UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

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Hyginus U. Aguzie, Holley C. Barnes, Jones Ella Hunt-O'Neal, and James A. Scott, Appellants, v. Office of Personnel Management, Agency.	Docket Numbers: DC-0731-09-0261-R-1 DC-0731-09-0260-R-1 AT-0731-09-0240-I-1 CH-0731-09-0578-I-1

BRIEF OF APPELLANT HYGINUS U. AGUZIE

Appellant Hyginus U. Aguzie ("Aguzie"), by and through undersigned counsel, respectfully submits this brief in response to the brief filed by the Office of Personnel Management ("OPM"). Mr. Aguzie was a permanent Federal employee who was removed from his employment by OPM pursuant to an expedited, summary process using a suitability determination under C.F.R. part 731.

On September 3, 2009, the Merit Systems Protection Board ("the MSPB" or "the Board") ruled that using a 5 C.F.R. part 731 suitability determination to remove a permanent Federal employee may conflict with the due process protections found in 5 C.F.R. part 752. *Aguzie v. Office of Personnel Management*, 112 M.S.P.R. 276, 2009 M.S.P.B. 177 ¶¶ 4-7 (2009) ("*Aguzie*"). Even though Mr. Aguzie was a permanent Federal employee, OPM did not honor his due process rights under 5 C.F.R. part 752,

which incorporates 5 U.S.C. Chapter 75, subchapter II, in its entirety.[1] OPM subsequently requested that the Board reopen the *Aguzie* appeal and allow the parties to brief the issues. The Board granted OPM's request, and this briefing followed.[2]

Questions Presented

1. Whether the appellant is entitled to invoke the adverse action procedures of 5 U.S.C. § 7513(d) to appeal his/her removal, notwithstanding that the removal was ordered by OPM pursuant to its suitability regulations at 5 C.F.R. Part 731, and, if so,

2. Whether review of the other actions on appeal, i.e., debarment and cancellation of eligibilities, remain within the Board's jurisdiction under 5 C.F.R. § 731.501.

Statement of the Case

A. Background.

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[1] Chapter 75 provides Federal employees with due process protections, *see* 5 U.S.C. § 7513, and a Chapter 75 removal also entails consideration of the *Douglas v. Veterans Administration*, 5 M.S.P.B. 313, 5 M.S.P.R. 280, 296 (1981) factors.

[2] *Aguzie* was consolidated with *Holley C. Barnes v. Office of Personnel Management*, No. CH-0731-09-0260-R-1 and with OPM's appeal in the case entitled *James A. Scott v. Office of Personnel Management*, No. CH-0731-09-0578-I-1 on October 15, 2009. On October 22, 2009, the Board consolidated *Aguzie*, *Barnes*, and *Scott* with OPM's appeal in the case entitled *Jenee Ella Hunt-O'Neal v. Office of Personnel Management*, No. AT-0731-09-0240-I-1.

In May of 2006, Mr. Aguzie was hired as a Budget Analyst (GS 09) at the U.S. Commission on Civil Rights, where he worked for over two and a half years. On December 15, 2008, OPM issued a Final Decision Letter in its suitability in which it ordered Mr. Aguzie's removal from the Federal service. Id. OPM made one charge in its determination, that Mr. Aguzie made a "material, intentional false statement" on two Federal employment forms, a SF 85P and an Official Form 306.

The alleged false statement related to the terms of Mr. Aguzie's departure from a previous employer, [redacted] Mr. Aguzie stated that he had left [redacted] under unfavorable circumstances, because he resigned after [redacted] refused to grant him leave to travel to [redacted] o make arrangements for his [redacted] funeral and to tie up her financial affairs. A supervisor at [redacted] stated that he had fired Mr. Aguzie, but [redacted] could not provide any written evidence or supporting documentation. Despite this conflicting evidence presented at Mr. Aguzie's hearing before an administrative judge, the judge ruled against Mr. Aguzie. This appeal to the MSPB followed.

B. The Board's Decisions.

The Board's decisions in *Aguzie* and *Barnes* resulted in this briefing, to "address the question ... of whether the appellant is entitled to appeal his removal to the Board as an adverse action under 5 U.S.C. chapter 75, subchapter II." *Aguzie*, 112 M.S.P.R. at 277-78; *see also Barnes*, 112 M.S.P.R. at 275. The Board observed that Mr. Aguzie

held a competitive service position and had completed his one-year probationary period; the Board then concluded that Mr. Aguzie "therefore satisfies the definition of an 'employee' at 5 U.S.C. § 7511(a)(1)(A)." *Aguzie*, 112 M.S.P.R. at 278.

The Board noted that, "with certain exceptions not applicable here, a removal [of a permanent competitive service employee] falls within the scope of 5 U.S.C. Chapter 75, subchapter II." *Aguzie*, 112 M.S.P.R. at 278. Further, the Board noted, "An employee against whom such an action is taken is entitled to certain procedural protections, listed at § 7513(b)." Id. Therefore, the Board concluded, "notwithstanding OPM's characterization of the removal as an action under 5 C.F.R. part 731," Mr. Aguzie may have a statutory right to appeal his removal as an adverse action under chapter 75, subchapter II." Id.

As the Board recognized, "The distinction [between a removal under Chapter 75 of Title 5 and one under 5 C.F.R. part 731] is not merely academic." *Aguzie*, 112 M.S.P.R. at 278. The Board's Chapter 75 jurisdiction includes that authority to mitigate penalties under the factors articulated in *Douglas v. Veterans Administration*, 5 M.S.P.R 280, 296 (1981) ("*Douglas*"). In contrast, its jurisdiction under Part 731 is limited to determining whether the underlying suitability determination is supported by preponderant evidence. 5 C.F.R. § 731.501. In addition, the respondent in an adverse action under Chapter 75 would be the employing agency, not OPM. *Aguzie*, 112 M.S.P.R. at 278.

The Board recognized that OPM's suitability regulations preclude taking a removal action under both 5 C.F.R. Part 731 and Part 752. It further recognized that, "To the extent [5 C.F.R.] § 731.204(f) may purport to care out an exception to the Board's statutory jurisdiction under 5 U.S.C. § 7513(d), the validity of the regulation is in doubt." *Aguzie*, 112 M.S.P.R. at 278-79. Based upon this analysis, the Board requested the parties brief the issues in this proceeding.

Summary of Argument

OPM's reliance on decades-old executive orders and regulations is misplaced – most of the provisions on which OPM relies were superseded by the CSRA. OPM is denying Federal employees' significant rights, rights those employees have earned under 5 U.S.C. Chapter 75. OPM's current position allows for disparate treatment of Federal employees who are charged with falsifying employment records: some are prosecuted by OPM under Part 731, while others are prosecuted by the employing agency under Part 752. The only fair and rational resolution of this disparity is to restrict OPM's suitability determination proceedings to the period in which the employee is on probationary status; once the employee becomes a permanent Federal employee, any removal for suitability should be prosecuted by the employing agency under 5 C.F.R. part 752.

Argument

A. OPM's argument that it has broad authority to regulate suitability actions based upon statutes and executive orders that pre-date Chapter 75 of Title 5 of the U.S. Code is contrary to well-established Federal law.

OPM's primary argument in this case is that it has broad authority to regulate suitability actions based upon statutes and executive orders that pre-date Chapter 75 of Title 5 of the U.S. Code. This argument ignores the fact that the executive orders and statutes upon which OPM's relies were superseded in part by the passage of the Civil Service Reform Act of 1978 ("CSRA" or "Civil Service Reform Act"), which includes Chapter 75.

OPM is arguing, in essence, that passage of the CRSA had no effect on suitability determinations for permanent Federal employees. However, if Congress had intended to exclude OPM's suitability determinations from the CRSA it would have so stated it would seem. Since Congress did not exclude OPM's suitability determinations from the CRSA, it follows that OPM's suitability determinations are subject to the CRSA, including Chapter 75 of Title 5 of the U.S. Code.

Second, the executive orders upon which OPM relies are each made explicitly subject to "the civil service laws." "The civil service laws" include Chapter 75 of Title 5 of the U.S. Code. Moreover, an executive order cannot amend a statute passed by Congress and signed into law by the president. In essence, in these cases OPM is seeking to re-write the CSRA and to make itself the sole and final arbiter of the rights of permanent Federal employees.

OPM goes all the way back to the Civil Service Act of 1883 in citing President Eisenhower's Executive Order (E.O.) 10577 and Rule V promulgated thereunder. While

OPM argues that the CRSA had no effect on E.O. 10577, such an argument runs counter to rules of statutory construction.

Moreover, E.O. 10577 is made explicitly subject to "the requirements of law [and] the Civil Service Rules and Regulations." Certainly, "the requirements of law" include Chapter 75 of Title 5 of the U.S. Code, and "the Civil Service Rules and Regulations" include 5 C.F.R. part 752, which incorporates 5 U.S.C. Chapter 75, subchapter II, in its entirety.

The second executive order cited by OPM, E.O. 12107 of December 28, 1978, is likewise explicitly subject to "the civil service laws, rules, and regulations." These "civil service laws, rules, and regulations" of course include Chapter 75 of Title 5 of the U.S. Code, and they also include 5 C.F.R. part 752, which incorporates 5 U.S.C. Chapter 75, subchapter II, in its entirety.[3]

OPM then discusses its rule-making powers under 5 C.F.R. §§ 1103, 1104, and

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[3] By its very terms, E.O. 12107 is made subject to the CSRA. Section 2-402 provides: "*Continuing Effect of this Order.* Except as required by the Civil Service Reform Act of 1978 as its provisions become effective, in accord with Section 7135 of Title 5, United States Code, as amended, and in accord with Section 902(a) of that Act, the provisions of this Order shall continue in effect, according to its terms, until modified, terminated or suspended." In turn, 5 U.S.C. § 7135(b) explicitly states that previous regulations remain in effect "unless superseded by specific provisions of this chapter."

1302, which, again, explicitly limit OPM's rule-making authority "to ensure compliance with the civil service laws..." And again, the civil service laws include Chapter 75 of Title 5 of the U.S. Code.

OPM ends its discussion of its first point without a conclusion, but Appellant Aguzie will provide the only valid conclusion possible. OPM's executive orders and rule-making authority are explicitly subject to the civil service statutes and regulations. Since Chapter 75 of Title 5 of the U.S. Code and 5 C.F.R. part 752 are civil service statutes and regulations, the provisions of Chapter 75 and part 752 clearly apply in this matter.

B. OPM's regulations, as well as the MSPB's, distinguish between OPM-initiated suitability removals and adverse actions taken by employing agencies, and this distinction is based upon the employee's status, i.e., permanent Federal employees are entitled to the protections of Chapter 75 of Title 5 of the U.S. Code.

OPM's second argument here is valid as far as it goes – i.e., that its regulations, distinguish between OPM-initiated suitability removals and adverse actions taken by employing agencies. However, OPM does not recognize that the distinction between OPM-initiated suitability removals and adverse actions taken by employing agencies are based upon the employee's status: permanent Federal employees are entitled to the protections of Chapter 75 of Title 5 of the U.S. Code.

The only case cited by OPM on this point, *Folio v. Department of Homeland Security*, 402 F.3d 1350 (Fed. Cir. 2005), supports Appellant Aguzie's position here.

Folio is easily distinguishable from the instant case because Mr. Folio was merely an applicant for a Federal job, 402 F.3d at 1352, while Mr. Aguzie was a permanent Federal employee. Since the issue presented in this case deals with the rights of a permanent Federal employee, *Folio* bears little if any relevance to the analysis here, except to show that the current position held by OPM is untenable.

Therefore, OPM's argument is a tacit admission that its powers are not infinite, and OPM's admits that its powers are expressly limited by the "the civil service laws." OPM's removal of Mr. Aguzie did not comport with "the civil service laws." Accordingly, OPM's actions violated Mr. Aguzie's rights, and Mr. Aguzie should be reinstated to his position, with any further proceedings on a suitability determination to be taken by his employing agency under Chapter 75 of Title 5 and 5 C.F.R. part 752.

C. In the Civil Service Reform Act of 1978, Congress ratified the use of separate procedures for directed suitability removals and adverse actions, but Congress also provided significant due process protections for permanent Federal employees in the CRSA.

OPM's third argument is that, in enacting the Civil Service Reform Act of 1978, Congress ratified the use of separate procedures for directed suitability removals and adverse actions, but OPM ignores the key fact also contained in the CSRA: Congress also provided significant due process protections for permanent Federal employees pursuant to Chapter 75 of Title 5.

OPM disputes the Board's analysis that, in essence, OPM is seeking to "carve out" an exception to the Board's authority under 5 U.S.C. § 7513, but there is no doubt

that this is true. Moreover, OPM is attempting to "carve out" an exception to the rights of permanent Federal employees as found in Chapter 75 of Title 5 of the U.S. Code. OPM's attempt to usurp such authority should not be countenanced.

A clear-minded review of the facts and law in these cases shows that OPM is trying to turn Federal law and regulation on its head. OPM insists that the Board's theory "collides" with the principle of giving great deference to OPM's rule-making authority (OPM's Brief at p. 16), but of course OPM is entitled to no deference at all when its rule-making "collides" with the explicit terms of a Federal statute and express Congressional intent.

In essence, OPM is trying to re-write Chapter 75 of Title 5 of the U.S. Code. It does not have the authority to do so.

OPM next claims that the Board is "ignor[ing] the long line of both Board and Federal Circuit precedent under which suitability removals have been adjudicated for decades." OPM Brief at p. 16. With all respect, Appellant Aguzie asserts that it is OPM which is ignoring the long line of both Board and Federal Circuit precedent under which suitability removals have been adjudicated for decades.

In fact, the cases OPM cites on this point inveigh in favor of the Board's action in *Aguzie*. OPM cites five cases in support of its argument, but provides no discussion of the cases other than a cursory footnote review of an irrelevant point of one case. Appellant Aguzie will address each case in some detail.

Two of OPM's cases do not provide sufficient facts to determine whether the employee involved was a permanent Federal employee, *Doerr v. Office of Personnel Management*, 104 M.S.P.R. 196, 2006 M.S.P.B. 347 (2006) and *Sosa v. Office of Personnel Management*, 101 M.S.P.R. 583, 2006 M.S.P.B. 101 (2006). *Doerr* and *Sosa* each reviewed OPM's use of 5 C.F.R. part 731 in suitability determinations, but the facts provided in the cases do not allow one to ascertain the status of the employee involved.

McClain v. Office of Personnel Management, 76 M.S.P.R. 230 (1997), cited by OPM here, clearly supports Appellant Aguzie's position. The employee involved in *McClain* had served less than eight months before OPM issued its suitability determination pursuant to 5 C.F.R. part 731. 76 M.S.P.R. at 234. This fact fits nicely with Appellant Aguzie's position, that Part 731 is properly used in suitability determinations for non-permanent Federal employees.

Shelton v. Office of Personnel Management, 42 M.S.P.R. 214 (1989), also cited by OPM, supports Appellant Aguzie's position in that it shows how confusing OPM's practice has become. The *Shelton* case bounced back and forth between the MSPB and the Federal Circuit, and both tribunals at various times applied the *Douglas* factors in the case. 42 M.S.P.R. at 216-17, 220-21. The status of the employee in *Shelton* is not ascertainable, but his suitability determination was processed by OPM under Part 731.

OPM's fifth and final case cited here, *Kissner v. Office of Personnel Management*, 792 F.2d 133 (Fed. Cir. 1986), also supports Appellant Aguzie's argument

in this matter. *Kissner* applied the *Douglas* factors in analyzing OPM's actions, 792 F.2d at 134-35, and, while it is not made explicit by the discussion in *Kissner*, if OPM had proceeded under Part 731 in *Kissner*, the *Douglas* factors would not have been relevant.

Therefore, even using OPM's cases, it is abundantly clear that in many cases involving permanent Federal employees, suitability removals are processed under 5 C.F.R. part 752 and include consideration of the *Douglas* factors. Accordingly, as to the issues presented in Mr. Aguzie's appeal, his suitability determination should be processed under 5 C.F.R. part 752 and the *Douglas* factors should be considered.

OPM then cites *Lackhouse v. Merit Systems Protection Board*, 773 F.2d 313 (Fed. Cir. 1985), in support of its argument on this point, but OPM ignores the fundamental holding of *Lackhouse*: *Lackhouse* ruled that the MSPB "did have that precise authority" to overturn a rule promulgated by OPM. 773 F.2d at 315. In this case, as is *Lackhouse*, OPM's rules "facially conflict" with the civil service statutes – in particular, Chapter 75 of Title 5 of the U.S. Code.

OPM next discusses *Lovshin v. Department of the Navy*, 767 F.2d 826 (Fed. Cir. 1985), but, once again, misconstrues the holdings in *Lovshin*. Among other rulings, *Lovshin* held that, "Chapter 75 was revised to spell out with greater particularity the procedural rights of employees when action is taken thereunder. The minimum rights to which an employee is entitled are set out in § 7513(b), which need not be discussed

here." 767 F.2d 834-35.

In this case, OPM is arguing that it should be permitted to ignore the protections afforded to permanent Federal employees by Chapter 75, even though *Lovshin* also held that an employee's "substantive rights" under the civil service laws may not be abridged by an agency's use of different rules and procedure regarding discipline. 767 F.2d at 841-42. In this case, Mr. Aguzie's substantive rights under 5 U.S.C. § 7513 were abridged by OPM's use of Part 731 to remove him from the Federal service. As a permanent Federal employee, Mr. Aguzie was entitled to the protections of Chapter 75, and, since OPM's actions violated Mr. Aguzie's rights, Mr. Aguzie should be allowed to asset his Chapter 75 rights in this and in any subsequent proceeding.

OPM ignores the fact that it has every right to use Part 731 to remove a Federal employee pursuant to a suitability determination, but only if it acts before the employee earns permanent status. Once a Federal employee earns permanent status, he can be removed only in cases in which his Chapter 75 rights have been honored.

OPM's final argument on this point is another gambit that does not pass the straight face test. OPM argues that, "on balance – Part 731 procedures are neither more nor less favorable to the employee than those provided by Chapter 75." OPM Brief at p. 22. If such were the case, why is OPM expending such effort, time, and resources on this case in an attempt to seek approval for its use of Part 731?

Any impartial observer would acknowledge that permanent Federal employees

would significant advantages in having suitability determinations be processed under Chapter 75 and 5 C.F.R. part 752. First, the burden of proof utilized by the two procedures is quite different, even though OPM omits any discussion of this. Under Part 731, mere substantial evidence is sufficient to remove an employee; under Chapter 75, an agency must prove its charges by preponderant evidence. Second, the due process protections of Chapter 75 are considerable, and especially so in comparison to the expedited, summary nature of the proceedings under Part 731. Third, resort to the *Douglas* factors is of critical importance, even though OPM attempts to denigrate the importance of those factors in its argument here. Finally, having the employing agency prosecute the charge is of critical importance: the employing agency knows the employee, and, since we are discussing permanent Federal employees here, the employing agency would have had at least one year in which to observe the employee and make its own determination as to his suitability for Federal employment, as well as having at least one year of experience with the employee, thereby having first-hand knowledge as to the employee's veracity, moral fiber, character and competence.

The Board anticipated OPM's argument, and the Board's answer to that argument is persuasive: *Lovshin* differs from *Aguzie* in that chapter 43 and chapter 75 procedures are, by statute, mutually exclusive. Thus an agency may prevent the Board from applying chapter 75 standards by invoking chapter 43 for its performance-based action. By contrast, there is no statutory provision that would preclude a removal action ostensibly

taken under 5 C.F.R. part 731 from being adjudicated under chapter 75 standards. *Aguzie*, 110 M.S.P.R. at 278 n. 2.

In conclusion, OPM's argument is misguided and misconstrues the statutory and regulatory framework of the civil service system. The CRSA provided significant due process protections to permanent Federal employees, and OPM should not be permitted to do an end run around those protections by using a suitability determination under Part 731.

D. OPM is trying to carve out an exception to Chapter 75 of Title 5 of the U.S. Code, and no matter how many ways OPM attempts to spin the story here, OPM is acting contrary to well-established Federal law.

OPM, in its last substantive argument, accuses the MSPB of falsely analyzing OPM's rationale in these cases. The MSPB has the essence of these cases exactly right: OPM is trying to carve out an exception to Chapter 75 of Title 5 of the U.S. Code.

If being a permanent Federal employee means anything – and it does – it must mean that the protections of 5 C.F.R. part 752 and 5 U.S.C. Chapter 75, provided by Congress and earned by Federal employees, be honored. No matter how many ways OPM attempts to spin the facts, its OPM's position is contrary to well-established Federal law.

OPM submitted a 27-page brief, yet it never mentioned the real reason we are here: OPM is simply failing to process Federal employees in a prompt and efficient manner. OPM may have become more detailed in its suitability determinations, or it

may simply be inefficient, but the fact is no Federal employee should be held hostage to OPM's dilatory suitability determinations.

Taking OPM's position a bit further, one can foresee a situation in which OPM decides to remove a Federal employee pursuant to a suitability determination ten or fifteen years after the employee began his Federal service. Or, OPM could wait until a day before a Federal employee retires from a distinguished 30-year Federal career, decide the employee was not suitable, and remove him from the Federal service using its expedited, summary suitability procedures. That is simply not fair. It is also contrary to the spirit and letter of the Federal civil service statutes and regulations.

Appellant Aguzie proposes a bright-line test that would be both fair and in accord with the spirit and letter of the Federal civil service statutes and regulations: OPM has one year from the date an employee starts his Federal service in which to render a suitability determination. Should OPM fail to act within that time period, any suitability issues would have to be determined by the employing agency under the procedures enunciated in 5 C.F.R. part 752 and 5 U.S.C. Chapter 75.

Appellant Aguzie's solution is the only fair resolution of this issue. Moreover, it is the only resolution that is in accord with the spirit and letter of the Federal civil service statutes and regulations.

In conclusion, permanent Federal employees should not have their careers made subject to OPM's dilatory suitability determinations. Permanent Federal employees are

entitled to the protections of 5 C.F.R. part 752 and 5 U.S.C. Chapter 75. Any removal action taken pursuant to a suitability determination against a permanent Federal employee should adhere to those standards. Accordingly, once a Federal employee has earned the status of a permanent Federal employee, any attempt to remove him from his Federal career should be required to be taken under 5 C.F.R. part 752 and 5 U.S.C. Chapter 75.

E. The remedies of debarment and cancellation of eligibilities would still be available to OPM for Federal employees who have not earned permanent Federal employment status.

OPM's final argument in this case is directed to the Board's second question, i.e., would debarment and cancellation of eligibilities be available if OPM-initiated suitability determinations were adjudicated before the Board under Chapter 75. This question is best answered with reference to the reasoning immediately above: if OPM made its suitability determination within one year of the employee's start date, then debarment and cancellation of eligibilities would be available; if OPM failed to make its suitability determination within one year of the employee's start date, then debarment and cancellation of eligibilities would not be available.

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Appellant Aguzie provides the following discussion of issues that were not discussed by OPM but which are critical to a proper determination of the issues presented.

F. OPM's actions and regulations here do not comport with the provisions of the Civil Service Reform Act, violate important Due

Process Rights provided to permanent Federal employees by Congress, are fundamentally unfair to permanent Federal employees, and are contrary to well-established Federal law.

OPM's actions and regulations here do not comport with the provisions of the Civil Service Reform Act, as discussed in depth above. In short, under OPM's current regime, the protections provided to permanent Federal employees by Chapter 75 of Title 5 of the U.S. Code are disregarded.

OPM's actions and regulations in these cases violate important due process rights provided to permanent Federal employees by Congress. Men and women who have faithfully and proficiently served the Federal government for over one year have earned important due process rights provided by Congress pursuant to 5 U.S.C. § Chapter 75 and 5 C.F.R. part 752.

Additionally, OPM's actions and regulations are fundamentally unfair to permanent Federal employees. Permanent Federal employees charged with falsification are liable for punishment under two separate procedures – under 5 C.F.R. part 731 or pursuant to 5 C.F.R. part 752 – and can be prosecuted by two different agencies – their employing agency or OPM. Such a framework must invariably lead to inconsistent results in cases involving Federal employees and different treatment for Federal employees who are in the same or similar situations.

Consistency and treating all employees the same are important goals in the Federal civil service. As noted in *Lovshin*, "All federal employees should be subject to

some degree to a uniform disciplinary system ..." 767 F.2d at 843. The following cases highlight instances in which OPM's current position has led to inconsistent results and different treatment for Federal employees who are in the same or similar situations.

In *Naekel v. Department of Transportation*, 782 F.2d 975 (Fed. Cir. 1986), an employee was accused of making false statements on several SF 171 forms regarding the basis for his departure from a previous job. After the removal was upheld by the MSPB, the Federal Circuit reversed and held that the agency had failed to prove its charge of falsification by a preponderance of the evidence. 782 F.2d at 977-78. Even though the employee in *Naekel* had only been employed for about six months at the time of his removal for falsification, the charge was prosecuted by his employing agency, not OPM, and apparently was processed under 5 C.F.R. part 752, not 5 C.F.R. part 731, since the standard of proof required was the preponderance of evidence, not "substantial evidence" as found in Part 731 suitability determinations.

In *Haebe v. Department of Justice*, 288 F.3d 1288 (Fed. Cir. 2002), the Federal Circuit again held that the agency failed to prove that the employee had acted with intent to defraud, deceive, or mislead the agency in submitting an official report. 288 F.3d at 1308-09. While the employee in *Haebe* was charged with falsification, and not subject to a suitability determination, *Haebe* still bears relevance here since the falsification charge was prosecuted by his employing agency, not OPM, and apparently was processed under 5 C.F.R. part 752, not 5 C.F.R. part 731, since the standard of proof required was

the preponderance of evidence, not "substantial evidence" as found in 5 C.F.R. part 731 suitability determinations. Id.

Guerrero v. Department of the Veterans Affairs, 105 M.S.P.R. 617, 2007 M.S.P.B. 132 (2007) is also highly relevant. An employee who had worked for "approximately one year" was charged with falsification in *Guerrero* for falsifying Federal employment forms and misrepresentations, but the case was prosecuted by the employing agency and the employee was afforded the protections of Chapter 75 of Title 5, including consideration of the *Douglas* factors. 105 M.S.P.R. at ¶¶ 5, 11, 24. Allowing the employee those protections enabled him to save his Federal career, for the MSPB ruled that the employee should not have been removed and held that the employee may have been "confused" or even "careless," but had not intentionally misled the agency. Id. at ¶ 14.

Another relevant case here is *Cruz-Packer v. Department of Homeland Security*, 102 M.S.P.R. 64, 2006 M.S.P.B. 126 (2006). *Cruz-Packer* ruled that 5 C.F.R. part 731 did not serve as authority for the removal of an excepted service employee, notwithstanding the agency's characterization of the action as a suitability determination. 102 M.S.P.R. at ¶¶ 9, 12.

There is no rational basis in these cases for discriminating between competitive service and excepted service employees. If Part 731 cannot be used to remove an excepted service employee, then it should not be used to remove a permanent competitive

service employee.

A recent case from the Federal Circuit provides further illumination. In *Weidel v. Department of Justice*, 230 F.3d 1380 (table), 2000 WL 133845 (Fed. Cir. 2000) at * 4-5, the court held that an excepted service employee who was still in probationary status was not entitled to the protections of Chapter 75 and could properly be removed from the Federal service pursuant to a suitability determination under Part 731. *Weidel* comports well with the great weight of authority and with Appellant Aguzie's position here – while OPM can properly use Part 731 to remove probationary employees, it should not be allowed to use it in cases involving permanent Federal employees.

In sum, Mr. Aguzie was denied his civil service rights, significant rights he earned as a permanent Federal employee. OPM's actions in this case, as well as in the cases discussed above, subject permanent Federal employees charged with the same conduct to different procedures and impose different penalties. The Board should order that Mr. Aguzie be reinstated in his previous position and that any future suitability determination be carried out by his employing agency pursuant to Part 752.

Conclusion

OPM's authority in suitability determinations is limited by the provisions of the Civil Service Reform Act. The CRSA provides substantial protections to permanent Federal employees, including consideration of the *Douglas* factors in removal actions. OPM's actions violated Appellant Aguzie's CRSA protections and subjected Mr. Aguzie

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