10-1987

Department of the Navy v. Egan

Lewis F. Powell, Jr.

Court CA - Fed. Cir.

Argued ....., 19.....

Submitted ....., 19.....

Voted on ....., 19.....

Assigned ....., 19.....

Announced ....., 19.....

No. 86-1552

DEPARTMENT OF THE NAVY, Petitioner

vs.

THOMAS E. EGAN

03/26/87 - Cert.

5/26/87 - Cert. Granted.

HOLD FOR	DEFER		CERT.			JURISDICTIONAL STATEMENT				MERITS		MOTION		
	RELIST	CVSG	G	D	G&R	N	POST	DIS	AFF	REV	AFF	G	D	
Rehnquist, Ch. J.			J.S.											
Brennan, J.				✓										
White, J.				✓										
Marshall, J.														
Blackmun, J.			J.S.											
Powell, J.			✓											
Stevens, J.														
O'Connor, J.				✓										
Scalia, J.			✓											
.....														

rjm 05/12/87

Renewed
Grant

SUPPLEMENT TO POOL MEMORANDUM

To: Justice Powell May 12, 1987

From: Ronald

Re: No. 86-1552, Department of Navy v. Egan

The Navy hired Egan as a laborer at a nuclear submarine facility. On his job application, Egan noted that he had been convicted for assault and carrying a pistol. He also noted that he has an alcohol problem. He improperly failed to note two other convictions for carrying a loaded firearm. When the Navy discovered these other convictions, it revoked Egan's security clearance. Because there were no jobs available at the facility that did not require a security clearance, Egan was discharged.

Egan appealed (eventually) to the Merit Systems Protection Board (MSPB). MSPB consolidated this case with others to decide whether it has power to review the revocation of a security clearance. MSPB decided that it could determine whether the Navy actually required a clearance for the job in question and whether the Navy actually had revoked the clearance. But it decided that it could not review the Navy's decision to revoke the clearance.

On appeal, CAFed reversed. 5 U.S.C. §7512 provides for MSPB review of all agency personnel actions. There is no exception for security clearances. Accordingly, MSPB should have reviewed this decision. CAFed noted that Congress has recognized the strong government interest in national security. To that end, Congress enacted §7532, that allows suspension of a security clearance (without MSPB review) when it is "necessary in the interests of national security." The Navy did not act under §7532 in this case. Accordingly, it is bound by the normal §7512 procedures, including MSPB review.

The SG argues persuasively that CAFed's analysis is troublesome. §7532 provides for removal only if the Navy determines, after a hearing, that removal is "necessary" in the interests of national security. This is a much stricter standard than the standard for granting a security clearance, if it is "clearly consistent with the interests of national security." It is easy enough to see how giving Egan a clearance is not "clearly consistent with the interests of national security." But CAFed's result indicates that Egan can keep his clearance until the Navy

demonstrates that it is "necessary in the interests of national security" to revoke the clearance. Such a decision infringes the President's unbridled discretion to grant and revoke security clearances.

Of course, Congress' creation of the MSPB demonstrates the important interests in unbiased review of actions that adversely affect federal employees. Thus, CAFed's decision is not clearly wrong. On the other hand, the Court regularly has refused to apply relatively clear statutory language in a way that might compromise the efficiency of the armed forces. I think the SG's argument is persuasive enough to merit review by this Court. I note that there is no conflict in the CAs, but I gather that all such cases go to CAFed; accordingly there can be no conflict.

I recommend GRANT.

Grant - Flag
& bring to me
before Conference

See Ronald's memo.

Grant
(if not
granted -
relist
for me)

Presents an important Q
as to when an employee -
- in this case of the Navy - may
be deprived of his job because
his "security clearance" has been
withdrawn. Here the employee
lied about his criminal record.
SG urges grant in interest
of national security.

PRELIMINARY MEMORANDUM

May 21, 1987 Conference
List 1, Sheet 2

No. 86-1552-CFX

DEPT. OF NAVY (wants no review of security clearance denials/revocations)	Cert to CAFed (Newman, Swygert [CA7], Markey, C.J. [dis.])	
v.		
THOMAS E. EGAN (employee who lost security clearance)	Federal/Civil	Timely

1. SUMMARY: Petr argues that the CAFed erred in permitting the Board to review decisions to deny security clearance.

2. FACTS AND PROCEEDINGS BELOW: On Nov. 29, 1981,

Grant (see memo) Ronald

resp was appointed to a position of laborer at a Naval submarine facility and then, on Apr. 18, 1982, assigned to that of labor leader, a position with access to secret or confidential information. A condition for the retention of resp's employment was his satisfactory completion of security reports. Over a year after resp's initial appointment, the Director of Naval Civilian Personnel Command (NCPC) issued a notice of intention to deny/revoke resp's security clearance. The reason for this action was resp's prior convictions for assault and carrying a pistol (apparently listed on his job application), his failure to list in his application two other convictions for carrying a loaded firearm, and his alcohol problem (also initially documented by resp). In a written reply to this notice, resp stated (1) that he had not listed the two convictions either because they had been dismissed or he had not been found guilty of them and because they were outside the period stated on the application, (2) that, with respect to the other two convictions, he had paid his "debt" to society for them, and (3) that alcohol had not been a problem for him for more than three years. The NCPC did not accept this explanation as adequate and revoked resp's security clearance. Because security clearance was a mandatory condition for resp's job (he worked on and around nuclear submarines) and because transfer to a nonsecurity position was not feasible at the facility, resp was removed from his position.

Resp appealed to the Merit Systems Protection Board (Board), which reversed the removal decision. The presiding official (PO) stated that the agency must set forth the criteria

according to which a security clearance is granted or denied and explain how these criteria are related to national security. Petr had set forth no such criteria or explanation, and so it was impossible to determine whether its decision was reasonable. Petr also failed to present evidence that it had weighed conscientiously the circumstances of resp's misconduct against the interests in national security and to heed the PO's warning about the deficiencies in its evidence and the problem in relying upon conclusory statements.

The Board itself in turn reversed the PO. (Because other cases presented a similar issue, the Board made this a "test" case and solicited amicus briefs on the issues.) The Board stated that it had no authority to review petr's stated reasons for the security clearance determination. Its review was limited to the following: "(1) the requirement of a security clearance for the position in question; (2) the loss or denial of the security clearance; (3) and the granting of minimal due process protection to the employee." Ptn. App. 7a. This due process suggested that an employee should have notice of the denial or revocation, a statement of the reasons for it, and an opportunity to respond. Moreover, the Board could not order reinstatement of a security clearance; rather, the appropriate remedy, if an employee were denied due process, would be to reverse the action and to order the agency to put the employee back on a pay status. The agency could then reinstate the removal after supplying the employee with the due process. In resp's case, the correct procedures mandated by due process had been followed.

The CAFed vacated and remanded. It first observed that 5 U.S.C. §7532 ("the head of an agency may suspend without pay an employee of his agency when he considers that action necessary in the interests of national security" [full text on Ptn. App. 73a-74a]), which excludes Board review, is not the exclusive basis for removal on national security grounds and, in fact, was not petr's stated basis in this case. Rather, resp was removed pursuant to §§7512 and 7513 ("an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service" [full text in Ptn. App. 72a-73a]), which provide for the standard Board review. There is nothing in §7532 stating that it preempts §7513 procedures in national security cases; it is up to the agency to select the appropriate procedure for a particular case.

The CAFed then considered the Board's proper scope of review in this case. The Board was wrong to think that it had no authority to review petr's reasons for the security clearance determination. §7701(c)(1)(B) provides that the Board will determine whether an agency's decision is supported by a preponderance of the evidence, and no exception is made for security clearance decisions (unless, of course, the removal is based on §7532). See Hoska v. United States Dept. of Army, 677 F.2d 131 (CADC 1982). The Board relied upon Exec. Order No. 10,450 under which a "head of each department and agency of the government shall be responsible for establishing and maintaining within his department or agency an effective program to insure that the employment and retention in employment of any civilian officer or

employee within the department or agency is clearly consistent with the interests of national security" [full text, Ptn. App. 75a-86a]. This Order, which establishes responsibilities in the Executive Branch, has nothing to do with appellate review of an agency's decisions as to security clearance.

The Board acknowledges that, in general, it has the authority to review the merits of a case, including the underlying reasons on which an adverse action was based. There is an exception for military assignments, see Zimmerman v. Dept. of Army, 755 F.2d 156 (CAFed 1985); Buriani v. Dept. of Air Force, 777 F.2d 674 (CAFed 1985), criminal convictions, and bar decertifications, but these cases are not relevant here: security clearances involve employees in military and civilian agencies; the law on criminal convictions and bar decertifications prevents collateral attacks on other tribunals--here petr wants to insulate its decision from appellate review. While the Board thought that a review of a security clearance decision would bring to light all sorts of sensitive information, no such materials were asserted to be relevant in resp's case (and petr always has the option of proceeding under §7532 if it is worried about disclosing such materials). Because resp's removal was "for cause" under §7512 and according to specific criteria in petr's own regulations (i.e., deliberate false statement [see regulation, Ptn. App. 18a]), the Board "is capable of reviewing the record to decide if the agency has established by appropriate standard that the employee should be denied security clearance." In addition, the Board also can evaluate the nexus between the criteria set

out by petr's regulations and an employee's ability to safeguard classified information (such a determination is no different from other nexus examinations made by the Board). Thus, the Board here should make a full review of petr's action as it would any other agency action taken pursuant to §7512.

The CAFed then noted that the Board's decision would produce the anomalous result of giving employees removed for national security reasons pursuant to §7512 less process than those removed pursuant to §7532, where a full evidentiary hearing is required, see §7532(c)(3)(C). Indeed, the Board's minimum due process is a departure from the statutorily mandated post-termination hearing provided in §7701(a)(1) and the constitutional protection from a deprivation of a liberty or property interest, see Arnett v. Kennedy, 416 U.S. 134 (1974). A right to a full hearing is particularly significant in a security clearance case. For the record of information used to deny security clearance will make it difficult for resp to get other govt employment and even private sector employment. Although resp's alleged transgressions may justify his removal, the merits of petr's actions have not yet been reviewed by the Board. "The Board, by refusing to review an agency's reasons for refusal of security clearance, denies to those federal employees the minimal opportunity to correct agency error, or to be protected from specious, arbitrary, or discriminatory actions." Ptn. App. 22a.

Finally, the CAFed noted that the question of the remedies available to petr if the Board orders resp's reinstatement is not ripe. On remand, the Board may well affirm petr's deci-

sion to removal resp. The problem partly has been created by petr which took over 15 mos. to investigate resp (whose criminal past, after all, was listed on his employment form). The Board will not substitute its judgment for that of petr or other agencies on the security clearance matter, but will function only as a typical appellate tribunal, as it does in other cases.

In a long (and somewhat rambling) dissent, C.J. Markey first observed that resp was nothing more than a conditional employee who did not satisfy the condition precedent to his job. (In a long footnote, he pointed out an anomaly that results from this case: because petr hired resp before conducting the full review, its security decision will be subject to Board review; if resp's security clearance matter had been decided before resp started working, denial of employment on the basis of security clearance would never have been subject to Board review. Thus, agencies might be on notice no longer to hire probationary employees. He also points out that resp did not avail himself of an appeal process provided by petr.)

Moreover, there is no evidence that officials of petr "arbitrarily" removed resp. Due process does not require a full evidentiary hearing to review the action against resp, especially where there is no dispute with respect to any material fact. If the majority's evaluation is allowed to stand, the discretion to grant or to deny a security clearance, given by Exec. Order No. 10450 to an agency's head, will now be in the hands of the Board, which has no institutional competence to make such a decision. The question is not what is within the Board's jurisdiction, but

what is the scope of that jurisdiction. "Congress has not signalled any intent that MSPB should use the jurisdiction it was granted as authority to inject itself into that sensitive area committed to the Executive branch." Ptn. App. 34a. This case is like Zimmerman and Buriani where employees were denied continued civilian employment because of unreviewable military decisions.

In addition, there is a separation of powers problem here. Who receives a security clearance is a matter assigned to the Executive Branch. "The majority does not tell us why an MSPB presiding official, or MSPB itself, is better, or even equally, qualified to make that judgment than are the responsible military officials." Ptn. App. 39a. Finally, C.J. Markey stated that the decision below would produce an absurd result: despite resp's criminal record and history of alcohol dependence, petr may be forced to grant him security clearance. The Board has not established any set criteria for petr to apply in determining whether to grant or to deny a clearance.

3. CONTENTIONS: The SG first argues that the power to determine whether an individual is sufficiently trustworthy to occupy an executive branch position is in the President's hands. Granting a security clearance requires an affirmative act of executive discretion. It is possible to specify some factors relied upon in making such a decision, but not to list all of them. This decision, which attempts to predict an employee's future behavior, is subjective in nature and "it is not reasonably possible for an outside, inexpert body to review the substance of such a judgment." Brief 11. This Court has recognized

that, as to employees in sensitive positions, such decisions as to security clearance should be in the hands of an agency head. Cole v. Young, 351 U.S. 536 (1956). When the Civil Service Reform Act of 1978 was enacted, there never had been a case in which a denial of security clearance was reviewed on the merits. (The SG admits in a footnote that there were cases dealing with review on the merits of the security clearance revocation of govt contractors. See, e.g., Gayer v. Schlesinger, 490 F.2d 740 (CADC 1973).)

The CAFed is wrong in its conclusion that §§7512 and 7513 permit a review of a denial of security clearance simply because this denial leads to a removal. See Zimmerman and Buriani. The legislative history of the Act does not indicate that Congress intended to alter the settled law that denials of security clearance are not subject to substantive review. To find congressional intent from congressional silence is misplaced especially with respect to decisions that are inherently discretionary in nature and involving all sorts of intelligence matters. The preponderance of the evidence standard under §7701(c)(1)(B) is ill-suited to judge such determinations, for they are affirmative decisions where every doubt is resolved against the employee. Although the CAFed argues to the contrary, the Board will be second-guessing agency determinations in the full evidentiary hearing provided by §7701 (this already has happened in some cases).

Moreover, the CAFed also errs in relying upon the availability of §7532, which is a drastic remedy not appropriate

for every denial of security clearance. §7532 requires an affirmative determination by the head of an agency that the removal is in the interests of national security. The granting of a security clearance, by contrast, occurs only if it is "clearly consistent with the interests of national security." If the agency cannot make such a finding, the employee has several important protections (notice, opportunity to be heard), but not the right to a review of the underlying security determination.

Finally, the SG argues that review is appropriate for three reasons: (1) this is the dispositive case on the issue and was a test case; (2) national security interests are involved (there is a risk sensitive material will be brought to light); and (3) this case involves numerous decisions by agencies (200 by petr this year).

In a five-page brief, resp simply notes that, if petr is worried about national security, then it can remove employees under §7532 and that resp was not a probationary employee (and thus entitled to the full protections of Board review).

In a longer brief, amicus Bogdanowicz (an individual in resp's position and represented by American Federation of Govt Employees) points out that the SG ignores the Hoska decision, where the CADC noted that the Board could review an underlying basis for a security clearance revocation in an adverse personnel action. Moreover, the SG ignores the fact that in petr's own review process an employee, like resp, has no opportunity for a hearing to challenge the grounds for a security clearance revocation. The SG makes much of the "subjective" nature of the secu-

rity clearance decision and of the Board's lack of suitability to review it. The Board, however, simply is being asked to review factual matters (i.e., did resp actually commit the crimes?). The SG also is misleading when he states that there is no history of judicial review of security clearance denials. See Gayer v. Schlesinger, supra (govt contractor employees). Moreover, petr's property interest in his job and liberty interest are at stake. The hearing simply gives resp a chance to clear his name.

The SG is wrong to suggest that there is no statutory authority for the Board's review in such cases: there is specific provision of §7513(a) that does not exclude this class of cases. And the SG downplays the availability of §7532 to the Govt. Moreover, the SG's position that §§7512 and 7513 provide for a review of removal but not for the agency action leading to removal is illogical, for one can examine the removal only by looking at the facts allegedly supporting the denial of a security clearance. The SG never raised the question of the standard of proof of §7701(c)(1)(B) below.

4. DISCUSSION: This is a "test" case that potentially affects a large number of other cases and that presents the rather sensitive issue of national security clearance. In my view, however, the CAFed has responded adequately to the arguments raised by the SG: the statutory language of §§7512 and 7513 makes no exception for removals based on security clearance revocation; the Executive Order does not deal with appellate review; the review here primarily would consist of an examination of factual matters; by the Board's decision resp is placed in the odd posi-

tion of not being entitled to a hearing (although he would have one under §7532); and the issue of what petr must do is not ripe--the Board may conclude on remand that resp was properly dismissed. And there is the precedent of Hoska, whose approach is consistent with the CAFed's.

There are some disturbing points in the CAFed's conclusion, however. As C.J. Markey points out, agencies may be discouraged from taking on employees before a security clearance has been run (on the other hand, perhaps petr is to blame in not speeding up the security check while employees are still on probationary status). Although this case does not present such a situation, there at least is the possibility that Board review will force agencies to disclose sensitive material (in such situations, however, the agency has the recourse of §7532). And the reasoning of cases like Zimmerman, where the condition of a civilian's job with the Army was continued membership in an Army Reserve Unit (which she lost), could be extended here. Just as the Board had no jurisdiction to examine military assignments or transfers, 755 F.2d, at 156, which were job conditions, concerns about potential interference with executive decision-making (particularly on military intelligence matters) would counsel against Board review of security clearance matters.

5. RECOMMENDATION: I recommend a denial.

There is a response and an amicus brief.

May 12, 1987 Fanto opn in petn