JENEE ELLA HUNT-O'NEAL v. OFFICE OF PERSONNEL MANAGEMENT

Docket # AT-0731-09-0240-I-1

Response to Order to File Brief dated 8/9/2010

Summary Page

Case Title : JENEE ELLA HUNT-O'NEAL v. OFFICE OF PERSONNEL MANAGEMENT

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Filer's Pleading Role : Private Attorney

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Online Interview

1. Would you like to enter the text online or upload the file containing the pleading?

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No

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

Jenee Ella Hunt-O'Neal Appellant, v. Office of Personnel Management, Agency.	Docket No. AT-0731-09-0240-I-1 August 31, 2010

BRIEF FOR APPELLANT JENEE ELLA HUNT-O'NEAL

Appellant, Jenee Ella Hunt-O'Neal, through undersigned counsel, hereby submits this supplemental brief in support of her timely filed petition for review of the Board's Initial Decision (ID), issued September 11, 2009, which sustained the Office of Personnel Management's (OPM's) decision to remove her for suitability reasons under 5 C.F.R. § 731.201 *et seq.*

I. INTRODUCTION

The understanding of two authorities is important to this case: part 731 of Title 5 of the Code of Federal Regulations ("part 731") regulating suitability for federal employment; and Chapter 75 of the Civil Service Reform Act (CSRA or Act) regarding appeal rights for federal employees subject to "adverse actions."

Part 731 includes authority for the Office of Personnel Management (OPM) to determine the suitability of persons for the federal service and to take action against those deemed unsuitable ("suitability actions"). The "suitability actions" include removal, cancellation of

eligibility, denial of appointment, cancellation of reinstatement eligibility, and debarment. 5 C.F.R. § 731.203(a)(1)-(5) ("suitability actions")

Typically, the Board has authority to mitigate "adverse actions," under Chapter 75. However, part 731 denies the Board the authority to mitigate a suitability-based adverse action, a power which it enjoys under the Act. *See* 5 U.S.C. § 7701(b)(3). Part 731 also purports to deny the Board jurisdiction in certain circumstances. As explained below, an employee who has successfully completed her probationary period is entitled to the broader protections of Chapter 75, rather than the more limited provisions of part 731.

II. ISSUES PRESENTED

The Board has limited the issues to be considered to the following:

1. When OPM directs an agency to separate a tenured employee for suitability reasons, may the Board review the removal action using its broad authority under Chapter 75 of the United States Code or is the Board's scope of review limited, as identified in OPM's regulations at Part 731 of the Code of Federal Regulations, which limit the employee's statutory due process rights.
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, where the Board's enabling statutory provisions are silent on debarment and cancellation.

II. FACTS AND PROCEDURAL HISTORY

The Appellant, Jenee Hunt-O'Neal, was appointed to a Contact Representative position with the Department of the Treasury, Internal Revenue Service, on January 7, 2008. (SF-50, 1-7-08). As part of her application, Ms. Hunt-O'Neal completed a Declaration for Federal Employment, Optional Form 306, on November 15, 2007. Question number twelve on this form

asked if Ms. Hunt-O'Neal had been fired from any job within the last five years, and she answered by checking "no". On the same day, Ms. Hunt-O'Neal completed a Questionnaire for Non-Sensitive Positions, SF-85, where she listed [redacted] as one of her previous employers and Aslean Tucker as her supervisor there.

The Office of Personnel Management (OPM) sent to the ACB an Investigative Request for Employment Data and Supervisor Information. On December 26, 2007, ACB's Human Resources Manager, Kathy O'Connor, filled out this form and noted that Ms. Hunt-O'Neal's supervisor was Walter Wages and that Ms. Hunt-O'Neal had been discharged for "excessive tardiness/absenteeism." (Appeal Index at 9 (Agency Resp. File): Tab 2p at 2.) In a letter dated April 18, 2008, the IRS Deputy Director of Personnel Security and Investigations referred Ms. Hunt-O'Neal to OPM's Office of Federal Investigations for further investigation of possible falsification. (Appeal Index at 9 (Agency Resp. File): Tab 2k at 1.) OPM commenced an investigation on June 3, 2008, and released a Report of Investigation on November 5, 2008. (Appeal Index at 9 (Agency Resp. File): Tab 2g at 1.) On November 18, 2008, OPM sent a letter to Ms. Hunt-O'Neal notifying her that it proposed removing her from her position based on a finding of unsuitability due to "[m]isconduct or negligence in employment" and "[m]aterial, intentional false statement." (Appeal Index at 9 (Agency Resp. File): Tab 2e at 1.) Ms. Hunt-O'Neal responded to the proposal in a short letter dated December 1, 2008. (Appeal Index at 9 (Agency Resp. File): Tab 2e at 2.) In a letter to Ms. Hunt-O'Neal dated December 30, 2008, OPM stated it directed the IRS to remove Ms. Hunt-O'Neal within five work days. (Appeal Index at 9 (Agency Resp. File): Tab 2c at 1.) The IRS removed Ms. Hunt-O'Neal on January 5, 2009.

Ms. Hunt-O'Neal timely appealed her removal to the Board and an administrative judge (AJ) held a telephonic hearing on September 4, 2009. OPM called no witnesses at the hearing, but rather rested on the record. Ms. Hunt-O'Neal, appearing *pro se*, testified on her own behalf.

In a September 11, 2009, decision, the AJ sustained OPM's determination of unsuitability. Ms. Hunt-O'Neal timely filed a petition for review. In October 2009, the Board consolidated this matter with *Aguzie v. OPM, Scott v. OPM,* and *Barnes v. OPM*, because the three cases present the same legal issue.

III. ARGUMENT

A. The Board Has Jurisdiction Over Suitability-Based Removals, Notwithstanding OPM's Regulations at 5 C.F.R. part 731.

1. Suitability-Based Adverse Actions Are Covered By Chapter 75

"The starting point for interpreting a statute is the language of the statute itself, which governs absent a clearly expressed legislative intent to the contrary." *Forest v. Merit Systems Protection Board*, 47 F.3d 409, 411 (Fed. Cir. 1995), citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The Civil Service Reform Act (CSRA or Act) grants the Board jurisdiction over an appeal by an "employee" who has been subjected to an "adverse action." The Act "comprehensively overhauled the civil service system" and "created a new framework for evaluating adverse personnel actions against 'employees' and 'applicants for employment.'" *Lindahl v. Office of Personnel Management*, 470 US 768. 773-74 (1985).

Chapter 75 of the Civil Service Reform Act regards "Adverse Actions." Chapter 75 explicitly identifies adverse actions over which the Board has–and does not have appellate jurisdiction. The Act states:

> This subchapter [i.e., the Board's original jurisdiction] applies to --

(1) a removal;
(2) a suspension for more than 14 days;
(3) a reduction in grade;
(4) a reduction in pay; and
(5) a furlough of 30 days or less;

but does not apply to --

(A) a suspension or removal under section 7532 of this title,
(B) a reduction-in-force action under section 3502 of this title,
(C) the reduction in grade of a supervisor or manager who has not completed the probationary period under section 3321 (a)(2) of this title if such reduction is to the grade held immediately before becoming such a supervisor or manager,
(D) a reduction in grade or removal under section 4303 of this title, or
(E) an action initiated under section 1215 or 7521 of this title.

5 U.S.C. § 7512. Thus the Act explicitly states that "removal" is covered. The Act is unambiguous.

The Act also provides that "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." 5 U.S.C. §7513(a).[1] If an agency takes action covered by the subchapter, then "[a]n employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title." 5 U.S.C. §7513(d).

The Act does not differentiate among the different possible reasons giving rise to an adverse action. The Act does not distinguish between actions where the employing agency takes the adverse actions and where OPM takes the adverse action. The Act does not mention or exclude suitability-based adverse actions. Each of these points demonstrates that the Act does not intend to apply different standards to suitability-based adverse actions.

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[1] The Act defines "employee", in part, as "an individual in the competitive service (i) who is not serving a probationary or trial period under an initial appointment; or (ii) who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less."[1] 5 U.S.C. § 7511(a)(1).

The Act's legislative history demonstrates that Congress intentionally chose not to differentiate between the two types of actions – suitability-based and non-suitability-based adverse actions. When crafting the Act, Congress considered the impact of suitability actions in the context of the CSRA. In the Senate Report accompanying the bill that would become the CSRA, the Senate's Committee of Governmental Affairs noted that in 1976 17,157 employees[2] were dismissed from federal service, which included 418 employees "separated for suitability reasons," or a mere 2.4% of those removed.[3] S. Rep. No. 95-969, at 9 (1978). In discussing the bounds of what became the amended Chapter 75, the report states, "The actions covered in subchapter II [i.e. §§7511-7514 of Chapter 75] may be appealed by the employee to the Board. These provisions govern ***any*** such action where the basis of the agency action is misconduct ***or any other cause*** besides unacceptable performance." *Id.* at 46 (emphasis added). In referencing "actions covered," Congress implicitly incorporated its prior evaluation of suitability actions. Thus, this provision of the legislative history illustrates conclusively that Congress intended to include suitability-based actions within Chapter 75.

2. OPM's Arguments That Chapter 75 Excludes Suitability-Based Adverse Actions Are Not Supportable

As noted above, in Chapter 75 Congress explicitly identified exceptions to "adverse actions", and suitability actions are not identified within those exceptions. OPM argues that even though Congress did not explicitly exclude suitability actions, Congress meant to exclude suitability-based removals. OPM does not cite – nor can it – any authority to support its argument. To the contrary, OPM argues that because the Act is *silent* with regard to suitability

[2] It is apparent from context that the Senate Committee's use of the term "employee" is not the same as the statutory definition used elsewhere in this brief.
[3] For comparison, the report notes that 2,287 employees were dismissed for poor performance and 3,164 employees were dismissed for misconduct. S. Rep. No. 95-969, at 9 (1978

actions, Congress intended such actions would be *excluded* from Chapter 75. This argument is specious and clashes with judicial interpretation of Congressional intent. It is well established that when Congress chooses to identify exceptions, omitted exceptions should not be inferred. *See Carter v. Gibbs*, 909 F.2d 1452, 1455 (Fed. Cir. 1990) (holding that statutory exceptions should not be implied if not explicitly stated).

OPM's arguments clash with the legislative history which demonstrates that Congress explicitly considered the impact of suitability actions, yet chose not to exclude suitability actions from the definition of "adverse actions." For these reasons, OPM's argument should be rejected.

OPM further argues that any interpretation of Chapter 75 which *includes* suitability actions would constitute such a "major" and "sweeping" change of the prior civil service scheme that it is inconceivable without explicit Congressional intent. (Br. For OPM 19) (quoting *Lovshin v. Dep't of the Navy*, 767 F.2d 826, 842 (Fed. Cir. 1985). Again, this contention is at odds with the legislative history and judicial interpretation. The Committee Report demonstrates that at the time of the legislation, only 2.4% of removals were grounded in suitability determinations. Thus, by including this modest 2.4% of the removal actions in covered actions, Congress did not institute "major" or "sweeping" changes to the prior scheme; Congress merely included a small set of cases. Therefore, the Report supports the conclusion that Congress intended suitability-based actions would be included within Chapter 75's coverage.

The statute explicitly identifies actions which do *not* constitute "adverse actions." The exclusions are exhaustive and definite; they are not illustrative. While enacting the legislation, Congress explicitly considered and quantified the number of suitability-based adverse actions in the federal workforce. The legislative history confirms that when Congress defined "adverse actions", it was aware of removals (and other adverse actions) based on suitability

determinations. Because Congress was aware of and considered suitability-based removals when it enacted the legislation, the Board must conclude that Congress' failure to carve out an exception for suitability-based removals was intentional. Under these circumstances, Congress' omission is dispositive; Congress did not intend to exclude suitability-based removals from the definition of "adverse actions" covered under Chapter 75. When Congress explicitly and carefully identifies statutory exclusions, the courts may not infer or apply additional exceptions. *Carter, supra.* OPM's arguments to the contrary, i.e., that there is no indication that the list of exclusions in § 7512 is exhaustive (see OPM Br. at 10), is without support in the legislative history or case law.

The Department of Veterans Affairs (DVA) similarly mistakenly concludes in its *amicus* brief that the "plain language of § 7513(d) indicates that a removal under § 7513 is the *only* removal that may be appealed through chapter 75. Section 7513(d) does not state that an employee is entitled to appeal *any* adverse action through chapter 75 – only adverse actions taken *under* § 7513." (Vet. Admin. Br. At 3). DVA's argument is misplaced.

Only one statute defines "adverse actions" – Chapter 75 of the Act. The DVA's argument suggests another statute which defines "adverse actions" and under which suitability-based adverse actions would fall. However, there is not; OPM has cited to none; DVA has cited to none; none exists. Chapter 75 unambiguously identifies the totality of "adverse actions". Therefore, all "adverse actions" are appealable consistent with Chapter 75. Because there is no other statutory basis for an "adverse action", DVA's argument is without support.

OPM further supports its contention that the Act excludes suitability-based adverse actions by citing to the Act's savings provision, arguing that the CSRA's savings provision reserved existing civil service rules and regulations. (OPM Br. at 11). Again, OPM is mistaken.

Section 902(a) of the Act states that all consistent civil service rules not explicitly modified by the Act are intended to remain in place, but that the Act extinguishes contrary rules. The Act is silent on modified suitability-review procedures. (See, *accord,* Department of Veterans Administration Br. at 6). Thus, § 902(a) provides that after implementation of the Act, OPM (or its predecessor) retained authority to render suitability determinations and suitability-based adverse actions – but only to the extent that such removals do not clash with the Act. Thus, the Act modified any pre-existing suitability rules that conflict with the Act's Chapter 75 "adverse action" procedures. To the extent pre-CSRA rules excluded suitability-based adverse actions from the due process provided by Chapter 75, the Act extinguished such rules. For these reasons, again, OPM's argument is misplaced and should be rejected.

OPM's claims rely heavily on its own regulation where it has created different procedures for suitability actions (part 731) separate from adverse actions (part 752). The source of the Board's jurisdiction, however, is not regulatory, but statutory. Neither the statute nor its legislative history supports an argument that suitability-based adverse actions should be treated differently than other adverse actions. *See* 5 U.S.C. § 7512. The legislative history proves Congress intended only one distinction within removals: removals for poor performance (i.e. Chapter 43 of Title 5) and all other removals. *See* S. Rep. No. 95-969, at 46 (1978). OPM's regulations do not carry sufficient weight to overcome clear statutory authority and legislative history.

***The power of OPM to make suitability determinations and to take suitability actions is not doubted and is not at issue before Board in this case. What is at issue is whether a removal initiated by OPM on suitability grounds deserves a different appellate standard that that of Chapter 75. As OPM argues, it has promulgated different procedures to regulate suitability

actions (part 731) separate from adverse actions (part 752). The source of the Board's jurisdiction, however, is not these regulations, but the Act. That statute does not differentiate between different kinds of removal. *See* 5 U.S.C. § 7512. Congress sought to distinguish only between removals under Chapter 75 (conduct) and Chapter 43 (performance). *See* S. Rep. No. 95-969, at 46 (1978).

OPM cites *Lovshin v Dep't of the Navy*, 767 F.3d 826 (Fed. Cir. 1985), for the proposition that if two procedural paths exist, then an agency is empowered to choose between them when taking action against an employee. (Br. For OPM 20.) At issue in *Lovshin* was whether an agency could remove an employee for poor performance under Chapter 75 or whether it was bound to use the procedures in Chapter 43. *Lovshin*, 767 F.3d at 829. Congress provided that removals under Chapter 43 and Chapter 75 were explicitly exclusive of each other. *See* 5 U.S.C. §7512(D). Thus, *Lovshin* concerned two clear but separate statutory paths.

Here, one path is statutory (Chapter 75) while the other is regulatory (part 731) and frustrates the purpose of the statute. OPM lacks statutory authority and thus OPM does not have the power to promulgate regulations which narrow the Board's statutory-based authority. This tension was not present in *Lovshin* and, therefore, *Lovshin* does not apply here.[4] OPM does not have authority to modify Congress's grant of authority to the Board. For these reasons, OPM's reliance on *Lovshin* is misplaced.

3. OPM's Regulations Are Inconsistent With the Board's Statutory Authority

[4] The Department of Veterans' Affairs makes a similar argument. (Amicus Br. of the Office of the General Counsel, Dep't of Veterans' Affairs 3.) This argument claims that since a suitability removal is taken under some authority other than § 7513, it is not an action "under" this statute and therefore the statute does not apply. *Id. quoting* 5 U.S.C. §7513(d). This argument must fail because does not address the Act's legislative history that any removal not otherwise excluded by the language of §7513 is necessarily included and thus is covered by Chapter 75.

The impact of OPM's argument is to limit and narrow the Board's authority to review and mitigate adverse actions. Because this result frustrates the purpose and intent of Congress, it cannot be honored.

Whereas the Act provides that the Board may fashion its own penalty and remedy, OPM's regulations strip the Board of this authority. OPM regulations describe the parameters of an appeal of a suitability action to the Board. 5 C.F.R. § 731.501. The regulation provides that a person may appeal a suitability action to the Board, but limits the Board's authority on appeal. *Id.* Whereas the Act provides that the Board may evaluate the reasonableness of a penalty, 5 U.S.C. §7701(b)(3), OPM's regulations deny the Board this authority. Where the Act allows the Board to mitigate a penalty, OPM's regulations provide only that the Board may remand an unsubstantiated penalty to OPM. Where the Act provides the Board may be the ultimate arbiter after remand, OPM's regulation reserves that authority to OPM.

OPM's regulation is inconsistent with the Board's appellate procedures as defined by statute. *See* 5 U.S.C. §7701.[5] Section 7701(b)(3), for example, grants the Board power to mitigate a personnel action covered by Chapter 75. 5 U.S.C. §7701(b)(3). OPM's regulatory preclusion of appellate review of a remanded suitability action is in conflict with subchapter II, which allows an employee to appeal the remanded case. *See* 5 U.S.C. §§7511-14.

The statute that enables OPM to promulgate its regulations is silent on suitability determinations. For this reason, OPM cannot argue that its general grant of administrative power should triumph over a conflict with express power granted by statute. Similarly, OPM's argument that it should be granted *Chevron* deference is without merit, as such deference is not available when an agency's interpretation of its regulations are in conflict with explicit statutes. *See Butterbaugh v. Dep't of Justice*, 336 F.3d 1332, 1341 (Fed. Cir. 2003); *Van Wersch v. Dep't*

[5] The Board, not OPM, is empowered to promulgate regulations under this section. *See* 5 U.S.C. §7701(k)

of Health and Human Services, 197 F.3d 1144, 1151 (Fed. Cir. 1999). OPM's suitability regulations are contrary to the statute. OPM's regulations strip from the Board jurisdiction which Congress explicitly and implicitly authorized. Accordingly, OPM's suitability regulations are not entitled to deference.

4. If Ms. Hunt-O'Neal Was an Employee At the Time of Her Removal, She Is Entitled to an Appeal to the Board Where Mitigation Would Be Available.

The ID does not address whether Ms. Hunt-O'Neal meets the statutory definition of "employee." OPM presented no evidence as to whether Ms. Hunt-O'Neal had been removed before the end of her probationary period. Ms. Hunt-O'Neal, appearing without the benefit of counsel, was no doubt unaware that she carried a burden to prove the Board's jurisdiction under Chapter 75 or part 731. With such an ambiguity present, it is not clear whether Ms. Hunt-O'Neal's right to appeal is found in the procedurally broader but substantively more limited part 731 or whether she has the right to appeal in the procedurally more narrow Chapter 75 and thereby gain access to more substantive benefits, such as mitigation by the Board.

Should the Board rule in Appellants' favor it will be necessary to remand Ms. Hunt-O'Neal's case for a finding of fact as to her employment status at the time of her removal. If she is then found to be an "employee" and not a probationer, then she should be permitted to appeal her case under Chapter 75. Were Ms. Hunt-O'Neal able to appeal under Chapter 75, and if the AJ sustains one or both of the charges against her, the judge would then have the power to mitigate according to *Douglas*. The Board would be able to hear evidence as to Ms. Hunt-O'Neal's performance at the IRS and weigh the relevance of this against the charges against her to determine if removal is the just result. Under part 731, the Board is denied the opportunity to mitigate, a power granted to it by statute. *See* 5 U.S.C. §7701(b)(3).

B. The Board Has Limited Jurisdiction Over Suitability Actions Which Are Not "Adverse Actions" Under Chapter 75.

As discussed above, the Board has jurisdiction over appeals of removals, including suitability removals, based on 5 U.S.C. § 7512. Other suitability actions available to OPM that are not enumerated in § 7512 are not appealable under Chapter 75. The Board's jurisdiction in the cases of these other actions, including debarment and cancellation of eligibilities, remains based on 5 C.F.R. § 731.501. *See also* 5 C.F.R. §1201.3(a)(7).

IV. CONCLUSION

For the foregoing reasons, Appellant asks the Board to find that it has the power to review the removal action using its broad authority under Chapter 75 and to remand for further processing.

August 31, 2010

_/s/_____
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Certificate Of Service

e-Appeal has handled service of the assembled pleading to MSPB and the following Parties.

Name & Address	Documents	Method of Service
MSPB: Office of the Clerk of the Board	Response to Order to File Brief dated 8/9/2010	e-Appeal / e-Mail
Jenee Ella Hunt-O'Neal Appellant	Response to Order to File Brief dated 8/9/2010	e-Appeal / e-Mail

I agree to send a printed copy of the electronic pleading with attachments to non-efilers by the end of next business day, as follows:

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Robert J. Girouard, Esq. Agency Representative Office of Personnel Management Office of the General Counsel 1900 E Street, N.W. Room 7353 Washington, DC 20415-1300	Response to Order to File Brief dated 8/9/2010	Fax