AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

John Gage
National President

J. David Cox, Sr.
National Secretary-Treasurer

Augusta Y. Thomas
National Vice President for
Women and Fair Practices

7y/DoD/282488

October 22, 2010

The Honorable William J. Lynn, III
Deputy Secretary of Defense
1010 Defense Pentagon
Washington, D.C. 20301-1010

Re: Adverse Actions Arising from Defense Employees' Loss of Eligibility to Occupy Non-Critical Sensitive Positions

Dear Deputy Secretary Lynn:

I am writing to raise for your review and discussion the unjust approach taken by the Department of Defense ("DoD"), particularly the U.S. Defense Finance and Accounting Service ("DFAS"), in adverse personnel actions arising from employees' loss of eligibility to occupy non-critical sensitive positions.

First, DoD has subjected numerous employees who previously occupied non-sensitive positions, many of them long-term DoD employees, to unnecessary heightened background investigations by arbitrarily changing the national security designation of their non-sensitive positions to "non-critical sensitive." Second, DoD has then fired or demoted some of these same employees, often based on nothing more than their credit records, and at the same time argued that no neutral third-party may review the merits of DoD's decision - even if an employee chooses to exercise his Title V adverse action appeal rights. Third, DoD has not attempted to place these employees in other positions within DoD even though their work performance was not in question.

The American Federation of Government Employees believes that not only is DoD's approach inconsistent with law, but that, at bottom, it is simply unfair. As this country struggles to recover from an historic recession, it penalizes federal workers who are already feeling the effects of the recession by throwing them out of work and taking away their livelihoods, without even attempting to find them alternate employment within DoD. This is counterproductive and wrong.

To further exacerbate the injustice of DoD's approach, the re-designation of the previously non-sensitive positions that are at issue here also makes no sense. This year alone, for example, DFAS has initiated at least 50 adverse actions stemming from a previously non-sensitive employee's loss or denial of eligibility to occupy a non-critical sensitive position. However, although the employees involved occupied different

positions, they had two key attributes in common: 1) none of them was required to possess a security clearance; and 2) none of them was required to have access to classified information in order to do their jobs.

Indeed, enclosed with this letter you will find 33 DFAS position descriptions for jobs ranging from Accounting Technician to Contact Representative, positions now designated non-critical sensitive. Attached to each of these position descriptions is a DFAS position sensitivity designation record. DFAS uses these designation records to record the reasons underlying its decision to designate a particular position as sensitive. These designation records conclusively show that not a single one of the positions represented by the 33 enclosed DFAS position descriptions was designated as non-critical sensitive based on national security concerns. The area on each form where DFAS could have recorded any national security concerns or motivation that it might have had when designating the positions as non-critical sensitive is blank. Instead, the vast majority of the records show that the reason DFAS designated the positions as non-critical sensitive was because they entailed the delivery of customer services to the public. But this rationale is a non-sequitur. Public trust and national security do not go hand in hand, especially in the absence of access to classified material or information.

This leads us, of course, to DoD's argument that the merits of an agency's decision to deny, revoke or suspend an employee's eligibility to occupy a sensitive position are not subject to review pursuant to the rule announced in *Department of the Navy v. Egan*, 484 U.S. 518 (1988)("*Egan*"). As you undoubtedly know, the applicability of *Egan* to sensitive position eligibility matters is currently before the U.S. Merit Systems Protection Board ("MSPB"), and was recently addressed at oral argument in the appeals of *Conyers v. Dep't of Defense*, Docket No. CH-0752-09-0925-I-1, and *Northover v. Dep't of Defense*, Docket No. AT-0752-10-0184-I-1.

DoD, through DFAS and the Defense Commissary Agency, has inexplicably fought tooth and nail to prevent the review of appeals involving employees who did not possess security clearances or have access to classified information. Clearly, however, if the MSPB or any similar statutorily authorized authority cannot review the merits behind an agency's decision to remove an employee for loss of eligibility to occupy a non-critical sensitive position when classified material is not a factor, there will be no neutral third-party able to ascertain the truth of the factual allegations underlying the agency's decision or to determine whether illegal discrimination played a part in that decision. This absence of meaningful review would essentially give DoD a license to discriminate on any basis and to act in a completely arbitrary manner.[1] But, surely you would agree that neither the President, nor Congress nor the Supreme Court ever intended to give DoD the power to intentionally discriminate against entire agency workforces?

---

[1] For example, it is worth noting here that in a recent rash of eligibility-based adverse actions at DFAS Cleveland, the overwhelming majority of effected employees were over 40 and African-American. These statistics are as startling as they are disturbing.

In human terms, the case of Rhonda Conyers is a perfect example of the toxic nature of DoD's strategy and why third-party review is critical. Ms. Conyers was a DFAS employee for approximately 20 years. After her position was re-designated as non-critical sensitive, the Washington Headquarters Service – Consolidated Adjudications Facility denied her eligibility to occupy a sensitive position based, in part, on financial considerations. She appealed the denial to the Defense Office of Hearing and Appeals ("DOHA"). A DOHA administrative judge then issued a multi-page decision in her favor. Yet, without explanation the Clearance Appeals Board ("CAB") summarily rejected what it characterized as the administrative judge's "recommendation." Now, she is out of work and struggling to get by. And Ms. Conyers is not alone. There are numerous cases, some also at the MSPB, where DOHA judges have ruled in the employee's favor only to have the CAB override the judge's decision (and credibility findings) without explanation.

Regardless of whether the positions were correctly designated and regardless of the scope of review to be applied, Rhonda Conyers and all of the long-term DoD employees like her deserved better. This is within your power to correct, and AFGE asks that you do so. Order DoD and its components to cease arbitrarily designating positions as non-critical sensitive, to stop seeking to prevent third-party review and to put effected employees back to work.

I request the opportunity to discuss this important matter with you.

Sincerely,

John Gage
National President

Enclosures

cc: Dr. Clifford L. Stanley, Under Secretary of Defense for Personnel and Readiness
Hon. Sherrod Brown, U.S. Senator
Hon. Andre Carson, Member of Congress
Hon. Marcia L. Fudge, Member of Congress
Hon. Dennis J. Kucinich, Member of Congress
Hon. Steven C. LaTourette, Member of Congress
Hon. Betty Sutton, Member of Congress
David A. Borer, GC AFGE
Don Hale, Chair AFGE DEFCON
Frank Rock, CP AFGE C-171
Angelo T. Marshall, LP AFGE L. 3283