinite suspension based on the CAF decision. JA 143-45. DFAS stated that Ms. Conyers no longer met a qualification requirement for her Accounting Technician position, and there were no vacant nonsensitive positions to which she could be detailed or reassigned. JA 143. DFAS issued a final decision on September 3, 2009, which made Ms. Conyers' indefinite suspension effective on September 11, 2009. JA 138.

Subsequently, an administrative judge in the Defense Office of Hearings and Appeals ("DOHA") issued a recommendation in Ms. Conyers' favor. The Clearance Review Board, however, denied Ms. Conyers' appeal, tersely informing Ms. Conyers that "[w]e recognize that our decision differs from the recommendation" and "[t]his concludes your administrative due process." JA 182. DFAS removed Ms. Conyers from her position effective February 19, 2010. JA 383.

b. Initial Proceedings Before the MSPB Administrative Judge

Ms. Conyers appealed her indefinite suspension to the Board on September 21, 2009.[7] JA 89-98. In its response, DFAS asserted that, pursuant to Egan, "the MSPB cannot review the merits of the CAF's decision that denied [Ms. Conyers'] eligibility for assess [sic] to sensitive or classified information and/or occupancy of a sensitive position." JA 126. On January 13, 2010, the AJ dismissed the appeal without prejudice so that the parties would have the benefit of a decision in Brown v. Dep't of Defense, Fed. Cir. No. 2009-3176, which at that time was pending before the Court, or Crumpler, which was pending before the Board. JA 195-201.

Ms. Conyers' appeal was refiled after a settlement was reached in Crumpler, removing that case from the Board's consideration. JA 210. In an order certifying the issue for interlocutory appeal, the AJ noted that "[n]o current case law requires the Board to allow Egan-like deference to agencies in reviewing actions taken against employees who do not hold security clearances." Id. The AJ stated her intention not to apply Egan to the present appeal. JA 211. She stated that she would apply Board case law holding that when an agency's charge consists of the employing agency's withdrawal or revocation of its certification or other approval of the

[7] The Board subsequently denied Ms. Conyers' motion to incorporate her removal into her appeal. JA 392-93.

employee's fitness or other qualifications to hold his position, the Board's authority generally extends to a review of the merits of that withdrawal or revocation. Id.

3. Northover: Statement of Facts and Procedural History

a. Facts

Mr. Northover was employed by the Defense Commissary Agency ("DeCA") in the competitive service position of GS-1144-07 Commissary Management Specialist (Computer Assisted Ordering ("CAO")) at the Gunter Air Force Base Commissary. JA 42, 962. The duties of the position included maintaining the CAO system and other inventory and merchandising tasks. JA 1016-21. DeCA designated the Commissary Management Specialist position as a non-critical sensitive position. JA 1009, 1100. According to DeCA, the position was designated as "non-critical sensitive" because:

> Commissary management specialists are able to gain information about troop movements at times, about populations on the base, about the presence of dignitaries on the base, [and] the food supply going to different military units. That information could be used by someone to interfere with military operations.

JA 1480. Nonetheless, the parties have stipulated that Mr. Northover did not have access to, or eligibility to access, classified information. JA 1316.

On March 6, 2009, the CAF denied Mr. Northover's "eligibility for access to classified information and/or occupancy of a sensitive position."[8] JA 995-96. Based on that denial of eligibility, DeCA proposed the demotion of Mr. Northover to the part-time GS-1101-04 position of Store Associate. JA 986-87. The Store Associate position also had been designated non-critical sensitive, but based on an "in-depth review" just prior to Mr. Northover's proposed demotion, the position was redesignated as nonsensitive. JA 989. Mr. Northover's demotion to the part-time Store Associate became effective on December 6, 2009. JA 42, 962.

b. Initial Proceedings Before the MSPB Administrative Judge

Mr. Northover appealed his reduction in grade to the Board on November 24, 2009 and requested a hearing. JA 906-915. He alleged that he was not required to have a security clearance and that the position was nonsensitive rather than non-critical sensitive. JA 910. He further alleged that the demotion was based on race and sex discrimination, and was taken in reprisal for past equal employment opportunity ("EEO") complaints that

[8] Mr. Northover sought an extension of time to respond to the tentative determination because he had been assisting his mother with the care of his terminally-ill father, had to attend his brother's funeral in Jamaica, and had forgotten about the matter "due to all the stress involved." JA 995. The CAF denied the request, stating that "[t]his office does not grant extensions when they are requested subsequent to the date the response is due." Id.

he had filed. JA 910, 912. In its response, DeCA asserted that Egan applied to Mr. Northover's appeal. JA 944-49, 1121-23. DeCA reasoned that "[s]ince an individual does not have a property right or liberty interest in obtaining or retaining a security clearance, an individual would also not appear to have a property right or liberty interest in occupying a position that the head of an agency has designated as sensitive for national security reasons." JA 948 (citations omitted). In an order certifying the issue for interlocutory appeal, the AJ stated his intention to apply Egan to Mr. Northover's appeal. JA 1246-48.

4. The Board's Interlocutory Review of Conyers and Northover

On interlocutory review, the parties stipulated that the positions held by Ms. Conyers and Mr. Northover did not require the incumbents to have a confidential, secret or top secret clearance. JA 376, 1316. The parties also agreed that the positions held by Ms. Conyers and Mr. Northover did not require the incumbents to have access to classified information. Id.

a. Gathering Input From Interested Parties

The Board's first act on interlocutory appeal was to request an advisory opinion from OPM seeking its interpretation of its National Security Position regulations at 5 C.F.R. Part 732 and "the propriety of the actions" taken by DoD against Ms. Conyers and Mr. Northover. JA 206-8.

In its advisory letter, OPM stated that its Part 732 regulations "do not independently confer any appeal right or affect any appeal right under law." JA 288. OPM noted that the regulations have their genesis in Executive Order 10,450, which requires agency heads to designate positions as sensitive where "the occupant . . . could bring about, by virtue of the nature of the position, a material adverse effect on the national security...." Id., citing Executive Order 10,450, § 3(b). OPM explained that the three sensitivity levels set out in its regulations determine the scope of the background investigation that OPM will conduct. JA 288-89. OPM concluded: "In short, the resolution of the issue before the Board regarding the scope of the Egan decision cannot be determined by reference to OPM's regulations." JA 289.

The Board also invited other interested parties to submit amicus briefs and comments on the issue. See 75 Fed. Reg. 6,728 (Feb. 10, 2010). Amici National Treasury Employees Union ("NTEU"), American Federation of Government Employees ("AFGE"), Government Accountability Project ("GAP"), National Employment Lawyers Association ("NELA"), and the Equal Employment Opportunity Commission ("EEOC") urged the Board not to expand Egan beyond its application to security clearance determinations. See 1130-60; 1176-1207. The Board scheduled oral argument for

September 21, 2010, and invited OPM and amici to participate along with the parties.

b. DoD's Motions To Dismiss As Moot

Prior to oral argument, DFAS and DeCA filed motions to dismiss the appeals as moot. JA 378-85, 1406-19. DFAS stated that it had canceled Ms. Conyers indefinite suspension and provided her with back pay and interest for the period between the effective date of her suspension and the date of her removal. JA 379-80. DeCA similarly asserted that it had canceled its demotion action and returned Mr. Northover to his full-time Commissary Management Specialist position. JA 1410. DeCA attached to its motion a memorandum from Thomas E. Milks, Acting Director of DeCA, dated September 8, 2010. JA 1411-12. Mr. Milks made the following findings:

> 1. That while the Statement of Reasons (SOR) dated September 11, 2008 raised questions concerning Mr. Northover's potential trustworthiness, reliability and judgment as those concepts relate to the grant of access to classified material, no access to classified material is required or permitted in the position to which he is being reassigned.
>
> 2. That it is unlikely that Mr. Northover's assignment to the subject position would result in a material adverse effect on national security and that therefore the level of risk in assigning him to that position is acceptable to the agency.

JA 1412. Based on those findings, Mr. Milks stated his determination that Mr. Northover could be placed back in his position and "carry on the full

panoply of duties" required by the position description at the Gunter Air Force Base commissary. Id.

Ms. Conyers and Mr. Northover opposed the motions to dismiss their appeals as moot because they had not received all of the relief they could have received if the appeals had been adjudicated and they prevailed. See JA 399-410, 1339-50. The Board denied the motions to dismiss, as well as subsequent motions to dismiss that were filed by the agencies on the eve of oral argument. See JA 392-98, 482-91, 1332-38, 1420-29.

c. Oral Argument Before The Board

On September 21, 2010, the Board held combined oral argument in Conyers and Northover. JA 1430-1509. The participants included counsel for Ms. Conyers and Mr. Northover, counsel for DeCA, counsel for DFAS, and counsel for amici GAP and NTEU. JA 1431. OPM declined the Board's invitation to present oral argument. JA 5, n.8; JA 44, n.6. After the argument, the Office of the Director of National Intelligence filed a written statement in favor of DoD's position that Egan applied to the appeals filed by Ms. Conyers and Mr. Northover. JA 552-58.

d. The Board's Orders On Interlocutory Appeal

On December 10, 2010, the Board issued orders affirming the AJ's ruling in Conyers and reversing the AJ's ruling in Northover. JA 1, 41. Based on the stipulations of the parties, the Board found that the positions occupied by Ms. Conyers and Mr. Northover did not require them to have a security clearance or the eligibility to access classified information. JA 8, 47-48. The Board held that Egan limits Board review of an otherwise appealable adverse action only if that action is based upon a denial, revocation or suspension of a "security clearance," i.e., involves a denial of access to classified information or eligibility for such access. JA 8-9, 48. The Board stated that Egan, "on its face, does not support the agency's effort here to expand the restriction on the Board's statutory review to any matter in which the government asserts a national security interest." JA 9-10, 49. The Board noted that accepting the theory of Egan advanced by DFAS and DeCA could, "without any Congressional mandate or imprimatur," preclude Board and judicial review of alleged unlawful discrimination, whistleblower retaliation, and a whole host of other constitutional and statutory violations for multitudes of federal employees subjected to otherwise appealable removals and other adverse actions. JA 17, 56. The cases were remanded to the regional offices for further adjudication "under the generally applicable standards the Board applies in

adverse action appeals, including the legal principles governing off-duty or on-duty conduct as applicable." JA 23, 61. Member Rose dissented in both cases. JA 24-35, 63.

5. OPM's Petition for Reconsideration

On January 24, 2011, OPM requested a 30-day enlargement of time within which to file a petition for reconsideration with the Board. JA 574-75. The Board denied the motion, stating that because the Board had not yet issued a final decision, there was no authority for OPM to seek either reconsideration before the Board or review by this Court. JA 578, citing 5 U.S.C. § 7703(d); 5 C.F.R. §§ 1201.119-120; Fed. Cir. R. 47.9.

OPM requested reconsideration of that ruling based on its belief that the Board's interlocutory orders fell within the collateral order doctrine. JA 600. The Board ordered briefing on the issue of whether the collateral order doctrine was a valid exception to the finality requirements of 5 U.S.C. § 7703(d) and, if so, whether OPM had established that it applied to the Board's non-final orders in Conyers and Northover. JA 606-8. Following briefing, the Board determined that the collateral order doctrine did not apply and dismissed OPM's requests for reconsideration as premature. JA 707-11. OPM then sought review in this Court, again asserting that the Board's interlocutory orders were reviewable pursuant to the collateral

order doctrine. On August 17, 2011, this Court granted the petition for judicial review.[9]

One year later, the Court reversed the Board and held that Egan applied to an agency determination on the eligibility of an employee to occupy a sensitive position. Berry v. Conyers, 692 F.3d 1223 (Fed. Cir. Aug. 17, 2012). In an Order dated January 24, 2013, the Court granted the petitions for rehearing en banc of the MSPB and respondents Conyers and Northover, vacated the panel decision, and ordered additional briefing.

SUMMARY OF ARGUMENT

OPM's authority to regulate the designation of national security positions does not empower it, or any other employing agency, to override the Board's statutory jurisdiction or scope of review. Indeed, to accept OPM's view would not only nullify the plain language of several statutory provisions, it would also upend the entire statutory scheme which created an independent board to protect against arbitrary action, personal favoritism, and partisan political coercion.

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[9] As discussed in the MSPB's jurisdictional statement, supra, the MSPB continues to object to the application of the collateral order doctrine to the non-final orders at issue in this case.

OPM is asking this Court to create a judicial exception to the Board's jurisdiction based on an expansive reading of the Supreme Court's holding in Egan. That decision does not stand for the proposition that the designation of a position as "sensitive" precludes Board review of the merits of any adverse actions taken against the incumbent of the position. Rather, Egan held that the Board may not review the substance of an underlying decision to deny or revoke a security clearance in the course of reviewing an adverse action. In so holding, the Court recognized the President's role in safeguarding classified information. An expansion of Egan to cover any position designated as "sensitive," even if the position does not require access to classified information, would be a judicially-created exception that would swallow the rule of civil service law.

Under the plain language of the Civil Service Reform Act, Ms. Conyers and Mr. Northover are "employees" entitled to appeal to the Board, and the adverse actions that have been taken against them are appealable actions. There is no exception to the Board's scope of review when employees in "sensitive" positions do not have access to classified information or the eligibility for such access. The parties have stipulated that the positions at issue here did not require a security clearance or the eligibility to access classified information.

Nor can these cases be reasonably described as involving the "merits of national security determinations." The merits of these cases, which have not been decided by the Board, concern the personal financial difficulties of two low-level employees. These cases do not require any "national security" expertise. The Board often has been confronted with cases involving a federal employee's failure to meet his debt obligations. Furthermore, the Board routinely evaluates such factors as loyalty, trustworthiness, and judgment in determining whether an adverse action will promote the efficiency of the service.

If implemented, petitioner's theory would mark a momentous change in civil service policy. Not only would it deny a tenured employee's right to MSPB review of an adverse action, it would also bar claims of prohibited discrimination and whistleblower retaliation, arbitration rights, and review of a whole host of other constitutional and statutory violations. The petitioner is attempting to amend the civil service laws through litigation, rather than by seeking congressional approval. This Court should reject the petitioner's invitation to create a new exception to MSPB jurisdiction for "sensitive positions" when Congress has not done so.

STANDARD OF REVIEW

This Court must affirm the decision of the Board unless it is: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without following the procedures required by law; or (3) unsupported by substantial evidence. 5 U.S.C. § 7703(c); Forest v. Merit Sys. Prot. Bd., 47 F.3d 409, 410 (Fed. Cir. 1995). Whether the Board has jurisdiction to adjudicate an appeal is a question of law, which this Court reviews de novo. Id.

ARGUMENT

I. *EGAN* APPLIES ONLY TO DETERMINATIONS CONCERNING WHO IS ELIGIBLE TO ACCESS CLASSIFIED INFORMATION

The Court requested that the parties address whether the Supreme Court's ruling in Egan forecloses MSPB review of the merits of determinations that an employee is ineligible for a "sensitive" position, or whether the ruling is confined to determinations that an employee is ineligible to hold a security clearance. For the reasons discussed below, Egan applies only to determinations concerning ineligibility to access classified information.

A. *Egan* Did Not Address The Issue In This Case

In Egan, the Supreme Court was not confronted, as this Court is now, with the concept that a position could be "sensitive" and yet not require access to classified information. Indeed, since Cole v. Young, 351 U.S. 536 (1956), courts have treated "sensitive" positions as synonymous with positions that require access to classified information.

In Cole, the Supreme Court found that Congress enacted the 1950 Summary Suspension Act (now codified at 5 U.S.C. § 7532) with the understanding that employees who occupy "sensitive" positions have access to classified information. Cole, 351 U.S. at 550. The Court stated that even DoD, which requested and drafted the legislation, was operating under the premise that the Act provided for the dismissal of employees who were "security risks" to the extent that they had access to classified materials. Id.

The Supreme Court operated under the same understanding in Egan when it considered the case of an employee who was removed after he was denied a security clearance. Egan, 484 U.S. at 522. Without a clearance, Mr. Egan could not perform his duties, which included the "repair, replenishment, and systems check-out" of nuclear-powered Trident submarines. Id. at 520. The fact that Mr. Egan occupied a noncritical-sensitive position was relevant only because such positions were defined to

include access to "Secret or Confidential information." Id. at 521, n.1. The Court stated, for example, that "with respect to employees in sensitive positions 'there is a reasonable basis for the view that an agency head who must bear the responsibility for the protection of classified information committed to his custody should have the final say in deciding whether to repose his trust in an employee who has access to such information.'" Id. at 529 (quoting Cole, 351 U.S. at 546) (emphasis supplied). The positions held by Ms. Conyers and Mr. Northover do not fall within Egan's usage of the term "noncritical-sensitive" because their positions do not require them to have a secret or confidential clearance, or even to have the eligibility to obtain such clearance. JA 376, 1316. As a result, the government's interest in protecting classified information is simply not triggered under the circumstances presented here.

Indeed, the premise of Egan is not that the designation of a position as "sensitive" somehow precludes the Board's review authority, but rather that the government has a "compelling interest in withholding national security information from unauthorized persons in the course of executive business." Id. at 527 (internal quotation marks omitted). The Court explained its rationale as follows:

> [The President's] authority to classify and control access to information bearing on national security and to determine

> whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant. This Court has recognized the Government's "compelling interest" in withholding national security information from unauthorized persons in the course of executive business. The authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief.

Id. (citations omitted; emphasis supplied). That rationale does not apply here because the positions held by Ms. Conyers and Mr. Northover did not require them to obtain authority to access classified national security information. Therefore, Egan does not provide a basis for denying their statutory rights.

B. *Egan* Was Based On Executive Orders That Are Inapplicable Here

In Egan, the Supreme Court found Presidential action "in a series of Executive Orders, [seeking] to protect sensitive information and to ensure its proper classification throughout the Executive Branch by delegating this responsibility to the heads of agencies." 484 U.S. at 528. The executive orders referenced in Egan are the precursors to Executive Order 12,968 – issued by President Clinton on August 2, 1995 – which is entitled "Access to Classified Information." In issuing Executive Order 12,968, the President explained that it "establishes a uniform Federal personnel security program for employees who will be considered for initial or continued

access to classified information." Id. (preamble) (emphasis supplied). Executive Order 12,968 does not apply to Ms. Conyers and Mr. Northover because the adverse actions taken against them were not based on eligibility to access classified information.

Executive Order 12,968 provides tangible limits on Egan's applicability because it states, inter alia, that the number of employees that each agency determines are eligible for access to classified information "shall be kept to the minimum required for conduct of agency functions." Id., § 2.1. OPM's proposed expansion of Egan removes those limits. Under OPM's theory, Egan would apply to any employee in a position that an agency, in its unfettered discretion, has designated as "sensitive." Consequently, an agency could designate all of its positions as "sensitive," thereby restricting the MSPB review rights of all of its employees. Indeed, the court need only look to DFAS itself for this result. In 2003, approximately 35% of DFAS employees were in "sensitive" positions. A mere two years later, however, *every* DFAS position had been designated "sensitive." JA 1503. Significantly, DFAS admits that it had no choice but to remove Ms. Conyers because there were *no* nonsensitive positions available to which she could be reassigned. JA 383.

With respect to Executive Order 10,450 – issued by President Eisenhower on April 27, 1953 – the Egan court relied on that order primarily for the uncontroversial proposition that "a clearance may be granted only when 'clearly consistent with the interests of the national security.'" Egan, 484 U.S. at 528 (emphasis supplied). Nothing in Egan detracts from the Supreme Court's statement in Cole that "... it 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. See also Doe v. Cheney, 885 F.2d 898, 907 (D.C. Cir. 1989) (The procedures of Executive Order 10,450 are not applicable to "for cause" removals). 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.

C. *Egan* Created A Narrow Exception To The CSRA That Should Not Be Expanded So As To Nullify That Statutory Scheme

The Court's holding in Egan was a narrow one: In reviewing an adverse action based on the denial or revocation of a security clearance, the Board does not have authority to review the substance of the underlying security clearance determination. Egan, 484 U.S. at 530-31. See also

Guillot v. Garrett, 970 F.2d 1320, 1325 (4th Cir. 1992) ("We agree with the appellant that the only question before the Court in Egan was whether § 7513 authorized the MSPB to review the Executive's substantive decisions of whether or not to grant particular security clearances."). The consequence of Egan's holding is that an employee subject to an adverse action based on the denial or revocation of a security clearance does not have the right to review of the adverse action on the merits. Because the holding in Egan is a limited, judicially-created exception to a statute, it should be confined to determinations that an employee is ineligible to hold a security clearance.

Moreover, the Supreme Court made explicit in Egan that its holding should be read narrowly. The Supreme Court made clear at the outset of its opinion that it was deciding only the "narrow question" that was before it: whether the MSPB "has authority by statute to review the substance of an underlying decision to deny or revoke a security clearance in the course of reviewing an adverse action." 484 U.S. at 520 (emphasis supplied). Thus, OPM's proposed expansion of Egan beyond security clearance decisions disregards the intent of the Supreme Court which is clearly articulated in the unambiguous language of Egan itself.

Additionally, OPM's proposed expansion of Egan is in direct contravention of the Court's warning in Cole that "national security" should not be read so expansively as to effectively supersede civil service law. 351 U.S. at 547. Cole involved a food and drug inspector for the Food & Drug Administration who appealed his termination to the Civil Service Commission, the predecessor of the MSPB. Id. at 540. The Commission declined to accept the appeal because the termination was pursuant to the 1950 Summary Suspension Act. Id. The Supreme Court held that the Summary Suspension Act did not apply to nonsensitive positions such as Mr. Cole's food and drug inspector position. Id. at 551. In so holding, the Court explained:

> [I]f Congress intended the term ["national security"] to have such a broad meaning that all positions in the Government could be said to be affected with the "national security," the result would be that the 1950 Act, though in form but an exception to the general personnel laws, could be utilized effectively to supersede those laws.

Id. at 547. See also Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 645-46 (1952) (Jackson, J., concurring) (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.").

Cole is directly analogous to the instant case. Just as the government advanced an overly-broad construction of the Summary Suspension Act in Cole, here the petitioner is attempting to nullify civil service law through an overly-broad interpretation of Egan. As the Board stated in its decisions, Egan, "on its face, does not support the agency's effort here to expand the restriction on the Board's statutory review to any matter in which the government asserts a national security interest." JA 9-10, 49. The Supreme Court in Egan was well aware of its prior decision in Cole and cited it with approval. Egan, 484 U.S. at 529. The narrow holding in Egan is consistent with Cole's warning that "national security" should not be construed so expansively as to effectively override laws.

Here, if OPM's theory were accepted, the designation of a position as "sensitive" would have a nullifying effect on laws pertaining to the merit systems, civil rights, and whistleblower protection. To begin with, employees such as Ms. Conyers and Mr. Northover would be denied their statutory right to adjudication of the merits of the adverse actions taken against them and therefore would not be protected against, among other things, arbitrary action and favoritism. Further, employees such as Mr. Northover who have alleged claims of unlawful discrimination would not have those claims heard. See, e.g., Bennett v. Chertoff, 425 F.3d 999, 1003-

4 (D.C. Cir. 2005) (adverse action based on denial or revocation of a security clearance is not actionable under Title VII of the Civil Rights Act of 1964). In addition, under OPM's view, neither the Board nor the courts would be able to review claims of whistleblower retaliation and a whole host of other constitutional and statutory violations. See, e.g., El Ganayni v. Dep't of Energy, 591 F.3d 176, 184-86 (3rd Cir. 2010) (First Amendment claim and Fifth Amendment equal protection claim must be dismissed because legal framework would require consideration of the reasons a security clearance was revoked); Hesse v. Dep't of State, 217 F.3d 1372, 1377 (Fed. Cir. 2000) (Egan precludes Board review of Whistleblower Protection Act claims in an indefinite suspension appeal).

II. CONGRESS DID NOT EXCLUDE FROM MSPB REVIEW EMPLOYEES IN "SENSITIVE" POSITIONS THAT DO NOT REQUIRE ACCESS TO CLASSIFIED INFORMATION

The Court has invited the parties to discuss whether congressional action before or after Egan has demonstrated that Congress intended to preserve MSPB review of adverse actions with respect to employees holding "sensitive" positions that do not involve intelligence agencies or security clearances. Prior to 2003, Congress exempted positions from MSPB review based on national security concerns falling into the two categories identified

by the Court's question: (1) positions in agencies with missions involving intelligence, and (2) positions requiring access to national security secrets.

In 2003, Congress provided DoD, as requested by that department, broad authority to create its own personnel system and its own appeals process that could, if DoD so elected, bypass MSPB review altogether. National Defense Authorization Act, Pub. L. 108-136, § 1101, 117 Stat. 1621 (Nov. 24, 2003). Congress repealed that grant of authority in 2008. National Defense Authorization Act, Pub. L. 110-181, § 1106(a), (b)(3), 122 Stat. 3, 349, 356-57 (2008). Thus, Congress experimented with a broader exemption from MSPB review based on DoD's national security mission but ultimately decided to retain MSPB review for DoD employees in non-intelligence components. OPM now asks this Court to create a much broader exemption from MSPB review than ever contemplated under the repealed 2003 legislation.

A. Congress Has Exempted Employees In Intelligence Agencies From MSPB Review

In 1912, Congress passed the Lloyd-LaFollette Act, which provided that "no person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service...." Act of August 24, 1912, § 6, ch. 389, 37 Stat. 539, 555. More than 100 years later, the "efficiency of the service" standard remains

the test that adverse actions must meet. See 5 U.S.C. § 7513(a). In 1944, Congress passed the Veterans Preference Act providing the right to appeal to the MSPB's predecessor, Civil Service Commission. The Commission's decisions were binding on the employing agency. Veterans Preference Act, 58 Stat. 390 (1944). See United States v. Fausto, 484 U.S. 439, 444 (1988) (Under the system existing prior to passage of the Civil Service Reform Act of 1978, only veterans enjoyed a statutory right to appeal adverse personnel actions to the Civil Service Commission, the predecessor of the MSPB).

Congress, three years after enacting the Veterans Preference Act, excepted Central Intelligence Agency ("CIA") employees from Civil Service Commission review. National Security Act of 1947, Pub. L. No. 80-253, § 102(c), codified at 50 U.S.C. § 403-4a. The 1947 legislation gave the Director of the CIA plenary authority to "terminate the employment of any officer or employee of the [CIA] whenever he shall deem such termination necessary or advisable in the interests of the United States." Id. See Rhodes v. United States, 156 Ct. Cl. 31 (1962) (The National Security Act gave the Director of the CIA the "absolute right" to terminate any CIA employee whenever he deems it necessary or advisable).

Similarly, in 1964, Congress granted the Secretary of Defense authority to terminate employees of the National Security Agency ("NSA")

whenever he considers that action to be in the best interests of the United States and determines that procedures in other provisions of the law cannot be invoked consistent with national security. NSA Personnel Procedures Act, Pub. L. No. 88-290, § 833, 78 Stat. 168, 169 (1964). See Carlucci v. Doe, 488 U.S. 93, 97 (1988).

In 1996, after Egan, Congress expanded the intelligence agency exemption by including "intelligence component[s] of the Department of Defense." National Defense Authorization Act, Pub. L. 104-201, § 1106(a), (b)(3), 110 Stat. 2422 (1996), codified at 10 U.S.C. § 1609(a)(2) and 1612. See Rice v. Merit Sys. Prot. Bd., 522 F.3d 1311, 1319 (Fed. Cir. 2008). Congress chose to retain MSPB review over all other DoD components, including the components that employed Ms. Conyers and Mr. Northover.

B. Congress Created An Alternative Procedure To MSPB Review In Cases Where The Position Requires Access To Classified Information

In 1950, at the request of the DoD, Congress passed the Summary Suspension Act, which provided an exception to the "efficiency of the service" standard that is applicable when an agency head determines that termination of a civil servant's employment is "necessary or advisable in the interest of the national security of the United States...." 64 Stat. 476, § 1 ("Notwithstanding the provisions of section 6 of the Act of August 24, 1912...."). As enacted in 1950, the Act did not afford the terminated

employees any appeal rights to the Civil Service Commission, and the current version at 5 U.S.C. § 7532 does not provide for review by the MSPB.

The Supreme Court reviewed the Summary Suspension Act in Cole and held that the Act used the term "national security" in a "definite and limited sense and relates only to those activities which are directly concerned with the Nation's safety, as distinguished from the general welfare." 351 U.S. at 543. The Court described the legislative history of the Summary Suspension Act as follows:

> Throughout the hearings, committee reports, and debates, the bill was described as being designed to provide for the dismissal of "security risks." In turn, the examples given of what might be a "security risk" always entailed employees having access to classified materials; they were security risks because of the risk they posed of intentional or inadvertent disclosure of confidential information. Mr. Larkin, a representative of the Department of Defense, which Department had requested and drafted the bill, made this consideration more explicit:
>
> > "They are security risks because of their access to confidential and classified material. *** But if they do not have classified material, why, there is no notion that they are security risks to the United States. They are security risks to the extent of having access to classified information.

Cole, 351 U.S. at 550 (emphasis supplied). The Court therefore rejected the proposition that "national security" was "so broad as to be involved in all activities of the Government," id., and cautioned against construing

"national security" so expansively as to effectively supersede civil service law, id. at 547.

In response to Cole, the House Committee on Un-American Activities ("HUAC") recommended amending the Summary Suspension Act to provide that "all employees of any department or agency of the U.S. Government are deemed to be employed in an activity of the Government involving national security." HUAC Annual Report For The Year 1958, H.R. Rep. No. 187 at 100 (1959). The suggested amendments were never enacted.

In 1978, Congress passed the Civil Service Reform Act ("CSRA"), Public Law No. 95-454, and it became effective on January 11, 1979. Under the CSRA, covered "employees," as defined by 5 U.S.C. § 7511, are entitled to appeal to the Board from a removal, a suspension for more than 14 days, a reduction in grade, a reduction in pay, and a furlough of 30 days or less. 5 U.S.C. §§ 7512, 7513. In addition to preference eligibles, the CSRA extended MSPB review rights to employees in the competitive service, such as Ms. Conyers and Mr. Northover.

The CSRA retained the "efficiency of the service" standard, see 5 U.S.C. § 7513(a),[10] and also codified the national security exception created

[10] Section 7513(a) provides: "Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this

by the Summary Suspension Act, see 5 U.S.C. § 7532.[11] An action taken pursuant to § 7532 is not appealable to the Board. See 5 U.S.C. § 7512(A). Under the statutory framework, an agency may remove a tenured employee who occupies a "sensitive" position pursuant to either § 7532 or § 7513, but when the for-cause procedures of 5 U.S.C. § 7513 "do not jeopardize national security, recourse may, even must, be had to those [] procedures." Carlucci, 488 U.S. at 100. See also Cole, 351 U.S. at 546 ("In 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 disappears.").

Egan addressed a question raised by a small but significant gap in the CSRA: Assuming that an employee holding a security clearance may be

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subchapter against an employee only for such cause as will promote the efficiency of the service."

[11] Section 7532(a) and (b) provide, in pertinent part:

> (a) Notwithstanding other statutes, the head of an agency may suspend without pay an employee of his agency when he considers that action necessary in the interests of national security. ...
>
> (b) Subject to subsection (c) of this section, the head of an agency may remove an employee suspended under subsection (a) of this section when, after such investigation and review as he considers necessary, he determines that removal is necessary or advisable in the interests of national security. The determination of the head of the agency is final.

removed under § 7513 procedures,[12] does the Board have authority to review the substance of an underlying decision to deny or revoke a security clearance in the course of reviewing an adverse action? 484 U.S. at 520. As discussed above, the Court in Egan held that the Board may not review the substance of an underlying decision to deny or revoke a security clearance in the course of reviewing an adverse action. Id. at 530-31.

C. Congress Enacted, But Then Repealed, A Broader Exclusion Of DoD Based On Its National Security Mission

As noted above, in 2003, Congress authorized DoD and OPM to establish a National Security Personnel System ("NSPS"), a comprehensive human resources management system for DoD. 117 Stat. at 1621. See, generally, Am. Fed'n of Gov't Emps. v. Rumsfeld, 486 F.3d 1316 (D.C. Cir. 2007).[13] Pursuant to that authority, DoD was empowered to waive, inter alia, chapters 43, 75, and 77 of title 5 of the United States Code. 117 Stat. at 1626-27. Indeed, as DoD stated in announcing its regulations implementing

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[12] In Egan, the Supreme Court assumed for purposes of its decision that § 7513 and § 7532 provide alternative routes for administrative action. 484 U.S. at 532. The Court made this assumption explicit when it subsequently held that § 7532 is not a mandatory procedure. Carlucci, 488 U.S. at 100.

[13] The authority that Congress granted to DoD came after similar personnel authorities were provided to the newly-created Department of Homeland Security. Homeland Security Act, Pub. L. No. 107-296, 116 Stat. 2135 (2002). See Nat'l Treasury Emps. Union v. Chertoff, 452 F.3d 839 (D.C. Cir. 2006).

NSPS, the legislation granted DoD authority to establish its own appellate review body and bypass the MSPB altogether. See NSPS Proposed Rule, 70 Fed. Reg. 7552, 7565 (Feb. 14, 2005). DoD and OPM opted to maintain the right of NSPS employees to appeal to the MSPB, but under more deferential rules that "must be interpreted in a way that recognizes the critical national security mission of [DoD], and each provision must be construed to promote the swift, flexible, effective day-to-day accomplishment of this mission as defined by the Secretary [of DoD]." Id. Furthermore, the proposed rules stated that "Mandatory Removal Offenses," defined as "offenses that have a direct and substantial adverse impact on [DoD's] national security mission," could be appealed to the MSPB, but the Board would not have the power to mitigate the penalties for such offenses. Id. at 7564-65. Significantly, if DoD was dissatisfied with MSPB review, it reserved the right to terminate MSPB review after an assessment of how the rules "are actually implemented and administered by MSPB." Id. at 7566.

It seems highly unlikely that Congress would have enacted the 2003 legislation if it had been aware of and accepted OPM's theory pertaining to position sensitivity. Indeed, if OPM's interpretation of Egan were correct, the NSPS regulations pertaining to MSPB review would be superfluous. For example, there would be no need to limit MSPB review over "offenses

that have a direct and substantial adverse impact on [DoD's] national security mission," see 70 Fed. Reg. at 7564-65, when, under OPM's view of Egan, DoD could simply designate positions as "sensitive" to preclude the MSPB from reviewing the merits of such offenses.

In 2008, Congress revoked DoD's authority to issue rules bypassing or modifying MSPB review. 122 Stat. at 349, 356-57. The passage and repeal of the NSPS legislation shows that Congress has considered many of the arguments that OPM is making in this case and, ultimately, has rejected them in favor of full MSPB merits review of DoD employees unless they are otherwise exempt from such review due to their access to classified information or employment in a DoD intelligence component.

D. Respondents Conyers And Northover Are Tenured Employees With Full MSPB Appeal Rights Under The Plain Language Of The Applicable Statutes

As the above discussion demonstrates, when Congress has acted with respect to the civil service, it has done so in "painstaking detail," setting out a comprehensive statutory scheme delineating the method for covered employees to obtain review of adverse actions. See Elgin v. Dep't of the Treasury, 132 S.Ct. 2126, 2134 (2012). OPM's theory of this case disregards that statutory scheme. Indeed, this case can and should be decided based on the plain language of the CSRA. The language of the statutes that Congress enacts provides the most reliable evidence of its

intent. Holloway v. United States, 526 U.S. 1, 6 (1999). See also Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) (The starting point for interpreting a statute is the language of the statute itself, which governs absent a clearly expressed legislative intent to the contrary). "If the language is clear, the plain meaning of the statute will be regarded as conclusive." Van Wersch v. Dep't of Health & Human Serv., 197 F.3d 1144, 1148 (Fed. Cir. 1999).

The Board's jurisdiction is set out in 5 U.S.C. § 7701(a), which provides:

> An 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.... Appeals shall be processed in accordance with regulations prescribed by the Board.

5 U.S.C. § 7701(a). See Bledsoe v. Merit Sys. Prot. Bd., 659 F.3d 1097, 1101 (Fed. Cir. 2011). Congress has mandated that the Board hear and adjudicate all matters within its jurisdiction. 5 U.S.C. § 1204(a)(1).

The appeals filed by respondents Conyers and Northover fall squarely within the Board's jurisdiction under the plain language of § 7701(a) and the related statutes. It is undisputed that both Ms. Conyers and Mr. Northover meet the definition of "employee" under 5 U.S.C. § 7511(a)(1)(A). Specifically, both Ms. Conyers and Mr. Northover are

permanent employees in the competitive service who have completed more than one year of current continuous service. JA 7, 46-47, 136, 962. Therefore, both meet the definition of an "employee" under 5 U.S.C. § 7511(a)(1)(A)(ii) because both have "completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less." See McCormick v. Dep't of the Air Force, 307 F.3d 1339, 1342 (Fed. Cir. 2002) (The Board has jurisdiction when an employee meets the definition of "employee" under § 7511(a)(1)(A)(i) or (ii)). As discussed above, neither Ms. Conyers nor Mr. Northover were employed by a DoD intelligence component excluded from MSPB review by 5 U.S.C. § 7511(b)(8). Moreover, Congress has made no exception for employees who occupy positions that their employing agencies have designated as "sensitive." That fact alone is dispositive of this case.

It is undisputed that the Board has subject matter jurisdiction over these appeals. Ms. Conyers appealed from a DFAS decision to indefinitely suspend her from her position of GS-525-05 Accounting Technician. See JA 7, 136, 138. Her suspension extended beyond 14 days and, therefore, constitutes an appealable action under 5 U.S.C. § 7512(2). Mr. Northover appealed from a DeCA decision to demote him from his position of GS-1144-07 Commissary Management Specialist to part-time GS-1104-04 Store

Associate. See JA 47, 962, 968, 970. His reduction in grade is an appealable action under 5 U.S.C. § 7512(3). Because the law unambiguously provides both Ms. Conyers and Mr. Northover with the right to appeal to the Board from the adverse actions taken against them, they are entitled to all of the procedures set forth in § 7701 and chapter 75 of title 5.

III. DOD'S INTERNAL PROCEDURES ON ELIGIBILITY TO OCCUPY "SENSITIVE" POSITIONS DO NOT TRUMP EMPLOYEES' STATUTORY MSPB REVIEW RIGHTS

The Court invited the parties to address the differences between the relevant processes and criteria associated with obtaining security clearances and those involved in determining whether an individual is deemed eligible to hold a "non-critical sensitive" or "critical sensitive" position that does not require a security clearance. The most significant difference is that while the criteria and processes regarding access to classified information have been delineated by executive order, there is no similar executive order pertaining to the eligibility of employees to occupy "sensitive" positions that do not require access to classified information.

On August 2, 1995, the President issued Executive Order 12,968, which is titled "Access to Classified Information." In issuing the order, the President explained that "[t]his order establishes a uniform Federal personnel security program for employees who will be considered for initial

or continued access to classified information." Id. (preamble). Part 5 of the executive order sets out the procedures for "review of access determinations." Id. Thus, on its face, Executive Order 12,968 does not apply to Ms. Conyers and Mr. Northover, neither of whom are eligible to access classified information.

Nevertheless, it appears that DoD applied the same or similar procedures to Ms. Conyers and Mr. Northover. See JA 159, 995-96 (Determinations by DoD's Consolidated Adjudications Facility on Ms. Conyers and Mr. Northover's eligibility to hold a "sensitive" positions issued). The Board takes no position on the propriety of these procedures. Regardless of DoD's process, DoD's internal procedures cannot trump an employee's statutory review rights when access to classified information is not involved.

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

The Court has asked what problems, if any, the MSPB would encounter in determining adverse action appeals for employees in "sensitive" positions that do not require a security clearance, and to what extent should the MSPB defer to the agency's judgment on issues of national security in resolving such adverse action appeals.

The Board is unquestionably competent to hear the merits of underlying agency decisions that do not involve access to classified information. See, e.g., Adams v. Dep't of the Army, 105 M.S.P.R. 50, 55 (2007) (disqualification of personnelist's eligibility to access computer systems), aff'd, 273 Fed. App'x 947 (Fed. Cir. 2008); Laycock v. Dep't of the Army, 97 M.S.P.R. 597 (2004) (withdrawal of agency approval to practice law), aff'd, 139 Fed. Appx. 270 (Fed. Cir. 2005); Jacobs v. Dep't of the Army, 62 M.S.P.R. 688 (1994) (security guard's disqualification from Chemical Personnel Reliability Program). The underlying merits of the instant cases involve the employees' credit histories, which have allegedly made them ineligible to occupy their "sensitive" positions. This is clearly an issue within the Board's competence. The Board has been reviewing personnel actions based on an employee's debts and poor credit since the earliest days of its existence. See, e.g., Cornish v. Dep't of Commerce, 10 M.S.P.R. 382, 383-85 (1982) (finding a nexus between an employee's failure to meet his debt obligations and the efficiency of the service), aff'd, 718 F.2d 1098 (6th Cir. 1983) (Table). Moreover, as this Court has stated, "[t]he Board routinely evaluates such factors as loyalty, trustworthiness, and judgment in determining whether an employee's discharge will promote the efficiency of the service." James v. Dale, 355 F.3d 1375, 1379 (Fed. Cir.

2004) (internal quotation marks omitted; quoting Egan, 484 U.S. at 537 n.1 (White, J., dissenting)).

With respect to the second part of the Court's question, the Court should reject OPM's efforts here to portray these cases as "national security determinations" that are beyond the Board's expertise. The Board does not decide issues of national security, which DoD regulations define as "the national defense and foreign relations of the United States." 32 C.F.R. § 154.3. Furthermore, the Board does not hear evidence or make any determinations as to whether a position has been properly designated as a "sensitive." See Skees v. Dep't of the Navy, 864 F.2d 1576, 1578 (Fed. Cir. 1989); Brady v. Dep't of the Navy, 50 M.S.P.R. 133, 138 (1991). Of course, as the HUAC proposed in 1959, all federal employees could be "deemed to be employed in an activity of the Government involving national security." H.R. Rep. No. 187 at 100. It does not follow, however, that any time an employing agency designates a position as a "national security position," the designation overrides the Board's statutory review. If that were so, the CSRA would be eviscerated.

The CSRA dissolved the Civil Service Commission into two separate, distinct, and independent bodies – OPM and the Board – "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. This principle, which the Court has described as the "cornerstone" of the CSRA, see Lachance v. Devall, 178 F.3d 1246, 1255 (Fed. Cir. 1999), would be dismantled if employing agencies could avoid Board review simply by designating positions as "sensitive."

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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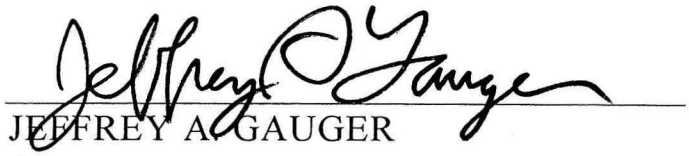

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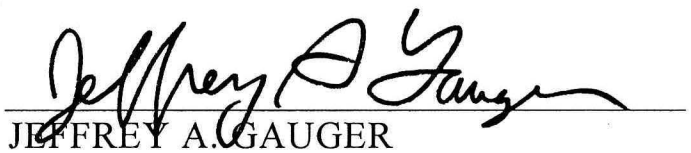

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CERTIFICATE OF SERVICE

I hereby certify that on this date, service of the EN BANC BRIEF FOR RESPONDENT MERIT SYSTEMS PROTECTION BOARD was made upon the following individuals by mailing a true and correct copy thereof by first class mail, postage prepaid:

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