UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

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Hyginus U. Aguzie,

Appellant,

v.

Office of Personnel Management,

Agency.

DATE: June 7, 2010

AMICUS BRIEF OF THE OFFICE OF GENERAL COUNSEL, DEPARTMENT OF VETERANS AFFAIRS

In connection with the above-captioned case, the Board is examining whether, when the Office of Personnel Management ("OPM") directs an agency to remove a tenured employee for suitability reasons, the Board must consider a subsequent appeal by the employee under the rules governing suitability (5 C.F.R. part 731), or is the employee entitled to appeal under statutory provisions governing adverse actions (5 U.S.C. chapter 75, subchapter II). We believe, for the reasons set forth below, that tenured employees removed in suitability actions are not entitled to appeal under 5 U.S.C. chapter 75.

Pursuant to 5 U.S.C. § 3301(2) and Executive Order 10577, OPM is authorized to "ascertain the fitness of [civil service] applicants as to age, health, character, knowledge, and ability for the employment sought." 5 U.S.C. § 3301(2).[1] Under this

[1] We stress that OPM's authority to regulate suitability actions is derived from statutes and executive orders, contrary to the Board's assertion that there is no "statutory provision that would preclude" using chapter 75's appellate procedures for a suitability appeal. *Aguzie v. OPM*, 112 M.S.P.R. 276, ¶ 4, n.2

authority, OPM promulgated regulations at 5 C.F.R. part 731, allowing OPM (and in certain situations, agencies) to make "suitability" determinations—"that is, those determinations based on a person's character or conduct that may have an impact on the integrity or efficiency of the service." 5 C.F.R. § 731.101. If OPM (or an agency) determines that the employee is not suitable, OPM (or the agency) may take a suitability action against the employee, to include cancellation of eligibility, removal, and debarment. *Id.* § 731.203(a). Employees removed in a suitability action may appeal the action to the Board under 5 C.F.R. § 731.501. This is the path taken by Mr. Aguzie's appeal.

The Board is considering, however, whether tenured employees are entitled to appeal their suitability removal through appellate provisions in 5 U.S.C. chapter 75, which authorize agencies to take adverse actions—removal, suspension for more than 14 days, reduction in grade or pay, and furlough for 30 days or less—against employees. The word "employee" is defined by statute and includes individuals in the competitive service who have completed their probationary periods (referred to by the Board in the present case as "tenured employees"). 5 U.S.C. § 7511(a)(1)(A). An agency may take an adverse action against an employee only if doing so "will promote the efficiency of the service." *Id.* § 7513(a). In turn, employees may appeal these adverse actions to the Board. *Id.* § 7513(d).

(2009). In addition to 5 U.S.C. § 3301(2) and Executive Order 10577, OPM's authority to regulate suitability actions is based upon Executive Order 12107, issued in 1978, which reiterated OPM's authority to takes suitability actions in enforcement of all "civil service laws, rules, and regulations, and all applicable Executive orders." Exec. Order No. 12,017, 5 C.F.R. § 5.3(a)(1), *reprinted as amended after* 5 U.S.C. § 3301.

I. Section 7513 explicitly forecloses the possibility of Board review of suitability actions through chapter 75.

The Board noted that because Mr. Aguzie, as a non-probationary competitive service employee, met § 7511's definition of "employee" at the time of his removal for suitability reasons, "it appears [that he] *may* have a statutory right to appeal his removal" under chapter 75, even though OPM characterized the removal as a suitability action. *Aguzie v. OPM*, 112 M.S.P.R. 276, ¶ 4 (2009) (italics added). Thus, it appears that the impetus behind the Board's desire to address this issue is simply the fact that Mr. Aguzie meets § 7511's definition of "employee." However, the plain language of § 7513(d) suggests that Congress did not intend to authorize employees removed in suitability actions to appeal through chapter 75. The wording of the chapter 75 appellate authority is key: "An employee against whom an action is taken ***under this section*** is entitled to appeal to the [Board] under section 7701 of this title." *Id.* § 7513(d) (emphasis added). While the Board asserted that this provision may create a chapter 75 appeal right in a suitability case, we believe 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. *See, e.g.*, *Lovshin v. Dep't of the Navy*, 767 F.2d 826, 834-35 (1985) ("Chapter 75 was revised to spell out with greater particularity the procedural rights of employees when action is taken ***thereunder***.") (emphasis added). If OPM removes an employee for suitability reasons, the removal is taken under 5 C.F.R. part 731, not under § 7513. Thus, a suitability removal is not appealable through § 7513(d).

Further, the plain language of the statute ("an agency may take an action covered by this subchapter against an employee. . .") suggests that chapter 75 authorizes the agency that employs the employee to take disciplinary action against the employee. 5 U.S.C. § 7513(a). Put differently, chapter 75 did not authorize OPM to take an adverse action against Mr. Aguzie, who was employed by the U.S. Commission on Civil Rights; rather, the suitability authorities discussed above authorized OPM to mandate Mr. Aguzie's removal. If chapter 75 did not authorize the action against Mr. Aguzie, then it is not possible that Mr. Aguzie's removal was taken under chapter 75 and there is no right to appeal through chapter 75.

II. There is neither case law precedent to allow chapter 75 review of suitability actions nor evidence that Congress intended such review to occur.

We are aware of no cases that establish a foundation for the Board to treat a suitability action taken against a non-probationary competitive service employee as a chapter 75 adverse action. The Board has discussed the propriety of addressing suitability appeals under chapter 75 in at least two cases: *Cruz-Packer v. Dep't of Homeland Security*, 102 M.S.P.R. 64 (2006) and *Knight v. Dep't of Homeland Security*, 102 M.S.P.R. 632 (2006). However, neither *Cruz-Packer* nor *Knight* stands for the proposition that the Board may review a suitability action under chapter 75. Rather, in both of those cases the appellant was removed from his excepted service position for suitability purposes at a time when 5 C.F.R. 731.101(a) did not apply suitability procedures to excepted service employees. *Cruz-Packer*, 102 M.S.P.R. at ¶ 6; *Knight*, 102 M.S.P.R. at ¶ 2. In other words, the agencies in *Cruz-Packer* and *Knight* had removed employees for suitability reasons when the agencies had no authority to do so,

which effectively transformed the purported suitability actions into chapter 75 adverse actions. Thus, the Board determined that it was authorized to review the *Cruz-Packer* appeal under chapter 75 (The *Knight* appeal was not reviewed under chapter 75 because the appellant failed to satisfy the "employee" definition.) That is not the situation in the present case. There is no question that Mr. Aguzie was a non-probationary competitive service employee at the time of his suitability removal. Accordingly, the rationale behind *Cruz-Packer* is inapplicable here.

The Federal Circuit examined suitability actions in *Folio v. Dep't of Homeland Sec.*, 402 F.3d 1350 (2005). While that case did not address an employee's ability to appeal a suitability action through chapter 75, the court stressed that "Congress granted OPM the authority to define the scope of the Board's authority." *Id.* at 1355. The court also noted that it "typically afford[s] deference to OPM's interpretation of its own regulations, unless plainly erroneous or inconsistent with the regulation." *Id.* at 1355. The Board should grant such deference to OPM's interpretation of this issue.

In addition to the lack of case law, there is also no evidence that Congress intended to grant to the Board the authority to review suitability actions under chapter 75. As noted above, OPM's authority to take suitability actions is derived from statutes and executive orders. Executive Order 10577, which authorized OPM's predecessor Commission to conduct suitability determinations and take suitability actions, was issued in 1954, and for decades was the authority for taking suitability actions prior to the passing of the 1978 Civil Service Reform Act ("CSRA"). Executive Order 12107 established OPM in 1978 and authorized OPM to conduct suitability actions based upon existing civil service laws, regulations, and Executive Orders. When Congress passed

the CSRA in 1978, it made no mention of any intention to change decades of suitability actions practice. Indeed, federal courts have noted that there is a presumption that Congress, when enacting statutes, is aware of "prior civil service practices" and will make clear if it seeks to amend or repeal those practices. *Lackhouse v. Merit Systems Protection Board*, 773 F.2d 313, 316 n.6 (Fed. Cir. 1985). Further, OPM's current interpretation of its suitability rules is entitled to "great deference . . . especially since there is no contrary indication in statute, regulation, legislative history, or practice." *Id.* at 316-17. Additionally, the Federal Circuit in *Lovshin*, 767 F.2d at 840, made clear that if Congress intended to make a "major change" to civil service laws—and allowing suitability appeals to proceed under chapter 75 would clearly be a major change—it would have enacted a "clear statutory provision or at least a single specific statement" to that effect. Instead, there is no statement from Congress that can be reasonably construed as endorsing this change.

III. Allowing suitability appeals to proceed under chapter 75 would place agencies in the position of defending actions with which the agencies disagree.

The Board noted in *Aguzie* that if the Board hears suitability appeals through chapter 75 instead of through part 731, the respondent would not be OPM, but the agency, "as it was the latter agency that effected the removal action, even if it did so at OPM's direction." *Aguzie*, 112 M.S.P.R. at ¶ 5. This would create a rather odd situation in which an agency is potentially forced to defend an action that the agency did not seek to take against an employee and with which the agency disagrees.

In situations such as the action at issue in *Aguzie*—suitability removal of a tenured employee—it is OPM that makes the suitability determination and orders the

agency to take the suitability action. 5 C.F.R. § 731.105(d), (e) (only OPM may take a suitability action against a tenured employee); *Id.* § 731.304 (the agency must remove the employee upon OPM's instruction). Even if the agency disagrees with OPM's decision, the agency must take the suitability action. *Id.* § 5.3(b). Therefore, if the Board were to consider suitability appeals through chapter 75, agencies in some instances would be forced to defend actions they neither took nor wanted to take. There is no evidence that Congress intended this bizarre outcome.

We see no conflict between 5 C.F.R. part 731 and 5 U.S.C. chapter 75. If an agency removes an employee through an adverse action, then the appellate procedures and protections of 5 U.S.C. chapter 75 apply. If, however, the removal is based upon a suitability determination, then the appellate procedures of 5 C.F.R. part 731 apply.

Respectfully submitted,

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General Counsel