

**BEFORE THE MERIT SYSTEMS PROTECTION BOARD**

Hyginus Aguzie )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 Office of Personnel Management )  
 )  
 Agency. )  
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Docket No. DC-0731-09-0261-R-1

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CLERK OF THE BOARD

**Amicus Brief**

Pursuant to the Notice published in the April 16, 2010 Federal Register, Vol. 75, No. 73, the undersigned, in his individual capacity, respectfully submits the instant Amicus Brief.

**Argument**

The United States Congress has defined the term competitive service "employee", for purposes here, as a person who has served one year of current continuous service. 5 U.S.C. § 7511(a)(1). In addition, the Congress has dictated that an adverse action to remove an employee shall be for the efficiency of the service and must meet certain minimum due process requirements. 5 U.S.C. § 7513. Of significance, for purposes of this case, are the exclusions that the Congress made to this statutory scheme. See 5 U.S.C. §§ 7511(b) and 7512. Missing among these exclusions is a removal action based on a suitability determination. However, despite the clarity of Congressional intent, OPM regulations at 5 CFR Part 731 attempt to evade the statute by crafting, through regulatory rulemaking, a new, unauthorized exception.

**I. OPM's Regulation is Invalid**

The OPM regulation at issue not only severely limits MSPB's ability to review the grounds for a removal action, but also constrains the mitigating factors that the removing agency, and hence MSPB, may consider on a removal action based on a suitability determination. OPM, in effect,

impermissibly modified an Act of Congress through legislative rulemaking. *See Cuellar v. United States Postal Serv.*, 8 MSPR 624 (1981) (invalidating OPM regulation that was inconsistent with 5 U.S.C. § 7513).

OPM itself recognizes that agencies are precluded from taking a suitability action under 5 CFR Part 731 against an employee. As provided in 5 CFR Part 731.105(e), an “agency may not take a *suitability* action against an *employee*.” (second emphasis only in original). In contrast, an agency may take a suitability action against an applicant or appointee (*i.e.*, a non-tenured employee), *see* 5 CFR Part 731.105(c), as neither an applicant or appointee are governed by the Congressionally-mandated provisions of 5 U.S.C. § 7513.

OPM disregards Congressional intent by mandating that an employee’s agency, at OPM’s direction, take a suitability action against an employee. 5 CFR Part 731.304. OPM cannot direct an agency to do what that Congress, as OPM acknowledges in 5 CFR Part 731.105, already has determined an agency shall not do.

Moreover, despite OPM’s recognition of the statutory limitations on an agency’s ability to remove an employee, OPM carves out for itself, absent any statutory authority, an entirely different adverse action scheme regarding suitability actions. Although OPM typically cites to 5 U.S.C. § 1301 *et seq.* as providing the statutory authority for its suitability functions and regulations, the statute is silent on suitability (*i.e.*, removal) actions. Had the Congress intended to exempt suitability actions from the requirements of 5 U.S.C. § 7513, it certainly could and would have done so.

Accordingly, an agency, whether it be OPM or another agency at the behest of OPM, may not remove an employee on suitability grounds except as provided in 5 U.S.C. § 7513, absent the presence of a Congressionally-approved exception. The OPM regulation, to the extent it seeks to modify this statute – and impermissibly constrain MSPB’s appellate jurisdiction – is invalid.

## II. Suitability Actions Must Incorporate Consideration of *Douglas* Factors

As the MSPB made clear nearly 30 years ago, before an agency may remove an employee under 5 U.S.C. § 7513, it must consider a number of potentially mitigating factors. MSPB *requires* consideration of, *inter alia*:

- Employee's past disciplinary record;
- Employee's work record;
- Effect on employee's ability to perform job and management confidence in ability to perform job;
- Potential for rehabilitation;
- Other mitigating circumstances; and
- Effectiveness of alternate sanctions.

Douglas v. Veterans Admin., 5 MSPR 280 (1981). In all, Douglas identifies 12 factors for agency, and MSPB, consideration.

In contrast, the OPM regulations at 5 CFR Part 731.202(c), allow consideration *only* of the following factors:

- Nature of the employee's position;
- Nature and seriousness of conduct;
- Circumstances surrounding the conduct;
- Recency of the conduct;
- Age the employee at time of conduct;
- Contributing societal consideration; and
- Potential for rehabilitation.

Worse, OPM precludes MSPB from reviewing any factor in 5 CFR Part 731.202(c) unless expressly considered by OPM or the removing agency. *See* 73 FR 20149, 20150. This restriction flies in the face of well-settled MSPB case law that MSPB may review an agency's consideration, or failure to consider, mitigating factors. Gmitro v. Department of Army, 95 MSPR 127, 135 (2003).

### **III. Even if the OPM Regulations Stand, Suitability Actions Remain Subject to 5 U.S.C. § 7513**

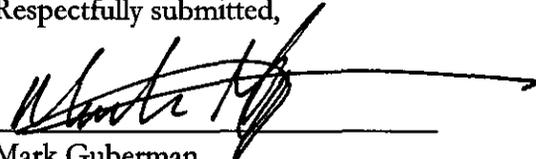
Through its 2008 amendments to 5 CFR Part 731, OPM clarified the difference between a suitability *determination* and a suitability *action*. Under 5 CFR Part 731.101, a suitability determination is the decision of whether someone is suitable or not suitable for Federal employment. A suitability action is based on a suitability determination and is limited to the following: (1) cancellation of eligibility; (2) **removal**; (3) cancellation of reinstatement eligibility; and (4) debarment. 5 CFR Parts 731.101 and 731.203(a).

Importantly, even in cases when OPM makes the suitability determination (*e.g.*, in cases of alleged fraud in the appointment process, refusal to furnish testimony, statutory bar to employment), it is the employing agency, at OPM's direction, that takes the suitability action. 5 CFR Part 731.304. Even if the regulations, as amended, are consistent with Congressional intent – which they are not – the regulations are internally inconsistent in that they require employing agencies to remove tenured employees despite OPM's express prohibition against doing so. 5 CFR Part 731.105(e) (“an agency may not take a suitability action against an *employee*”) (emphasis in original). OPM cannot order an agency to do what OPM – and Congress – elsewhere forbid an agency from doing. Thus, any removal action based on a suitability determination that is taken against an employee by an employing agency, is subject to the procedures and due process requirements expressed in 5 U.S.C. § 7513 and MSPB case law.

## Conclusion

Given the Congressional intent expressed through enactment of 5 U.S.C. Chapter 75, OPM is precluded from implementing a contradictory scheme through rulemaking. Consequently, when a suitability action is taken against a tenured employee, whether initiated by the employing agency, OPM, or at OPM's direction: (1) the action must be taken pursuant to 5 U.S.C. § 7513; (2) the action must be taken by the employing agency; (3) the right to a written and oral reply must be afforded to the employee; (4) the action must be supported by consideration of relevant Douglas factors; (5) the action must be amenable to mitigation by MSPB; and (6) all aspects of the action must be fully reviewable by MSPB.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Mark Guberman', is written over a horizontal line. The signature is stylized and includes a long horizontal stroke extending to the right.

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