Non-critical, Sensitive Position Debate Spills over to Congress, Supreme Court

Last month marked the four-year anniversary of my departure from the U.S. Merit Systems Protection Board (MSPB), which I chaired from December 2003 to November 2009. My tenure on the Board, which began with my appointment from President George W. Bush, remains a high point in my legal career. Without question, my path to the chairman's seat of this independent quasi-judicial agency was anything but traditional. I grew up in a simple household in Trinidad and Tobago. Before coming to America to pursue a career in law, I was actually a newspaper reporter in Port of Spain.Although I am no longer chairman, I remain close to the MSPB. Only now, instead of hearing petitions for review, I am representing federal employees before the Board as the Virginia Managing Partner of Tully Rinckey PLLC, one of the nation's largest federal employment law firms. Starting with my first job in the legal profession as an Equal Employment Opportunity Commission (EEOC) trial and appellate attorney in 1976, I have always been keenly interested in the protection of government employees' rights. Much of my three-plus decades of public service were dedicated to this end.For my first column, I'd like to focus on a debate I thought I had resolved during my last year as chairman. This debate revolves around the question of whether the Board can review cases where national security concerns prompt an agency to remove an employee from a non-critical, sensitive position. In August 2012, a panel of the U.S. Court of Appeals for the Federal Circuit in Berry v. Conyers ruled

that the U.S. Supreme Court's decision in Department of the Navy v. Egan

(1988) barred the MSPB from overruling agency eligibility determinations for sensitive positions, irrespective of whether they require access to classified information. The panel reversed and remanded two separated MSPB decisions.The Federal Circuit's decision in Conyers has been widely blasted as making employees in non-critical, sensitive positions susceptible to whistleblower retaliation and discrimination. Essentially, the decision allows agencies to place the removal of employees in non-critical, sensitive positions outside the reach of the MSPB by citing national security concerns as the basis for ineligibility determinations. The legal basis for this unfortunate outcome is something I have long recognized – and it is an opinion that other Board members, past and present, have not shared.Conyers addressed a question similar to the one I answered in Brown v Department of Defense

(2009), which involved the removal of an employee in a non-critical sensitive position. I advocated for adherence to the precedent set by Egan, in which the Supreme Court said it was not reasonable for an outside, non-expert body to review an agency's security clearance determination. "The absence of an alternative standard that would satisfy Egan further demonstrates the Board review of the agency's determination in this case would be incompatible with that controlling the Supreme Court precedent," I said in a separate decision. The Federal Circuit took a similar position in Conyers. Highlighting how contentious this issue has been, the vice chairman of the Board at the time disagreed with me in Brown, resulting in a split-vote decision. The vice chairman's disagreement, however, was short-lived. A few

months after Brown, she changed

her view in Crumpler v. Department of Defense (2009)When an administrative judge in 2010 decided on Conyers, she actually referenced the disagreement in Brown. On appeal

, the Board found the agency's designation of the position as non-critical, sensitive was "insufficient to limit the Board's scope of review to that set forth in Egan." So began the Conyers litigation saga.Last January, the Federal Circuit vacated

the panel's August 2012 decision and it granted a rehearing en banc for the two cases. Then last August, a majority of the court dismissed

one of the two merged cases because the appellant had no "cognizable interest in the outcome of this case." The court, however, reversed and remanded the Board's decision in the remaining case.The legal fight may not end there. On Nov. 15, the American Federation of Government Employees (AFGE) filed a petition for writ of certiorari

with the U.S. Supreme Court for the case of Devon Haughton Northover, which was the case from Conyers that the Federal Circuit had reversed and remanded. A few days later, AFGE's general counsel David A. Borer, said in a Senate Homeland Security and Governmental Affairs subcommittee that "AFGE will continue to press this issue both in court, in what is now the Northover case, and before Congress. Conyers should not be allowed to stand," according to his written testimony

.I believe closure to this issue is needed. Should the Federal Circuit's decision become finalized, the burden would then fall on Congress for establishing the "alternative standard that would satisfy Egan" that I four years ago noted was lacking in my separate decision for Brown.Neil McPhie is the Virginia Managing Partner for Tully Rinckey PLLC and the former chairman of the U.S. Merit Systems Protection Board. He concentrates his practice in federal sector employment and labor law and can be reached at info@fedattorney.com

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