

## Merit Systems Protection Board Balances National Security Exceptions Against Employee Rights

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Breaking with prior tradition the Board held Oral Arguments for the first time in nearly three decades to determine the potentially far reaching implications of an appeal from two Defense Department employees, both of whom were disciplined for national security reasons.

In announcing the hearing, the board said it will use oral arguments in cases “that present issues of special significance because of their broad potential impact on the federal civil service and merit systems.” The oral arguments were set in the elegant backdrop of the U.S. Court of Appeals for the Federal Circuit, in the latter part of September.

The hearings primarily concerned attempts by the Defense Finance and Accounting Service and the Defense Commissary Agency to restrict the board’s ability to consider actions against employees in certain circumstances on the grounds of national security, even when their duties do not require security clearances and they neither have, nor require, access to classified information.

Currently the Board does not have authority to review the judgment of executive branch officials regarding which employees receive security clearances. The Pentagon argued that the MSPB also does not have the authority to decide cases involving employees whose positions are classified as “non-critical sensitive.”

Contrary to the Pentagon’s position however, it is difficult to ignore that no statute or regulation exists that would otherwise preclude the MSPB from exercising jurisdiction over “non-critical sensitive” positions. Neither of the employment positions that formed the impetus for holding the oral arguments involved classified information or security clearances, that much was undisputed, even by the government.

The first appeal was that of Rhonda K. Conyers, a Defense Finance and Accounting Service (DFAS) accounting technician in Columbus, Ohio, whose security clearance was removed by the Pentagon. The revocation later resulted in Ms. Conyers’ dismissal from her position, which did not require a security clearance to perform, and after twenty years of successful federal service.

DFAS asserted that “[s]ince the Agency did not have work available for [Conyers] to perform without a security clearance, her removal promoted the efficiency of the service, [as] it allowed her superior to replace her with someone who met all the qualifications of the . . . position,” the Defense finance agency wrote in its brief. The dismissal was particularly troubling in light of a decision by an administrative judge with the Defense Department, who recommended that she be granted eligibility for a sensitive position.

The second case concerned the demotion of Devon Northover, who worked for the Defense Commissary Agency at Gunter Air Force Base in Alabama. He was demoted after officials decided to deny him “eligibility for access to classified information and/or occupancy of a sensitive position,” according to the agency’s brief.

“There is no dispute that appellant’s eligibility was revoked in this case,” the brief says. “Nor has the appellant raised any argument that the agency failed to follow applicable procedural requirements.”

The common nucleus of each appeal is that neither Conyers nor Northover, required security clearances to do their jobs, a point that Defense Department attorneys did not contest. Notwithstanding the undisputed facts, the government argues that a National Security exception prevents the Board from hearing their appeals.

In the event the Board adopts the Pentagon’s argument, it will effectively overturn well-settled Board precedent, and unnecessarily diminish the rights of those myriad federal employees who occupy sensitive designated positions, but who do not have access to classified national security information.

Susan Tsui Grundmann, Chairman of the MSPB stated, “it is incumbent upon the Board to... conduct oral argument in order to shed light on the issues, the debate, and the process. Doing so should result in the best decisions for federal employees and agencies, and the American people.”

What remains to be seen however, is whether the Board will adopt a potentially all encompassing national security exception that will prevent it from hearing appeals like that of *Conyers* and *Northover* at the expense of the letter and spirit of the civil service law.

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