

National Security and the Commissary Cashier

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In [Crumpler v. Department of Defense](#), DC-0752-09-0033-I-1 (11/2/09), the U.S. Merit Systems Protection Board (MSPB), reopened the case on its own motion to evaluate whether the Supreme Court's decision in *Department of the Navy v. Egan*, 484 U.S. 518, 530-31 (1988), also applies to the MSPB's review of removals from "non-critical sensitive" positions based on the employee having been denied eligibility "to access classified information and/or occupy a sensitive position."

In *Egan*, the Supreme Court limited the scope of the MSPB's review of security clearance denials and revocations, precluding the MSPB from examining the merits of the reasons underlying a denial or revocation of a security clearance. The MSPB concluded in *Crumpler* that *Egan* did also apply to removals based on denial of eligibility "to access classified information and/or occupy a sensitive position."

The appellant in *Crumpler* was a Store Associate (cashier), GS-4, at the Langley Air Force Base Commissary. The Department of Defense (DoD) designated her position as "non-critical sensitive," meaning the position is one in which "the occupant could bring about a material adverse effect on the national security." After providing the appellant with an opportunity to respond to a Statement of Reasons as to why she was unsuitable to hold a "non-critical sensitive" position, DoD issued a Letter of Denial for eligibility to access classified information and/or occupy a sensitive position. The DoD then removed the appellant because of this denial, and she appealed her removal to the MSPB.

Prior to the hearing, the MSPB administrative judge (AJ) ruled that the appellant's removal was analogous to a removal upon denial or revocation of a security clearance, and that, accordingly, she would apply the standard set forth in *Egan* for review of decisions on security clearances.

Under *Egan*, when an employee is removed for failure to maintain a security clearance, the MSPB is limited to looking at whether:

1. the employee's position required a security clearance;
2. his/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 in processing the removal action.

After the hearing, the AJ sustained the appellant's removal finding that while her position did not require a security clearance, the DoD's decision to deny her eligibility to occupy a sensitive position 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.

In its decision on appeal, the MSPB began by stating 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." See *Skees v. Department of the Navy*, 864 F.2d 1576, 1578 (Fed. Cir. 1989); see also *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."). Thus, the Board concluded, by designating the appellant's position as non-critical sensitive, 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."

The MSPB noted that 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)," but nevertheless, under current law the MSPB "lacks such authority."

The Board concluded that it was irrelevant that the appellant's position did not require a security clearance, agreeing with the AJ that *Egan* is not limited to security clearances, *per se*. The Board explained that 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 sensitive position." Accordingly, the Board sustained the appellant's removal because of its limited ability to review DoD's decision.

Following this decision, federal employees must take every step possible to challenge an agency action not only to deny or revoke a security clearance, but also to deny eligibility "to access classified information and/or occupy a sensitive position." Once the agency has effected a removal, the MSPB has very little authority to review, and thus to reverse, the agency action.