



FAX TRANSMITTAL FROM

**THE OFFICE OF THE GENERAL COUNSEL
U.S. OFFICE OF PERSONNEL MANAGEMENT**

TO: Honorable William D. Spencer, Clerk of the Board

of U.S. Merit Systems Protection Board

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DATE: OCT 15 2009

TOTAL NUMBER OF PAGES (including cover sheet): 23

COMMENTS:

Re: James A. Scott v. OPM

Docket No: Cff-0731-09-0578-I-1

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

JAMES A. SCOTT,)	DOCKET NO:
	)	CH-0731-09-0578-I-1
Appellant,	)	Before the Clerk of the Board
v.)	
OFFICE OF PERSONNEL MANAGEMENT,	)	Date: OCT 15 2009
)	
Agency.)	

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

I. 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 James A. Scott's (Appellant's) September 21, 2009 Petition for Review of the August 21, 2009 Initial Decision in the above-captioned appeal. The response is currently due on October 16, 2009. 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 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 adjudicates the unresolved issues of law presented in those appeals.

The Agency submits that this Motion should be granted because it is filed prior to October 16, 2009, the date on which the Agency's response to the Petition for Review is due, and because the Agency has shown good cause for the requested extension in its Sworn Statement of Good Cause, pt. II, infra.¹

In particular, 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.

¹ The Agency contacted the Appellant's representative, Jeffrey G. Letts, Esq., pursuant to 5 C.F.R. 1201.55(a) to determine whether there would be any objection to a motion to extend the deadline to respond to the Appellant's Petition for Review. The Appellant's representative advised on October 8, 2009 that he objects to the Agency's motion.

The Aguzie and Barnes appeals are pending at the initial level with Judge Weiss pursuant to the Board's remand orders, yet the Scott 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 current status of the appeals furnishes good cause for the Board to extend the time to file a response to the petition for review in Scott, 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.

II. Sworn Statement of Good Cause

I, Robert J. Girouard and I, Darlene M. Carr, hereby declare:

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 an August 21, 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, on grounds that "[a]n analysis of applicable statutes and Executive Order 10577 shows OPM has the authority to direct agencies to separate employees," that "[t]he suitability regulations issued by OPM specifically cover actions against current employees," and that "a suitability action under Part 731 includes a removal from employment." Scott v. Office of Per. Mgmt., No. CH-0731-09-0578-I-1, at 5-6 (M.S.P.B. filed Aug. 21, 2009) (Init. Dec.). The Administrative Judge acknowledged that the Board was "currently considering" the Aguzie and Barnes appeals on petitions for review. Init. Dec. at 7 n.3.

¶ 2 Thirteen days later, the full Board, in Aguzie, vacated an initial decision that affirmed the Agency's negative suitability determination which, as in the Scott appeal, had resulted in an incumbent employee's removal. The Board remanded the 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 Appellant in the above-captioned Appeal, James Scott, was initially appointed in schedule B of the excepted service on January 23, 2006. (Standard Form (SF) 50, in Agency File, tab 2r at 1.) He converted to a career appointment in the competitive service on January 23, 2008. (SF 50, in Agency File, tab 2q at 1.) DFAS removed him by order of OPM on April 13, 2009. (SF 50, in Agency File, tab 2a at 1.) Had his removal been an adverse action, rather than a suitability action, he would have met the definition of an "employee" in 5 U.S.C. 7511(a)(1)(A)(i), based on his status as a non-probationary employee in the competitive service. The Appellant concedes that he would have met this definition. (Appellant's Pet. for Review 3, Sept. 21, 2009.)

¶ 4 Accordingly, 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 Scott appeal.

¶ 5 The Appellant states that it is "hopefully unnecessary" for the Board to address these threshold issues of law in adjudicating his appeal. (Appellant's Pet. for Review 3 & Transmittal Ltr.) The Agency respectfully submits that the issues are unavoidable.

¶ 6 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.)

¶ 7 On October 6, 2009, the Agency filed its Motions 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)

¶ 8 The Aguzie and Barnes appeals are pending at the initial level with Judge Weiss pursuant to the Board's remand orders, yet the Scott 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 Scott, while the Board resolves the threshold issue of law in Aguzie and Barnes. The procedural posture of the appeals incidentally also furnishes additional good cause for the Board to grant the Agency's October 6, 2009 Motions to Reopen so that all three appeals may be expeditiously resolved.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on

10/15/2009

Date

10/15/2009

Date



Signature



Signature

Robert J. Girouard and Darlene M. Carr
Agency Representatives
Office of the General Counsel
Office of Personnel Management
1900 E Street, NW, Suite 7353
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Enclosures

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
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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

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FOR THE BOARD:



Jeremiah Cassidy
Regional Director

Agency Ex. 1

0000002

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

HYGINUS U. AGUZIE,	)	DOCKET NUMBER
Appellant,	)	DC-0731-09-0261-B-1
)	
V.)	
OFFICE OF PERSONNEL MANAGEMENT,	)	DATE: OCT - 6 2009
Agency.)	

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

Agency Ex. 2

0000001

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

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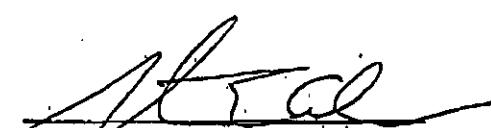
Ordinarily, when a party to litigation requests the Board to reopen a case to modify an order, the Board will balance "the desirability of finality and the public interest in reaching what ultimately appears to be the right result." *Payne v. United States Postal Service*, 69 M.S.P.R. 503 (1996). Here 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.

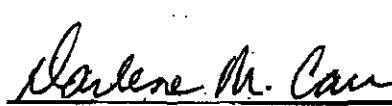
Respectfully submitted,

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,	)	DOCKET NUMBER
Appellant,	)	DC-0731-09-0260-B-1
)	
V.)	
OFFICE OF PERSONNEL MANAGEMENT,)	DATE: OCT - 6 2009
Agency.)	

MOTION TO REOPEN

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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.

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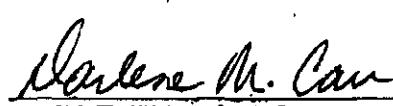
Respectfully submitted,

10/6/03

Date


ELAINE KAPLAN
General Counsel


STEVEN E. ABOW
Assistant General Counsel
Merit Systems and
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DARLENE M. CARR
Agency Representative

Agency Ex. 2

0000007

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

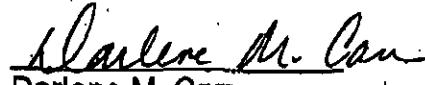
HYGINUS U. AGUZIE, Appellant,	)	DOCKET NUMBER
	)	DC-0731-09-0261-B-1
v.	)	DATE: <u>OCT - 6 2009</u>
OFFICE OF PERSONNEL MANAGEMENT, Agency.)	

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,)	DOCKET NUMBER DC-0731-09-0260-B-1
v.		DATE: OCT - 6 2009
OFFICE OF PERSONNEL MANAGEMENT, Agency.)	

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Respectfully submitted,



Steven E. Abow
Assistant General Counsel
Agency Representative


Darlene M. Carr
Agency Representative

Attachment

Agency Ex. 3

0000003