UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 224

Docket No. DC-0752-09-0033-I-1

Stella Crumpler,

Appellant,

v.

Department of Defense,

Agency.

November 2, 2009

M. Jefferson Euchler, Esquire, Virginia Beach, Virginia, for the appellant.

Darrin W. Gibbons, Esquire, Fort Lee, Virginia, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

Vice Chairman Rose issues a separate, concurring opinion.

OPINION AND ORDER

¶1 The appellant has filed a petition for review (PFR) of the initial decision (ID) that sustained her removal. For the reasons discussed below, we find that the PFR does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.118, however, and AFFIRM the ID as MODIFIED by this Opinion and Order, still SUSTAINING the appellant's removal.

BACKGROUND

¶2 The appellant was a GS-4 Store Associate at Langley Air Force Base Commissary in Fort Lee, Virginia. She occupied a position that was designated non-critical sensitive by the agency pursuant to 5 C.F.R. § 732.201(a). Initial Appeal File (IAF), Tab 4, subtabs 4a, 4i. A sensitive position is one in which the occupant could bring about a material adverse effect on the national security. 5 C.F.R. § 732.201(a). After providing the appellant with an opportunity to respond to a tentative decision in its Statement of Reasons (SOR) Package, the agency's Washington Headquarters Services (WHS), Consolidated Adjudications Facility (CAF) issued a Letter of Denial advising her that her eligibility for access to classified information and/or occupancy of a sensitive position had been denied. IAF, Tab 4, subtab 4g. The agency then removed the appellant from her position based on the "[r]evocation/denial of [her] Department of Defense eligibility to access classified information and/or occupy a sensitive position." *Id.*, subtab 4a; *see also* subtabs 4b-4c. The appellant filed an appeal of her removal. IAF, Tab 1.

¶3 Prior to the hearing, the administrative judge (AJ) ruled that the appellant's removal based on being found ineligible to occupy a sensitive position was analogous to a removal upon denial or revocation of a security clearance, and that, accordingly, she would apply the standard set forth in *Department of the Navy v. Egan*, 484 U.S. 518, 530-31 (1988), in adjudicating the appeal. According to the AJ, *Egan* stands for the proposition that an individual does not have a property right or liberty interest in obtaining or retaining a security clearance, and that the Board is therefore without authority to review the merits of an agency's decision to deny a security clearance to an employee. ID at 4. Under *Egan*, when an employee is removed for failure to maintain a security clearance, Board review is limited to determining whether the agency can meet its burden of proving that (1) the employee's position required a security clearance; (2) her security clearance was denied or revoked; (3) transfer to a non-sensitive

position was not feasible; and (4) the agency followed the procedural requirements of 5 U.S.C. § 7513 in processing the removal action. 484 U.S. at 530; ID at 3. Therefore, the AJ limited the issues to whether the appellant's position required eligibility to occupy a sensitive position, her eligibility was denied, the agency was required by regulation to reassign her to a non-sensitive position, and the agency followed 5 U.S.C. § 7513's procedural requirements in processing her removal. The AJ found that the only dispute involved the last issue, noting the appellant's argument that she was not given a proper opportunity to reply to either the SOR or the notice of proposed removal. IAF, Tab 17 at 2; ID at 2-3.

¶4 After the hearing, the AJ issued the ID sustaining the appellant's removal. The AJ found that, under 5 C.F.R. Part 732, a Federal agency head can designate as "sensitive" any position if it could enable its occupant to bring about a material adverse effect on national security. She found that the appellant did not dispute that her position was designated "noncritical sensitive." Citing *Egan* and *Brady v. Department of the Navy*, 50 M.S.P.R. 133, 138 (1991), the AJ stated that she did not consider the agency's reasons for either designating the appellant's position as sensitive or denying her eligibility to occupy such a position. In doing so, the AJ found that, although the appellant was not denied a security clearance and her position did not require one, the agency's decision to deny the appellant's eligibility to occupy a position designated as sensitive under 5 C.F.R. § 732.201(a) was "virtually identical" to the "security clearance" determination considered in *Egan*, and that the reasoning in that case was equally applicable to the circumstances of the appellant's case. ID at 3-4. She noted that the Office of Personnel Management's regulations governing national security positions do not provide for Board appeal rights from determinations made under those regulations. *Id*. at 4. Accordingly, the AJ considered the appeal under the limited standard of review prescribed by *Egan*. *Id.* at 4-5.

¶5 In that regard, the AJ found that the appellant was apprised of the reasons for the denial of her eligibility to occupy a sensitive position and that she did not dispute that the SOR notified her of her opportunity to respond and provided her with information on how to do so. The AJ acknowledged the appellant's testimony that she did not read the SOR closely and, thus, did not respond, but found that her inaction was not equivalent to a denial of due process. The AJ found that, similarly, the notice of proposed removal notified the appellant of her opportunity to reply and identified the person to whom she should direct her reply. The AJ found that the appellant's claim that she did not respond because her union steward said that he would take care of it did not excuse her from acting diligently in her own behalf and did not negate that she was given the opportunity to respond. The AJ found that the appellant received advance written notice of her removal, the reasons for the removal, an opportunity to respond to the reasons, the right to a representative, and a written decision. The AJ thus found that the appellant failed to show that she was deprived of her appropriate procedural rights and that removal promoted the efficiency of the service. ID at 4-5.

¶6 The appellant has filed a PFR. PFR File, Tab 1. The agency has not responded to the PFR.

ANALYSIS

¶7 The appellant contends that the agency is attempting to circumvent Board jurisdiction over, and review of, adverse actions that employees could previously appeal and to create unreviewable suitability determinations. She asserts that no reasonable or rational requirement, including national security, exists for such an exception to the law. In that regard, she argues that the AJ erred in applying *Egan*. She acknowledges that Egan's position was designated "sensitive," but argues that "sensitive" in that case was defined as having "access to secret or confidential information." She also argues that the reasoning in *Egan* was based

on Egan's work on Trident submarines and around nuclear weapons, in contrast to her work in a commissary, which did not require a clearance that would allow her to access classified information. She contends that working in a position designated "sensitive" should not be equated to working in a position requiring a security clearance. She claims that, in *Adams v. Department of the Army*, 105 M.S.P.R. 50 (2007), *aff'd*, 273 F. App'x 947 (Fed. Cir. 2008), the Board rejected applying *Egan* where access to classified information was not at issue. She also cites several Board decisions in which she claims that the Board has rejected efforts to expand *Egan* to areas beyond security clearances. PFR at 3-6.

¶8 The appellant's PFR does not provide a basis for Board review under 5 C.F.R. § 1201.115(d) because it does not show AJ error or present new and material evidence. Despite alleging AJ error, the appellant has basically reiterated the arguments she presented below. IAF, Tabs 9, 13.[1] In addition, the record does not indicate that she preserved a timely objection to the AJ's decision, announced in the prehearing conference memorandum, to apply *Egan* to this case. IAF, Tab 17. Thus, she has not shown that the Board should consider her objection on review. *See, e.g., Brown v. Department of the Army*, 96 M.S.P.R. 232, ¶ 6, *review dismissed*, 115 F. App'x 62 (Fed. Cir. 2004).

¶9 We have reopened this case, however, to address whether the *Egan* rule limiting the scope of Board review of a removal based on the revocation of a security clearance also applies to a removal from a "non-critical sensitive" position based on the employee having been denied eligibility "to access

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[1] In *Adams*, the agency removed the appellant after a background check resulted in suspending his access to a computer that was essential to performing his job. The Board found, though, that "the agency has acknowledged that the information [to which Adams would have access through the computer system] is not classified and has indicated that it does not consider access to that information to be equivalent to possession of a security clearance." *Adams*, 105 M.S.P.R. 50, ¶ 12. Nor does the decision show that Adams's position had been designated as "sensitive" by the agency. Consequently, the Board found that the appeal did not "involve the national security considerations presented in *Egan*." *Id.* *Adams* is therefore inapposite to this case.

classified information and/or occupy a sensitive position." IAF, Tab 4, subtab 4a. An understanding of the Supreme Court's holding and rationale in *Egan* is therefore an essential starting point. The respondent in *Egan* was hired into a position that had been classified as "sensitive" by the agency, with a condition precedent to his employment being his "satisfactory completion of security and medical reports." 484 U.S. at 520. Following procedural safeguards deemed adequate, the respondent was denied a security clearance. Without a security clearance, the respondent was ineligible for the position and he was removed for that reason. *Id*. at 521-22. The respondent sought review by the Board pursuant to 5 U.S.C. § 7513(d), and the case ultimately reached the Supreme Court on the question of whether the Board had authority to review the merits of the agency's decision to deny the respondent a security clearance.

¶10 The Court held that the Board does not have such authority, reasoning that the unique role played by the Executive Branch to protect national security precluded the inference without clear direction that Congress granted the Board the authority to review security clearance decisions. The Court explained:

> [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.

Id. at 527. The President, in turn, has delegated to the heads of agencies the responsibility to "protect sensitive information and to ensure proper classification throughout the Executive Branch." *Id*. at 528. Thus, agency heads have authority to classify positions "in three categories: critical sensitive, noncritical sensitive, and nonsensitive. Different types and levels of clearance are required, depending upon the positions sought. A Government appointment is expressly made subject to a background investigation that varies according to the degree of adverse effect the appointment could have on the national security." *Id*.

¶11 Whether to grant a particular employee access to classified information requires a predictive judgment regarding a person's potential future actions. And per the Supreme Court:

> Predictive judgment of this kind must be made by those with the necessary expertise in protecting classified information. . . . [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. Certainly, it is not reasonably possible for an outside nonexpert body to review the substance of such a judgment and to decide whether the agency should have been able to make the necessary affirmative prediction with confidence. Nor can such a body determine what constitutes an acceptable margin of error in assessing the potential risk. . . . [W]ith 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 v. Young*, 351 U.S. 536, 546 (1956)).

¶12 In this case, as previously noted, the appellant's position was classified by the agency as non-critical sensitive pursuant to 5 C.F.R. § 732.201(a). IAF, Tab 4, subtabs 4a, 4i. That section directs the head of each agency to designate

> any position within the department or agency the occupant of which could bring about by virtue of the nature of the position, a material adverse effect on the national security as a sensitive position at one of three sensitivity levels: Special-Sensitive, Critical-Sensitive, or Noncritical-Sensitive.

C.F.R. § 732.201(a). The "investigative requirements" for each sensitivity level are provided in OPM issuances. 5 C.F.R. § 732.201(b).

¶13 Consistent with *Egan* and the language and structure of the regulation, it is well-settled that the Board does not have authority to review the merits of an agency's designation of a position as a "sensitive position" at one of the three levels. *See Skees v. Department of the Navy*, 864 F.2d 1576, 1578 (Fed. Cir. 1989) (reasoning that if, under *Egan*, "the Board cannot review the employee's loss of security clearance, it is even further beyond question that it cannot review

the Navy's judgment that the position itself requires the clearance"); *Bolden v. Department of the Navy*, 62 M.S.P.R. 151, 154 (1994) (holding that "the Board is without authority to review the agency's reasons for imposing the security access requirement"); *Brady*, 50 M.S.P.R. at 138 (holding that the Board has no authority to review an agency's decision to classify a position as non-critical sensitive).

¶14 By designating the appellant's position as non-critical sensitive under 5 C.F.R. § 732.201(a), the agency made the unreviewable judgment that "the occupant . . . could bring about by virtue of the nature of the position, a material adverse effect on the national security." *Id.* Accordingly, pursuant to 5 C.F.R. § 732.201(b), the agency imposed an appropriate investigative requirement to ensure that the appellant's background did not create, in its judgment, an undue risk to national security. As a result of that investigation, the WHS/CAF, an independent branch of the agency, determined that the appellant was ineligible to occupy a sensitive position.

¶15 Under these facts, no meaningful distinction warrants treating the determination that the appellant is ineligible to occupy a sensitive position any differently from a determination denying or revoking an employee's security clearance. In *Egan*, the Supreme Court clearly described the precise authority under which the agency here designated appellant's position as sensitive,[2] and

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[2] The Supreme Court cited Executive Order No. 10450, § 3, 3 C.F.R. 937 (1949-1953 Comp.). *Egan*, 484 U.S. at 528. The regulations authorizing agency heads to designate positions as "sensitive" and authorizing OPM to establish investigative requirements for each sensitivity level - 5 C.F.R. §§ 732.201(a) and 732.201(b) - had not been codified at the time *Egan* was decided. However, Executive Order No. 10450 is the authority for the regulations and their requirements are drawn from the Executive Order. Thus, the Supreme Court clearly had in mind the language now contained in those two regulations when, as previously noted, it described the authority of agency heads to classify positions "in three categories: critical sensitive, noncritical sensitive, and non-sensitive. Different types and levels of clearance are required, depending upon the positions sought. A Government appointment is expressly made subject to a

went on to include an employee's eligibility to hold such a position as the type of discretionary judgment that is not reviewable by the Board because executive agency heads have authority to classify and control access to information consistent with national security.

¶16 The Board's judgment as to whether the position involves access to classified information or otherwise implicates national security is irrelevant. Under *Egan*, *Skees*, and *Brady*, the Board has no authority to review the agency's decision to designate the appellant's position as non-critical sensitive. Although a reasonable argument could be made that there *should* be some limitation upon or review of an agency's discretion to designate positions under 5 C.F.R. § 732.201(a), that fact does not bear upon whether the Board has such authority. *Cf. Hesse v. Department of State*, 217 F.3d 1372, 1380 (Fed. Cir. 2000) (in response to the argument that an employee who is denied Whistleblower Protection Act appeal rights to challenge as retaliatory the revocation of his security clearance would have no other recourse, the court observed that "employees typically have internal appeal procedures within their agencies through which to object to adverse decisions on security clearance issues").

¶17 It is also irrelevant that the appellant's position did not require a security clearance. As the foregoing discussion shows, *Egan* is not limited to security clearances, *per se*. Its reasoning applies to any access eligibility standard that an agency, in its discretion, chooses to impose on candidates for a position that the agency has designated as sensitive because, in its judgment, the occupant of the position could materially, adversely affect national security. Moreover, the term "security clearance" should not be viewed as a term of art, but merely as a semantic device to describe - in the Supreme Court's words - any "background investigation" an employee must undergo and pass before being placed in a

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background investigation that varies according to the degree of adverse effect the appointment could have on the national security." 484 U.S. at 528.

position deemed a national security risk. For instance, in *Romero v. Department of Defense*, 527 F.3d 1324 (Fed. Cir. 2008), the court rejected the argument that the appellant's security clearance was not revoked, on the grounds that "the WHS-CAF's statement that his eligibility 'for access to classified information and to occupy a sensitive position has been revoked' shows that his clearance was revoked." *Id.* at 1330 n.2. Notably, this is the language used by the agency to describe the appellant's loss of eligibility to occupy her "sensitive" position. *See also Tchakmakjian v. Department of Defense*, 57 F. App'x 438, 439-41 (Fed. Cir. 2003) (applying the *Egan* standard of review to the removal of an employee who occupied a position that was designated non-critical sensitive and who was removed when the agency revoked his "security clearance and eligibility to occupy a sensitive position")[3]; *Bolden*, 62 M.S.P.R. at 154 (holding that the Board did not have the authority to review the agency's reasons for imposing a "security access requirement or to review the merits of the security access determination" when reviewing the appeal of an employee holding a position that was designated non-critical sensitive and who was indefinitely suspended when his "access to classified information and areas was revoked"); *Brown v. Department of the Navy*, 49 M.S.P.R. 277, 278 (1991) (applying the *Egan* standard of review to removal of an employee who occupied a position that was designated non-critical sensitive and who was removed when his access to "sensitive duties or classified information" was revoked).

¶18 We also note the difficulty that an AJ would encounter in weighing the merits of the agency's decision to deny an appellant "eligibility for access to classified information and/or [to] occupy a sensitive position." In *Egan*, the AJ who originally heard the case held that the Board could review the merits of the

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[3] The Board has held that it may rely on an unpublished, non-precedential Federal Circuit decision if it finds the court's reasoning persuasive. *See, e.g., Vores v. Department of the Army*, 109 M.S.P.R. 191, ¶ 21 (2008), *aff'd*, 324 F. App'x 883 (Fed. Cir. 2009).

security clearance denial and imposed on the agency the burden to (1) specify the precise criteria used in its security-clearance decision; (2) show that those criteria are rationally related to national security; and (3) prove by a preponderance of the evidence that the acts precipitating the denial of his clearance actually occurred and that the alleged misconduct has an actual or potentially detrimental effect on national security interests. 484 U.S. at 523. These standards would obviously require the AJ to make the very determinations that the Supreme Court deemed in *Egan* to be beyond the expertise of the Board. As the Supreme Court explained, "it is not reasonably possible for an outside nonexpert body to review the substance of such a judgment [to deny a security clearance] and to decide whether the agency should have been able to make the necessary affirmative prediction [that the employee did not pose a national security threat] with confidence." 484 U.S. at 529. The absence of an alternative standard that would satisfy *Egan* further demonstrates that Board review of the agency's determination in this case would be incompatible with that controlling Supreme Court precedent.

¶19 Accordingly, we conclude that the AJ properly sustained the appellant's removal.

ORDER

¶20 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit

717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

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

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.

CONCURRING OPINION OF MARY M. ROSE

in

Stella Crumpler v. Department of Defense

MSPB Docket No. DC-0752-09-0033-I-1

¶1 According to the principle of stare decisis, a court or other neutral body should apply the interpretation of law developed in one decision to all future cases that present the same issue. *Hubbard v. United States*, 514 U.S. 695, 711-12 (1995). A corollary to this principle would be that an individual judge or administrative adjudicator should adhere to any previous interpretation of law announced in a separate opinion. Stare decisis is "not an inexorable command" however, *Payne v. Tennessee*, 501 U.S. 808, 828 (1991), and neither is any corollary derived from it. Today I am joining a decision that is not consistent with the position that I took in my separate opinion in *Brown v. Department of Defense*, 110 M.S.P.R. 593, 600-05 (2009). This change in position is not something that I take lightly. Nevertheless, no Board member should tie her own hands with a rigid rule that a view, once expressed, cannot be reexamined. While consistency and adherence to prior interpretations of the law are important values, an adjudicator must be willing to revisit an issue if, upon reflection and after the passage of time, she is persuaded to take a different view. *Cf. Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (stare decisis is not a "mechanical formula" that precludes a court from reexamining a previous interpretation of law and adopting a new interpretation where one is warranted).

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Mary M. Rose
Vice Chairman