AFGE
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STATEMENT BY

DAVID A. BORER
GENERAL COUNSEL
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

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AND GOVERNMENTAL AFFAIRS

ON

SAFEGUARDING OUR NATION'S SECRETS: EXAMINING THE NATIONAL SECURITY WORKFORCE

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American Federation of Government Employees, AFL-CIO
80 F Street, NW, Washington, D.C. 20001 ★ (202) 737-8700 ★ www.afge.org

Mr. Chairman, Ranking Member Portman, and Members of the Committee, my name is David A. Borer, and I am the General Counsel of the American Federation of Government Employees, AFL-CIO (AFGE). On behalf of AFGE and the more than 650,000 federal employees who we represent, including tens of thousands of long-term employees who occupy positions presently designated as "sensitive," I thank you for the opportunity to testify today. AFGE has grave concerns about the recent decision issued by the United States Court of Appeals for the Federal Circuit in *Kaplan v. Conyers*, and about the proposed rule concerning the designation of positions as national security sensitive, issued jointly by the Office of Personnel Management (OPM) and the Office of the Director of National Intelligence (ODNI).

The *Conyers* decision and the proposed regulations strike at the heart of the merit system which, for decades, has been the foundation of federal civil service. *Conyers*, whether viewed as limited to the Department of Defense (DoD) or not, eliminated a fundamental protection for a vast and growing number of federal employees that was granted to them by the Civil Service Reform Act of 1978 (CSRA): the right to a meaningful hearing before the U.S. Merit Systems Protection Board (MSPB or Board). The regulations proposed jointly by OPM and ODNI exacerbate the unfairness and faulty logic of the *Conyers* decision by allowing agencies to pick and choose which employees will have the right to due process before the MSPB and which employees will not.

If both *Conyers* and the proposed regulations are allowed to stand, the likely result will be that Executive branch agencies will have the unchecked power to deprive hundreds of thousands of employees of the protections and rights that Congress gave them in the CSRA. By unilaterally designating a position they hold as sensitive, regardless of whether the position entails access to classified information, Executive branch agencies will shield routine personnel decisions from review by the MSPB. That, Senators, is likely to be an irresistible invitation to abuse. AFGE thus looks forward to working with the members of this Committee to restore fairness and common sense to the due process protections and rights which have historically protected the federal workforce.

Conyers and the proposed regulations are, indeed, only the latest injustices federal workers have faced over the last several years. Dedicated public servants have seen their pay frozen and their retirement and health care threatened. They have undergone two rounds of furloughs as a result, first, of the sequestration cuts and then the pointless government shutdown. Many were left unsure of how or when they would be able to pay their bills and make ends meet. Some untold number fell into debt, or fell deeper into debt. Despite these indignities, AFGE's members and all federal employees continued to serve our country with care and resolve, many of them without pay for the duration of the shutdown. Federal employees are committed to protecting their fellow citizens and providing crucial public services to all Americans. It is time that they were treated fairly for doing so.

Kaplan v. Conyers

This brings me to *Conyers*. One of the most important facts here is that *Conyers* does *not* pertain to individuals with security clearances. It is *not* a case about classified information. The

individuals in *Conyers*, Rhonda Conyers and Devon Northover, were an accounting technician and a grocery store clerk, respectively. They did not hold security clearances and they did not access classified information. Mr. Northover, in particular, worked in a commissary – the very same commissary where he continued to work following his demotion based on his "loss of eligibility to occupy a sensitive position." Ms. Conyers worked for the Defense Finance and Accounting Service (DFAS) for 19 years, without incident, before DFAS indefinitely suspended her and then removed her based on her loss of eligibility to occupy a sensitive position. Both Conyers and Northover, in lower paid positions to begin with, lost their eligibility because of delinquent debt; modest amounts of delinquent debt similar to that held by many Americans. Both of them accrued their debt based on circumstances outside their control: divorce in one case and a death in the family in the other. In other words, Rhonda and Devon were both penalized because of their credit scores. The penalty came, ironically, in the form of a loss of pay.

Ms. Conyers and Mr. Northover are not unique. Like most Americans, federal employees have been hit hard by America's recession and economic troubles. Many have struggled to make ends meet. But unlike most Americans, federal employees face baseless accusations of disloyalty to their county based on nothing more a poor credit report. This is deeply troubling to AFGE, and should be a real concern for this Committee. The implication that financial hardship equates to disloyalty, for employees with no access to classified information in the first place, is unsupported and offensive. AFGE has, moreover, found that the practice of penalizing employees based on their credit scores has not been uniform in its impact or its application; except insofar as it disproportionately impacts employees over forty years old, female employees, and employees of color.

Federal employees are more than credit scores and financial statements. They are mothers and fathers, brothers and sisters, friends and neighbors. They are also your constituents. They have mortgages to pay, financial obligations to meet, and families to raise, like any other American. They work hard every day to make America a safer, stronger, more secure place for their fellow citizens. And, for decades, the MSPB has provided them with a safety net against arbitrary or unfounded personnel actions.

Now, let me explain exactly what the Federal Circuit's decision in *Conyers* took away. In 1988, the Supreme Court decided *Department of the Navy v. Egan*. The court in *Egan* held that, notwithstanding the CSRA, the MSPB could not review the merits of security clearance determination in the course of adjudicating an adverse action, i.e. an agency action made appealable to the MSPB by the CSRA. Courts uniformly, at least up until *Conyers*, interpreted *Egan* as limited to security clearance determinations.

Since 1994 (when *Egan* was already the law), the MSPB also distinguished *Egan* and exercised it full statutory scope of review in cases involving so-called "sensitive" duties or positions that did not require a security clearance. For example, in *Jacobs v. Dep't of the Army*, 62 M.S.P.R. 688, 695 (1994), the Board held that:

> The Supreme Court's decision in *Egan* was narrow in scope and specifically applied only to security clearance revocations. As the protector of the government's merit systems, the Board is not eager to

> expand the scope of the rationale in *Egan* to divest federal employees whose positions do not require a security clearance of basic protections against non-meritorious agency actions.

The MSPB continued to distinguish *Egan* for more than a dozen years. *See Adams v. Dep't of the Army*, 105 M.S.P.R. 50 (2007), *aff'd*, 273 Fed. Appx. 947 (Fed. Cir. 2008) (unpublished).

The MSPB thus held in *Conyers* and *Northover*, the companion case to *Conyers*, that in the absence of a security clearance, *Egan* did not apply so as to restrict its scope of review of an employee's appeal. The MSPB did so for very good reasons, not the least of which was to avoid sanctioning arbitrary agency conduct and to further its enforcement of the CSRA.

The MSPB has been charged with enforcing the CSRA since it was enacted in 1978. The MSPB's mandate is to serve as a vigorous defender of the merit system in the federal workplace. Chief among its functions is protecting federal employees from arbitrary disciplinary actions, inappropriate favoritism, and coercion for partisan political purposes. When a federal employee faces discipline or termination, he or she may challenge that decision before the Board. The Board reviews the decision to determine whether or not it complies with the principles of the CSRA. In short, the Board ensures accountability. Thus, for the past 35 years, federal employees have turned to the Board when their employers abuse their authority by, for example, arbitrary action, whistleblower reprisal or other forms or prohibited discrimination. The Board ensures our federal workforce runs efficiently and effectively. Board oversight remains one of the most important due process protections for federal employees and candidates for federal employment.

Conyers washed this carefully constructed statutory scheme away and opened the door to arbitrary, and unchecked, Executive agency decision-making. The Federal Circuit essentially extended *Egan* to any determination, made in the sole discretion of an agency (or more accurately, any number of agency personnel), that may be crammed under the aegis of national security. The Federal Circuit, moreover, rejected the text, structure and history of the CSRA, along with the plain language of *Egan*, to hold that the MSPB may not review the merits of an agency determination that an employee is ineligible to hold a sensitive position, regardless of whether the position requires a security clearance, and regardless of whether the agency had any genuine basis for designated the position as sensitive in the first instance.

This means that, just as in the *Northover* case where the agency altered his eligibility determination based on the existence of litigation (his appeal), an agency may make or alter a sensitivity designation for any reason and without any oversight. In other words, an agency may now designate any position, no matter how absurd, as a national security position. An agency may then also go on to find an employee ineligible to occupy that position for any reason, including an invidious or illegal reason, and at the same time shield its action entirely from third-party review by the MSPB. For example, *Conyers* permits an agency to find an employee ineligible based on one late car payment or one late mortgage payment and withholds any neutral review of that finding.

AFGE believes this result is contrary to the CSRA and basic principles of good government, not to mention a functional system of checks and balances. *Conyers* leaves no

safeguard in place to check the Executive's control over federal employees or its conclusory assertions of national security. The Board and the dissenting judges in the Federal Circuit got it right. This is why 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.

The Regulations Proposed by OPM and ODNI

AFGE previously submitted public comments concerning the regulations proposed by OPM and ODNI on this topic. AFGE was one of many organizations that condemned the proposed regulations. We strongly urged OPM and ODNI to withdraw the proposed regulations in their entirety. Our position has not changed. The regulations add to the lack of accountability endorsed by *Conyers*. At the same time, the regulations provide precious little guidance to agencies.

For example, the regulations provide no oversight of agency position designation determinations. They also fail to provide meaningful instruction, beyond listing a number of ill-defined examples, regarding how agencies should determine which positions should be designated as sensitive, or even which agency personnel should be tasked with making these decisions. Most importantly, the proposed regulations present a stark contrast to the rule proposed by OPM in 2010. The 2010 rule reminded agencies, for example, that to designate any position as a "national security position," an agency must make an affirmative determination that the occupant of that position could bring about a material adverse effect on national security through neglect, action or inaction. Similarly, the 2010 Rule reminded agencies that sensitivity designations must be based on the position's responsibilities, not the broad mission of the agency. The proposed regulations, however, opt for caprice in the guise of efficiency.

The regulations' sweeping notions of what might constitute a national security position also amplify the negative impact of *Conyers*. As the proposed regulations have been written, it is difficult to think of any position that an agency could not designate as a sensitive, national security position. The regulations also do not say whether such a designation depends on the agency's overall mission or the actual responsibilities of a particular position. The proposed regulations, instead, invite an agency's imagination to run wild. For example, the regulations are so broad that they would embrace the designation of every civilian employee at DoD as sensitive; no matter what they did, or where or how they did it. *Conyers* then says that once such a designation has been made, the MSPB may no longer review the merits of an agency eligibility determination; no matter what the employee did and no matter why the agency decided to find the employee ineligible. The exception thus entirely swallows the rule; which goes against the very purpose of the CSRA. The regulations should be scrapped.

At best, the jointly proposed rule is comprised of rushed, poorly-crafted, and imprecise regulations affecting hundreds of thousands of employees. At worst, it is a deliberate attempt to nullify the CSRA. AFGE therefore continues to urge OPM and ODNI to withdraw the proposed regulation or bring it into conformity with the many changes suggested by AFGE. Without major changes, or withdrawal, these regulations have the potential to assist in the destruction of a system of oversight and accountability that has strengthened our federal workforce for decades.

Conclusion

Thank you again for inviting AFGE to provide this testimony. AFGE is committed to protecting the rights of its 650,000 members. We are eager to continue improving our federal workforce to serve our country. We look forward to working to improve our merit system and to maintain the system of checks and balances envisioned by the CSRA.