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CLERK OF THE BOARD

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Clerk of the Board
To: Merit Systems Protection Board From: Joyce Harris - Turnberg
Fax: (202) 653-7130 Pages: 26
Phone: (202) 653-7200 Date: 10/19/09
Re: Renee Ella Hunt-O'Neal CC:
v. OPM

Urgent For Review Please Comment Please Reply Please Recycle

• Comments:

Agency's Motion for an Extension of Time

jbht

**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

Before the Clerk of the Board

Date: OCT 19 2009

**AGENCY'S MOTION FOR AN EXTENSION OF THE TIME TO FILE A
RESPONSE TO THE PETITION FOR REVIEW, AND STATEMENT OF GOOD
CAUSE**

1. Motion for an Extension of the Time to File a Response to the Petition for Review

Pursuant to 5 C.F.R. §1201.114(e), the Office of Personnel Management (OPM or Agency) moves for the Clerk of the Board to grant the Agency an extension of time to respond to Jenec Ella Hunt-O'Neal's (Appellant's) September 23, 2009 Petition for Review (Petition) of the September 11, 2009 Initial Decision in the above-captioned appeal. The response is currently due on October 19, 2009¹. Specifically, the Agency moves for an extension until 30 days after the Merit Systems Protection Board (Board) rules on the Agency's October 6, 2009 Motions to Reopen in the related appeals of Aguzic v. Office of Personnel Management, No. DC-0731-09-0261-I-1, 2009 WL 2840720 (M.S.P.B. filed Sept. 3, 2009) and Barnes v. Office of Personnel Management, No. DC-0731-09-0260-I-1, 2009 WL 2840719 (M.S.P.B. filed Sept. 3, 2009), and

¹ The U.S. Merit Systems Protection Board (MSPB) notice states that the Agency may file a response on or before October 18, 2009. However, October 18, 2009 was a Sunday.

adjudicates the unresolved issues of law presented in those appeals. Second, the Agency requests this extension because it did not learn of the Appellant's Petition for Review until October 15, 2009,² which was approximately 4 days before it was due, and did not receive a copy until October 16, 2009, which was approximately 3 days before it was due. Thus, in the alternative, the Agency requests that its request be granted in order to timely respond to Appellant's Petition for Review.

On October 6, 2009, OPM moved the Board to reopen Aguzie and Barnes on its own motion to speed adjudication of non-fact dependent issues of law in order to allay uncertainty caused by the Board's analysis. Specifically, OPM requested that the Board modify its orders to revoke its remands, request the parties to brief the issues presented before the Board itself within 60 days of the Board's granting of OPM's request, and invite the Director of OPM to intervene in the case in his discretion. Simultaneously, OPM moved the administrative judge who has been assigned to all Aguzie and Barnes-related cases, Judge Weiss, to stay proceedings pending resolution of OPM's motion to reopen.

The instant case presents the same issues that the Board remanded in Aguzie and Barnes: whether an appellant who has been removed by OPM under part 731, Title 5, Code of Federal Regulations is entitled to appeal his removal under 5 U.S.C. §7513(d), and, if so, whether 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.

The Aguzie and Barnes appeals are pending at the initial level with Judge Weiss pursuant to the Board's remand orders, yet the Hunt-O'Neal appeal, which cannot be

² The Agency telephoned the Appellant to determine whether there would be any objection to a motion to extend the deadline to respond to the Appellant's Petition for Review but was unable to contact her at the telephone numbers listed in the record.

decided until resolution of the Aguzie and Barnes appeals, has not been remanded, and is before the full Board on a petition for review. The current status of the appeals furnish good cause for the Board to extend the time to file a response to the petition for review in Hunt-O'Neal, while the Board resolves the threshold issues of law in Aguzie and Barnes.

Given the unsettled posture of all cases in which OPM has removed appellants under part 731, there is good cause for this extension to promote an orderly and coherent resolution to the significant Government-wide issues presented in these cases.

Second, in the alternative, the Agency requests that its request be granted in order because the Agency did not learn of Appellant's Petition until October 15, 2009, which is the date that it received the Board Notice dated September 28, 2009. See Attachment A. The Agency did not receive a copy of the Appellant's Petition until (upon the Agency's request) the Board faxed it a copy on October 16, 2009. See Attachment B. Therefore, in order to timely file a response this extension is requested.

II. Sworn Statement of Good Cause

I, Joyce B. Harris-Foukara, hereby declares:

That for the following reasons, there is good cause for the Clerk of the Board to grant the Agency an extension of the time to respond to the Appellant's Petition for Review in the above-captioned appeal, until such time as the Board rules on the Agency's October 6, 2009 Motions to Reopen in the related cases of Aguzie v. Office of Personnel Management, No. DC-0731-09-0261-I-1, 2009 WL 2840720 (M.S.P.B. filed Sept. 3, 2009) and Barnes v. Office of Personnel Management, No. DC-0731-09-0260-I-1, 2009 WL 2840719 (M.S.P.B. filed Sept. 3, 2009), and decides the unresolved issues of law presented in those appeals.

¶1 In a September 11, 2009 Initial Decision in the above-captioned appeal, the presiding Administrative Judge affirmed the Agency's negative suitability determination, which resulted in the Appellant's removal.

¶2 Prior to the date of the Initial Decision in the above-captioned appeal, the full Board, in Aguzie, vacated an initial decision that affirmed the Agency's negative suitability determination which, as in the Hunt-O'Neal appeal, had resulted in an incumbent employee's removal. The Board remanded the Aguzie case for a decision on the issue of whether the appellant had a right to appeal his removal as an adverse action, notwithstanding 5 C.F.R. part 731, which prescribes suitability procedures distinct from and exclusive of the adverse action procedures in 5 C.F.R. part 752; and the issue of whether, if so, the other actions on appeal, *i.e.*, debarment and cancellation of eligibilities, remain within the Board's jurisdiction under part 731. Aguzie, 2009 WL 2840720, at *1-2. The Board noted that if the Agency's suitability action were subject to an adverse action appeal, OPM would not be the responding party, and the penalty of removal could potentially be mitigated. *Id.* at *2. The Board vacated the initial decision and remanded for further proceedings in Barnes on the same reasoning.

¶3 The threshold issues of law presented in Aguzie and Barnes—first, whether OPM may order a removal as a suitability action under procedures distinct from and exclusive of adverse action procedures, or whether the person removed is entitled to an adverse action appeal, and second, whether the Board retains jurisdiction over the other actions on appeal—are also the threshold issues of law in the Hunt-O'Neal appeal.

¶4 On September 28, 2009, the Board's Washington Regional office filed Notices of Reassignment, reassigning the remanded Aguzie and Barnes appeals to Administrative Judge Ronald J. Weiss of the Board's Office of Regional Operations. (Ex. 1, infra.)

¶5 On October 6, 2009, the Agency filed its Motion to Reopen the Board's orders in Aguzie and Barnes, asking the Board to modify its orders to revoke its remands; to request the parties to brief the issues presented before the Board itself; to invite the Director of OPM to intervene; and to adjudicate the pure issues of law presented without the superfluous intermediate step of an initial decision by Judge Weiss. (Ex. 2, infra.) The Agency concurrently filed Motions for Stay with Judge Weiss. (Ex. 3, infra, enclosures excluded)

¶6 The Aguzie and Barnes appeals are pending at the initial level with Judge Weiss pursuant to the Board's remand orders, yet the Hunt-O'Neal appeal, which cannot be decided until resolution of the Aguzie and Barnes appeals, has not been remanded, and is before the full Board on a petition for review. The procedural posture of the appeals furnishes good cause for the Board to extend the time to file a response to the petition for review in Hunt-O'Neal, while the Board resolves the threshold issue of law in Aguzie and Barnes.

¶7 The Agency did not learn of Appellant's Petition for Review dated September 23, 2009 until October 15, 2009, the date that it received the Board's Notice. See Attachment A.

¶8 The Agency did not receive a copy of Appellant's Petition for Review until October 16, 2009, when—at the Agency's request—the MSPB faxed it a copy.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

HYGINUS U. AGUZIE,
Appellant,

DOCKET NUMBER
DC-0731-09-0261-B-1

v.

OFFICE OF PERSONNEL
MANAGEMENT,
Agency.

DATE: September 28, 2009

NOTICE OF REASSIGNMENT

The above-captioned case has been reassigned to Administrative Judge Ronald J. Weiss of the Office of Regional Operations. Any and all submissions filed by the parties in this matter must be directed to Administrative Judge Ronald J. Weiss.

U.S. Merit Systems Protection Board
Office of Regional Operations
1615 M Street, NW
Washington, DC 20419
Telephone No. (202) 653-7200
FAX No. (202) 653-8911

FOR THE BOARD:


Jeremiah Cassidy
Regional Director

Agency Ex. 1

0000001

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

HOLLEY C. BARNES,
Appellant,

DOCKET NUMBER
DC-0731-09-0260-B-1

v.

OFFICE OF PERSONNEL
MANAGEMENT,
Agency.

DATE: September 28, 2009

NOTICE OF REASSIGNMENT

The above-captioned case has been reassigned to Administrative Judge Ronald J. Weiss of the Office of Regional Operations. Any and all submissions filed by the parties in this matter must be directed to Administrative Judge Ronald J. Weiss.

U.S. Merit Systems Protection Board
Office of Regional Operations
1615 M Street, NW
Washington, DC 20419
Telephone No. (202) 653-7200
Fax No. (202) 653-8911

FOR THE BOARD:



Jeremiah Cassidy
Regional Director

Agency Ex. 1

0000002

were entitled to appeal their removal under 5 U.S.C. § 7513(d), and 2) if so, whether the other actions on appeal, that is, debarment and cancellation of eligibilities, remain within the Board's jurisdiction under 5 C.F.R. § 731.501.

The analysis preceding the Board's orders in both cases raises for the first time issues casting doubt on the authority of OPM, as well as the many agencies that take suitability actions under authority delegated by OPM, to take removal actions under 5 C.F.R. Part 731. Because these issues are not dependent in any way on specific factual determinations, including credibility determinations that are routinely made by the Board's administrative judges in the first instance, and because they raise legal issues of first impression, it is most appropriate for the Board itself to decide these issues in the first instance, subject to review by the Court of Appeals for the Federal Circuit. Remanding these decisions is an unnecessary step that will only delay resolution of these important legal issues. It is appropriate – indeed necessary – that these questions that the Board itself has interposed be decided expeditiously to prevent a long period of uncertainty during which OPM, agencies, and appellants and their representatives will not know how to proceed or react.

Indeed, it is not even clear that administrative judges may answer the first question posed in the affirmative without overruling Board precedent – something that is entirely beyond their authority. Administrative and judicial efficiency, as well as the uninterrupted efficient operation of the Government's vital suitability program require the Board to adjudicate these matters without superfluous intermediate steps.

Agency Ex. 2

0000002

Ordinarily, when a party to litigation requests the Board to reopen a case to modify an order, the Board will balance "the desirability of finality and the public interest in reaching what ultimately appears to be the right result." *Payne v. United States Postal Service*, 69 M.S.P.R. 503 (1996). Here considerations of both assuring finality and promoting the public interest argue in favor of the Board reopening these matters to (i) modify its order to revoke its remand; (ii) request the parties to brief the issues presented within 60 days of the Board's granting of OPM's request; and (iii) invite the Director of OPM to intervene in the case in his discretion.

Respectfully submitted,

10/6/09

Date



ELAINE KAPLAN
General Counsel



STEVEN E. ABOW
Assistant General Counsel
Merit Systems and
Accountability Group



DARLENE M. CARR
Agency Representative

Agency Ex. 2

0000003

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

HOLLEY C. BARNES,
Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,
Agency.

DOCKET NUMBER
DC-0731-09-0260-B-1

DATE: OCT - 6 2009

MOTION TO REOPEN

The Office of Personnel Management moves the Board to reopen its orders in *Aguzie v. Office of Personnel Management*, No. DC-0731-09-0261-I-1 (Sept. 3, 2009) and *Barnes v. Office of Personnel Management*, No. DC-0731-09-0260-I-1 (Sept. 3, 2009), two appeals of OPM actions removing appellants from their positions, debarring them from competition, and canceling their eligibilities under 5 C.F.R. Part 731. This action is warranted in the Board's discretion to speed adjudication of these non-fact dependent issues of law in order to allay uncertainty caused by the Board's analysis. Specifically, OPM requests that the Board modify its orders to revoke its remands, request the parties to brief the issues presented before the Board itself within 60 days of the Board's granting of OPM's request, and invite the Director of OPM to intervene in the case in his discretion.

In those orders the Board vacated the initial decisions in both cases and remanded the cases to the administrative judge to obtain briefing on two pure issues of law that were not raised below. They are 1) whether the appellants

were entitled to appeal their removal under 5 U.S.C. § 7513(d), and 2) if so, whether the other actions on appeal, that is, debarment and cancellation of eligibilities, remain within the Board's jurisdiction under 5 C.F.R. § 731.501.

The analysis preceding the Board's orders in both cases raises for the first time issues casting doubt on the authority of OPM, as well as the many agencies that take suitability actions under authority delegated by OPM, to take removal actions under 5 C.F.R. Part 731. Because these issues are not dependent in any way on specific factual determinations, including credibility determinations that are routinely made by the Board's administrative judges in the first instance, and because they raise legal issues of first impression, it is most appropriate for the Board itself to decide these issues in the first instance, subject to review by the Court of Appeals for the Federal Circuit. Remanding these decisions is an unnecessary step that will only delay resolution of these important legal issues. It is appropriate – indeed necessary – that these that questions the Board itself has interposed be decided expeditiously to prevent a long period of uncertainty during which OPM, agencies, and appellants and their representatives will not know how to proceed or react.

Indeed, it is not even clear that administrative judges may answer the first question posed in the affirmative without overruling Board precedent – something that is entirely beyond their authority. Administrative and judicial efficiency, as well as the uninterrupted efficient operation of the Government's vital suitability program require the Board to adjudicate these matters without superfluous intermediate steps.

Agency Ex. 2

0000006

Ordinarily, when a party to litigation requests the Board to reopen a case to modify an order, the Board will balance "the desirability of finality and the public interest in reaching what ultimately appears to be the right result." *Payne v. United States Postal Service*, 69 M.S.P.R. 503 (1996). Here considerations of both assuring finality and promoting the public interest argue in favor of the Board reopening these matters to (i) modify its order to revoke its remand; (ii) request the parties to brief the issues presented within 60 days of the Board's granting of OPM's request; and (iii) invite the Director of OPM to intervene in the case in his discretion.

Respectfully submitted,

10/6/09

Date



ELAINE KAPLAN
General Counsel



STEVEN E. ABOW
Assistant General Counsel
Merit Systems and
Accountability Group



DARLENE M. CARR
Agency Representative

Agency Ex. 2

0000007

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

HYGINUS U. AGUZIE,
Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,
Agency.

DOCKET NUMBER
DC-0731-09-0261-B-1

DATE: OCT - 6 2009

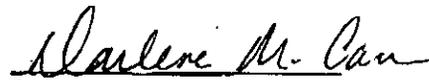
MOTION FOR STAY

The Office of Personnel Management requests that the Administrative Judge stay proceedings in the above-captioned case until the Board rules on the attached Motion to Reopen. OPM's Motion to Reopen asks the Board to revoke its remand orders in the above-captioned matter and to adjudicate itself the pure issues of law raised in its opinions and orders in these matters. Granting this motion will conserve the resources of the Board and the parties to these cases.

Respectfully submitted,



Steven E. Abow
Assistant General Counsel
Agency Representative



Darlene M. Carr
Agency Representative

Attachment

Agency Ex. 3

0000001

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

HOLLEY C. BARNES,
Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,
Agency.

DOCKET NUMBER
DC-0731-09-0260-B-1

DATE: OCT - 6 2009

MOTION FOR STAY

The Office of Personnel Management requests that the Administrative Judge stay proceedings in the above-captioned case until the Board rules on the attached Motion to Reopen. OPM's Motion to Reopen asks the Board to revoke its remand orders in the above-captioned matter and to adjudicate itself the pure issues of law raised in its opinions and orders in these matters. Granting this motion will conserve the resources of the Board and the parties to these cases.

Respectfully submitted,



Steven E. Abow
Assistant General Counsel
Agency Representative



Darlene M. Carr
Agency Representative

Attachment

Agency Ex. 3

0000003

Docket No. AT-0731-09-0240-I-1
Party: Agency's Representative

2009 OCT 19 11:11 AM
U.S. DEPARTMENT OF JUSTICE
OFFICE OF THE GENERAL COUNSEL

Joyce B. Harris-Toukara, Esq.
Office of Personnel Management
Office of the General Counsel
1900 E Street, N.W., Room 7353
Washington, DC 20415-1300



U.S. MERIT SYSTEMS PROTECTION BOARD

Office of the Clerk of the Board

1615 M Street, N.W.
Washington, D.C. 20419-0002

Phone: 202-653-7200; Fax: 202-653-7130; E-Mail: mspb@mspb.gov

September 28, 2009

Notice to:



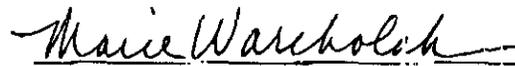
Re: Jenec Ella Hunt-O'neal v. Office of Personnel Management
MSPB Docket Number: AT-0731-09-0240-I-1

The Board acknowledges September 23, 2009 as the filing date of your petition for review. The other party(s) may file a response, or file a cross petition for review, on or before October 18, 2009. A cross petition for review differs from a response because it also disagrees with the initial decision. If a cross petition for review is filed, any response must be filed within 25 days after the date of service of the cross petition. The filing date is the date the document is postmarked, if mailed; the date the document is received by the Board, if personally delivered; the date the facsimile of the document was sent; or the date of electronic submission, if filed via e-Appeal. All parties must notify the Board and each other in writing of any changes in representation and/or address.

The record closes when the time period ends for filing a response to the petition for review or to the cross petition. After the record closes, the Board may consider an additional submission only if the submission includes a statement that convinces the Board why the submission was not available earlier. 5 C.F.R. § 1201.114(i).

The Board encourages settlement. If the parties settle and they enter a written settlement agreement into the record, the Board will enforce the terms. The Board has no enforcement authority over settlement agreements that are not entered into its record.

William D. Spencer
Clerk of the Board


Marie Warcholak
Legal Assistant

Attachment: Settlement Program Information

10.16.09

To:

Joyce B. Harris-Tounkara, Esq.
Ag. Rep.

DPM

fax - 202.606.0082

From:

Marie Warcholak
Legal Assistant
(202) 653.7200

JENEE ELLA HUNT-O'NEAL v. OFFICE OF PERSONNEL MANAGEMENT
Docket # AT-0731-09-0240-I-1
Petition for Review
Summary Page

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

Docket Number : AT-0731-09-0240-I-1

Pleading Title : Petition for Review

Filer's Name : Jenee Ella Hunt-O'Neal

Filer's Pleading Role : Appellant

Details about the supporting documentation

N/A

