

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2012 MSPB 122

Docket No. CH-0731-09-0798-I-3

**Tony D. Hopper,
Appellant,**

v.

**Office of Personnel Management,
Agency,**

and

**Director of the Office of Personnel Management,
Intervenor.**

November 5, 2012

Jimmy B. Botts, Glasgow, Kentucky, for the appellant.

Joyce B. Harris-Touunkara, Esquire, Washington, D.C., for the agency.

Robert J. Girouard, Esquire, and Elaine Kaplan, Esquire, Washington, D.C., for the Director of the Office of Personnel Management.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The Office of Personnel Management (OPM or the agency) has petitioned for review of the initial decision that mitigated the appellant's removal due to a negative suitability determination under the reasoning set forth in *Aguzie v. Office of Personnel Management*, [116 M.S.P.R. 64](#) (2011). The Director of OPM

has requested to intervene in support of the petition for review. OPM argues that it was an error of law for the administrative judge to adjudicate this appeal as an adverse action appeal under chapter 75 of Title 5 of the United States Code instead of as a suitability action under [5 C.F.R. § 731.501](#) and that the Board's decision in *Aguzie* should be overruled. We GRANT the Director's request to intervene, DENY the petition for review, and AFFIRM the initial decision for the reasons set forth below.

BACKGROUND

¶2 The appellant appealed OPM's July 14, 2009 decision, which directed the Social Security Administration (SSA) to separate him from his position, canceled all eligibilities for reinstatement obtained from his current appointment, canceled his eligibility for positions with the federal government, and debarred him from competition for, or appointment to, such position for a period of 3 years based on material, intentional false statements on federal employment forms regarding his employment record. MSPB Docket No. CH-0731-09-0798-I-1, Initial Appeal File (IAF 1), Tab 6, Subtab 2c. The appeal was dismissed without prejudice pending the resolution of the remanded appeals in *Aguzie v. Office of Personnel Management*, [112 M.S.P.R. 276](#) (2009), *rev'd in part on recons.*, [116 M.S.P.R. 64](#) (2011), and *Barnes v. Office of Personnel Management*, [112 M.S.P.R. 273](#) (2009), which raised the question of whether an individual meeting the definition of an "employee" under [5 U.S.C. § 7511\(a\)\(1\)](#), who has been separated pursuant to a suitability action brought by OPM, has a statutory right to appeal his removal as an adverse action under chapter 75. IAF 1, Tab 15 at 2; *see Aguzie*, [116 M.S.P.R. 64](#), ¶ 1 & n.1.

¶3 After the Board issued its decision in *Aguzie*, [116 M.S.P.R. 64](#), the administrative judge adjudicated the appellant's removal as an adverse action under chapter 75 and mitigated the removal to a letter of reprimand. MSPB Docket No. CH-0731-09-0798-I-3, Initial Appeal File (IAF 3), Tab 15, Initial

Decision (ID) at 2, 8. The administrative judge found that, although the appeal originated as a suitability action under [5 C.F.R. §§ 731.202](#)-.204, 731.301-.304, because the appellant was undisputedly an employee under 5 U.S.C. chapter 75, subchapter II, he was entitled to appeal his removal, cancellation of eligibilities, and debarment under chapter 75, pursuant to *Aguzie*. ID at 2 n.1. He found that the agency proved the charge of “Material, Intentional False Statement, or Deception or Fraud in Examination or Appointment” by preponderant evidence. ID at 2-5. The administrative judge conducted an independent review of the reasonableness of the penalty in light of the relevant factors set forth in *Douglas v. Veterans Administration*, [5 M.S.P.R. 280](#), 305-06 (1981), pursuant to the Board’s decision in *Aguzie*, and concluded that the agency’s action should be mitigated because the appellant provided the unchallenged testimony of his second-line supervisor, who expressed continued confidence in the appellant and testified that he would have issued a lesser penalty, such as a letter of reprimand, rather than impose the penalty of removal. ID at 6-7. Because the appellant’s employer expressed its preference for a penalty falling well short of removal, the administrative judge concluded that there was no sound basis for imposing a harsher result, and he mitigated the removal to a letter of reprimand. ID at 7-8. He noted that OPM attended the hearing but refused to participate, in objection to the Board’s decision in *Aguzie*. ID at 6. The administrative judge ordered the SSA to cancel the appellant’s removal, substitute in its place a letter of reprimand, and provide the appropriate amount of back pay and benefits.¹ ID at 8.

¹ The administrative judge also found that the appellant failed to prove a harmful error defense. ID at 5-6. Because OPM does not challenge this finding on review and the appellant has not filed a cross-petition for review on this issue, we do not consider it further. [5 C.F.R. § 1201.114](#)(b).

¶4 OPM has filed a petition for review. Petition for Review (PFR) File, Tab 4. In it, OPM argues that the administrative judge failed to apply the correct standard of review for suitability actions set forth in [5 C.F.R. § 731.501](#) and argues that the Board should overrule *Aguzie*. *Id.* at 6. The appellant has filed an opposition to OPM’s petition for review. PFR File, Tab 6. The Director of OPM has filed a request to intervene. PFR File, Tabs 7, 11.

ANALYSIS

¶5 The Director of OPM has exercised his statutory authority under [5 U.S.C. § 7701\(d\)](#) to intervene in this case because he is of the opinion that an erroneous decision would have a substantial impact on a civil service law, rule, or regulation under OPM’s jurisdiction. PFR File, Tab 7. In his brief supporting his request to intervene, the Director adopts and incorporates OPM’s petition for review and submits that, for the reasons stated in the petition for review, the Board should overrule *Aguzie*, reverse the initial decision, and remand this appeal for adjudication “under the correct legal standard in [5 C.F.R. § 731.501](#).” PFR File, Tab 11 at 4-5. Because the Director argues that the Board’s decision could have a substantial impact on civil service law, rule, or regulation under OPM’s jurisdiction, we find that he is entitled to intervene as a matter of right. Therefore, we GRANT the Director’s unopposed request to intervene. [5 U.S.C. § 7701\(d\)\(1\)](#); [5 C.F.R. § 1201.34\(b\)\(1\)](#).

¶6 OPM has not objected to any of the administrative judge’s factual findings, and we discern no reason to disturb them. The administrative judge correctly applied *Aguzie* to the facts of this appeal. In *Aguzie*, the Board held that, when OPM directs an agency to remove a tenured employee² pursuant to its authority under 5 C.F.R. part 731, the removal action is subject to the requirements of

² In this context, tenured employee means an individual who satisfies the definition of “employee” at [5 U.S.C. § 7511\(a\)\(1\)](#). *Aguzie*, [116 M.S.P.R. 64](#), ¶ 1 n.1.

5 U.S.C. chapter 75, subchapter II, including the Board appeal rights guaranteed under [5 U.S.C. § 7513](#)(d). [116 M.S.P.R. 64](#), ¶ 1. The Board found that the OPM-directed removal of a tenured employee pursuant to 5 C.F.R. part 731 is an action taken by an “agency,” that 5 U.S.C. chapter 75, subchapter II covers suitability-based removals of tenured employees, that the relevant question is whether the individuals who suffered suitability-based removals are “employees” under [5 U.S.C. § 7511](#), and that, if so, the OPM-directed removal of a tenured employee is “taken under” [5 U.S.C. § 7513](#) and is therefore appealable to the Board under [5 U.S.C. § 7513](#)(d). *Aguzie*, [116 M.S.P.R. 64](#), ¶¶ 10, 12, 22, 25-26, 31. The Board further found that, in an appeal of an OPM-directed suitability removal, the Board must conduct an independent review of the penalty in light of the relevant *Douglas* factors, which may include facts not in OPM’s possession. *Id.*, ¶ 33. Finally, the Board concluded that its statutory jurisdiction extends to review of the other suitability actions on appeal, i.e., debarment and cancellation of eligibilities, because they are components of a unitary penalty arising from the same underlying misconduct. *Id.*, ¶ 34.

¶7 Here, the administrative judge correctly found that the appellant was an employee under 5 U.S.C. chapter 75, subchapter II.³ ID at 2 n.1; IAF 1, Tab 6, Subtab 2x. Thus, consistent with the Board’s decision in *Aguzie*, the administrative judge properly considered the appellant’s removal, as well as the cancellation of his appointment eligibilities and his debarment, as an adverse

³ The administrative judge cited to [5 U.S.C. § 7511](#)(a)(1)(A), but it appears that the appellant is an employee under [5 U.S.C. § 7511](#)(a)(1)(B) because he is a preference eligible in the excepted service who has completed 1 year of current continuous service in the same or similar position. IAF 1, Tab 6, Subtabs 2a (removed from his position with the agency on July 31, 2009), 2x (appointed to the excepted service, with veterans’ preference, on April 27, 2008). OPM does not dispute that the appellant is an employee for purposes of chapter 75 appeal rights. Excepted service appointments are not generally subject to suitability investigations unless, as here, the incumbent can be noncompetitively converted to the competitive service. See [5 C.F.R. § 731.101](#)(b) (definition of “covered position”), .104; IAF 1, Tab 6, Subtab 2x at 2.

action under chapter 75. *See Aguzie*, [116 M.S.P.R. 64](#), ¶¶ 22-24, 34-35. Further, consistent with *Aguzie*, the administrative judge conducted an independent analysis of the penalty. The administrative judge considered the unchallenged testimony of the appellant's second-line supervisor, who expressed unwavering confidence and trust in the appellant's performance and testified that, had he conducted an investigation that yielded the same results as OPM's investigation and resulted in a conclusion that the appellant falsified his application in the manner set forth in OPM's action, he would have imposed a far lesser penalty than removal, such as a letter of reprimand. ID at 7. Although OPM attended the hearing, it refused to participate. Thus, in light of the evidence before him and the continued confidence in the appellant expressed by the employing agency, the administrative judge found no sound basis for imposing a harsher result and mitigated the penalty to a letter of reprimand. *Id.* We discern no reason to disturb his finding, and OPM has not challenged it other than to attack the legal framework set forth in *Aguzie*, which we address below.

¶8 With respect to OPM's attacks on *Aguzie*, we decline to disturb the *Aguzie* decision for the following reasons. First, OPM argues that the Board's decision directly contravenes the decision of the U.S. Court of Appeals for the Federal Circuit in *Folio v. Department of Homeland Security*, [402 F.3d 1350](#), 1355 (Fed. Cir. 2005). PFR File, Tab 4 at 7-9. The Board rejected this argument by OPM during the *Aguzie* appeal and specifically referenced *Folio* in holding that tenured employees are guaranteed a statutory right of appeal. MSPB Docket No. DC-0731-09-0261-R-1, PFR File, Tab 16 (OPM Reply Brief, Feb. 4, 2010); *Aguzie*, [116 M.S.P.R. 64](#), ¶¶ 29-31. In *Folio*, the Immigration and Naturalization Service determined that the appellant was not suitable for employment and withdrew its tentative offer of employment. *Folio*, 402 F.3d at 1352. In contrast, *Aguzie* was a tenured employee. Such distinction is central to the Board's finding regarding its chapter 75 review of an OPM-directed removal as a result of a negative suitability determination. *See Hunt-O'Neal v. Office of Personnel*

Management, [116 M.S.P.R. 286](#), ¶ 9 (2011). Furthermore, in *Folio*, the court focused solely on the question of whether, under [5 C.F.R. § 731.501](#) (2004), the Board had jurisdiction to review the relationship between the “specific factors” set forth in [5 C.F.R. § 731.202](#)(b) (2004) and the “additional considerations” set forth in [5 C.F.R. § 731.202](#)(c) (2004) and concluded that it did. 402 F.3d at 1353-55. This inquiry is distinct from the inquiry before the Board in *Aguzie*, and we find unpersuasive OPM’s attempt to argue that the holding in *Aguzie* conflicts with *Folio*.

¶9 OPM also argues that its suitability regulations are a valid exercise of its authority to define ambiguous terms in 5 U.S.C. chapter 75 and that the Board should have deferred to its rulemaking. PFR File, Tab 4 at 9. In *Aguzie*, however, the Board explicitly found that OPM’s regulations were contrary to the plain language of [5 U.S.C. § 7512](#) and declined to follow them. [116 M.S.P.R. 64](#), ¶¶ 12-20. OPM’s arguments on review do not persuasively challenge this finding, which renders any further analysis of OPM’s rulemaking authority unnecessary. *Id.*, ¶¶ 13, 30. OPM cites to *Horner v. Andrzejewski*, [811 F.2d 571](#), 576 (Fed. Cir. 1987), for the proposition that “[t]he provisions of sections 7512 and 7513 are . . . not without ambiguity.” PFR File, Tab 4 at 11. In that case, however, the court was considering whether the emergency furlough regulation established by OPM was valid. *Horner*, 811 F.2d at 574. The court concluded that there was an ambiguity in the statute that was properly resolved by OPM’s regulations because it could reasonably be said that an agency did not “take an action” covered by chapter 75 because an agency has no choice in the case of an emergency furlough. *Id.* at 576. OPM analogizes *Andrzejewski* to the instant appeal by arguing that the agency taking the removal action, the SSA, also had no choice and, therefore, it did not “take an action” covered by chapter 75. PFR File, Tab 4 at 11-12. We do not find this reasoning persuasive, however, nor do we discern an ambiguity here. As set forth in *Aguzie*, OPM is the agency choosing to take the action to remove the employee and must be the agency that

defends the action before the Board. *Aguzie*, [116 M.S.P.R. 64](#), ¶ 11 & n.5. Moreover, unlike the emergency furlough at issue *Andrzjewski*, a removal is clearly an adverse action under [5 U.S.C. § 7512](#). Therefore, there is no question here that an agency took an action against an employee within the meaning of chapter 75. Thus, we affirm our finding that there is no ambiguity in the statute, for the reasons set forth in *Aguzie*, and we decline OPM’s invitation to review the reasonableness of its suitability regulations. PFR File, Tab 4 at 19.

¶10 We further decline to revisit our holding that the Board should conduct its own independent review of the penalty in light of the relevant *Douglas* factors for the reasons set forth in *Aguzie*, [116 M.S.P.R. 64](#), ¶¶ 32-33. OPM argues that, “[t]aken to its logical outcome,” *Aguzie* would allow the Board to mitigate the removal of an employee “based on the favorable recommendation of the very supervisor with whom the employee has colluded to engage in discrimination, personal or political favoritism, or a violation of veterans preference.” PFR File, Tab 4 at 25. It is unclear how OPM reached this conclusion; furthermore, through the adjudicative process, the administrative judge would review the record as a whole, weigh the evidence, consider the *Douglas* factors, and make appropriate credibility determinations to resolve arguments concerning the reasonableness of the penalty. Therefore, we affirm our analysis in *Aguzie* and find that the administrative judge applied the appropriate analysis to mitigate the removal.

¶11 OPM also asserts that it was error for the administrative judge to order, as interim relief, that the SSA, a nonparty to the appeal, reinstate the appellant. PFR File, Tab 4 at 7. We do not reach this issue here because OPM demonstrated that it and the SSA complied with the interim relief order, the appellant did not object to the interim relief ordered, and we have considered OPM’s arguments on the merits. PFR File, Tab 1 at 4, Tab 4 at 27-28. In ordering relief, we follow the language set forth in *Scott v. Office of Personnel Management*, [116 M.S.P.R.](#)

[356](#), ¶¶ 19-22 (2011), *aff'd as modified on recons.*, [117 M.S.P.R. 467](#) (2012), concerning the various obligations of OPM and the employing agency.

ORDER

¶12 We ORDER OPM to cancel its decision letter of July 14, 2009, and to direct the employing agency to cancel the appellant's removal and substitute in its place a letter of reprimand. *See Kerr v. National Endowment for the Arts*, [726 F.2d 730](#) (Fed. Cir. 1984); *Scott*, [116 M.S.P.R. 356](#), ¶ 19. OPM must complete this action no later than 20 days after the date of this decision.

¶13 We also ORDER OPM to direct the employing agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Back Pay Act and/or Postal Service Regulations, as appropriate, no later than 60 calendar days after the date of this decision. *See Scott*, [116 M.S.P.R. 356](#), ¶ 20. We ORDER the appellant to cooperate in good faith in the employing agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the employing agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶14 We further ORDER OPM and the employing agency to tell the appellant promptly in writing when they believe they have fully carried out the Board's Order and to describe the actions they took to carry out the Board's Order. The appellant, if not notified, should ask OPM and/or the employing agency about their progress. *See* [5 C.F.R. § 1201.181\(b\)](#).

¶15 No later than 30 days after OPM and the employing agency tell the appellant that they have fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal to resolve any disputed compliance issues. The petition should contain specific reasons why the appellant believes that OPM and/or the

employing agency have not fully carried out the Board's Order, and should include the dates and results of any communications with OPM and/or the employing agency. [5 C.F.R. § 1201.182](#)(a).

¶16 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The employing agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

¶17 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113](#)(c)).

NOTICE TO THE APPELLANT
REGARDING YOUR RIGHT TO REQUEST
ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at [5 C.F.R. §§ 1201.201](#), 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees **WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION**. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's

"Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.



DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
 - a. Outside earnings with copies of W2's or statement from employer.
 - b. Statement that employee was ready, willing and able to work during the period.
 - c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.



NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts.

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.
2. The following information must be included on AD-343 for Restoration:
 - a. Employee name and social security number.
 - b. Detailed explanation of request.
 - c. Valid agency accounting.
 - d. Authorized signature (Table 63)
 - e. If interest is to be included.
 - f. Check mailing address.
 - g. Indicate if case is prior to conversion. Computations must be attached.
 - h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)
2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.
3. Outside earnings documentation statement from agency.
4. If employee received retirement annuity or unemployment, provide amount and address to return monies.
5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)
6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.
7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

- a. Must provide same data as in 2, a-g above.
- b. Prior to conversion computation must be provided.
- c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.