

The text of Chapter 75 cannot be stretched to authorize the Board to hear suitability appeals and the legislative history of the Chapter confirms this interpretation. For years before the passage of the Civil Service Reform Act of 1978 (CSRA), suitability appeals and appeals from agency adverse actions were substantively and procedurally distinct. The authority of OPM and its predecessor Civil Service Commission (CSC) to investigate and direct the removal of federal employees for suitability reasons arises from Executive Order. In contrast, Congress granted the Board and its predecessors authority to review agency adverse actions, and that authority has long been codified at Chapter 75. Congress' enactment of the CSRA left this distinction undisturbed. Moreover, Congress has implicitly endorsed OPM's long-standing regulations precluding application of Chapter 75 procedures to suitability appeals by leaving them undisturbed through numerous amendments to Chapter 75.

There are also substantial practical impediments to subjecting agencies to Chapter 75 review of suitability actions directed by OPM. Agencies cannot reasonably be expected to defend decisions they did not make and over which they had no control. This is especially true because certain grounds relied upon by OPM to make suitability determinations would not constitute cause under Chapter 75. In addition, exercise of the Board's Chapter 75 mitigation authority is ill-fitted for a suitability appeal. Finally, agencies cannot be relied upon to effectively defend the removal of employees determined by OPM to be unsuitable for federal employment where they may have conflicting interests in retaining productive workers.

II. ISSUE PRESENTED AND BRIEF CONCLUSION

A. Issue Presented.

When the Office of Personnel Management (OPM) directs an agency to separate a tenured employee for suitability reasons, must the Board consider a subsequent appeal under 5 C.F.R. part 731 as contemplated therein, or should the Board instead consider the appeal under 5 U.S.C. Chapter 75, given that the scope of a chapter 75 appeal is broader than a part 731 appeal and that OPM generally lacks authority to issue regulations limiting statutory rights?

B. Brief Conclusion.

The correct procedural remedy is dictated by the fact that the MSPB lacks jurisdiction to consider a tenured employee's appeal of a suitability finding under Chapter 75. The MSPB's jurisdiction is not plenary. Rather, its jurisdiction is construed "narrowly" and "includes only those actions specifically granted by some law, rule or regulation." *Jerome v. MSPB*, 42 F.3d 1371, 1374 (Fed. Cir. 1995); *see also* 5 U.S.C. § 7701. The Board may therefore lawfully consider under 5 U.S.C. Chapter 75 an appeal of an OPM-directed separation of a tenured employee for suitability reasons only if Chapter 75 grants such authority to the Board. Chapter 75 does not. Rather, Federal Circuit precedent and the application of well-settled tenets of statutory and regulatory construction compel the conclusion that the only source of Board authority to review suitability determinations or actions is 5 C.F.R. Part 731. Thus, OPM did not "issue regulations limiting statutory rights"; rather, no *statutory* right exists for the Board to review suitability determinations.

III. ARGUMENT

A. The Board's Authority to Hear Suitability Appeals Arises from OPM Regulations, Not from Chapter 75.

Federal Circuit precedent is dispositive of the issue presented here. The Court has held that "Congress granted OPM the authority to define the scope of the Board's authority" to review suitability determinations and actions. *Folio v. Department of Homeland Security*, 402 F.3d 1350, 1355 (Fed. Cir. 2005). OPM exercised that authority by setting out the Board's limited jurisdiction to hear appeals from suitability decisions and suitability actions at 5 C.F.R. § 731.501. *Id.* at 1353.

Under 5 C.F.R. § 731.501, the MSPB has jurisdiction to review OPM's suitability *decision*, including whether the charged conduct upon which the negative suitability decision is based can be sustained in light of the evaluative criteria set forth in 5 C.F.R. § 731.202. *Folio*, 402 F.3d at 1353. The Board has *no* jurisdiction to review the suitability *action*, i.e., OPM's directive that the agency remove an employee because he is unsuitable for Federal employment. If the Board sustains all of the charges, it must also sustain the separation. If the Board sustains fewer than all of the charges, it must remand the case back to OPM for an unreviewable determination of whether the action taken remains appropriate. *Id.* at 1355; 5 C.F.R. § 731.501(2010).

B. Congress Did Not Intend the MSPB to Exercise Part 75 Adverse Action Jurisdiction Over Suitability Determinations and Actions.

1. Chapter 75 Cannot Be Construed to Grant the MSPB Jurisdiction Over Suitability Determinations and Actions.

"The starting point for statutory construction is the language of the statute." *Bull v. United States*, 479 F.2d 1365, 1376 (Fed. Cir. 2007). Where the plain meaning of a

statute is ambiguous, courts resort to “other extrinsic aids such as legislative history, rules of statutory construction, and the construction placed on the statute by the agency which administers it.” *Amgen, Inc. v. United States International Trade Commission*, 902 F.2d 1532, 1538 (Fed. Cir. 1990).

The text of Chapter 75 cannot be read to grant the Board jurisdiction to review suitability determinations and actions. Under Chapter 75, Subchapter II, “an agency may take an action covered by” the Subchapter, including “a removal”, only “for such cause as will promote the efficiency of the service.” 5 U.S.C. § 7512 & 7513. “An employee against whom an action is taken under [5 U.S.C. § 7513] is entitled to appeal to the Merit Systems Protection Board under section 7701 of” title 5. 5 U.S.C. § 7513(d). Suitability determinations are not among the adverse actions covered by section 7512. Thus, Chapter 75 cannot be the source of the Board’s authority to review OPM suitability determinations. Just as Chapter 75 does not authorize the Board to review a determination that an individual is not suitable for federal employment, the Chapter also should not be construed to authorize the Board to review the logical outcome of that determination: that the employee may not continue in federal employment.

Although a suitability action may result in an employee’s removal, it is not an adverse action within the meaning of sections 7512 and 7513. Chapter 75 expressly and exclusively applies to actions taken by agencies. A suitability-based removal action, in contrast, is taken by OPM. An agency merely carries out OPM’s directive. Thus, the only decision that could be subject to review is made by OPM.

2. The Legislative History of Chapter 75 Supports the Plain Meaning Interpretation of the Statutory Language.

Even prior to the Civil Service Reform Act of 1978 (CSRA), there was a substantive and procedural distinction between suitability determinations and actions on one hand, and adverse actions taken by executive agencies on the other. Each was considered mutually exclusive grounds for removal from the federal service, and each followed separate appellate tracks. The CSRA made no change to that statutory and regulatory scheme.

OPM's authority to make suitability determinations and to direct agencies to take personnel actions based thereon against non-probationary employees arises from EO 10577 (1954). Under EO 10577, the Civil Service Commission (CSC) was authorized to establish standards with respect to "suitability", and to investigate and to instruct agencies to remove employees whom the CSC disqualified from Federal employment. EO 10577, §§ 2.1, 5.2. Although these suitability actions resulted in *removals*, they were not subject to Part 752, as discussed, *infra*.

On the other hand, agency authority to remove employees for cause was codified at Chapter 75 long before the passage of the CSRA. Moreover, the operative language from Chapter 75 has not changed. Prior to passage of the CSRA, 5 U.S.C. §§ 7511 and 7512 permitted an "agency" to "take adverse action against a preference eligible employee . . . only for such cause as will promote the efficiency of the service." 5 U.S.C. §§ 7511, 7512 (1970). *See also* S.Rep. No. 969, 95th Cong., 2nd Sess. 50 (observing that the CSRA section 7513 provisions requiring that agencies take adverse actions only for cause "are identical to current statutory provisions relating to adverse actions.")

The pre-CSRA regulatory framework accordingly created separate and mutually exclusive appellate review tracks for suitability determinations and CSC-directed suitability actions, on one hand, and agency initiated adverse actions, on the other. Appeals from §7512 adverse actions were governed by 5 U.S.C. § 7701 (1970) and 5 C.F.R. Part 752 (1975). In contrast, the appeal rights of a non-probationary employee directed by the CSC to be removed following a negative suitability determination were governed by 5 C.F.R. Part 754. Part 752 expressly excluded from its scope “an action taken by an agency pursuant to instructions from the Commission.” 5 C.F.R. § 752.103(b)(2) (1975). 5 C.F.R. Part 731, which governed suitability disqualifications, confirmed that “an action taken to remove an appointee or employee taken pursuant to an instruction from the Commission is not subject to Part 752 of this chapter. Part 752 of this chapter applies when removal or other disciplinary action covered by that part is initiated by the agency.” 5 C.F.R. § 731.302(c) (1975).

The enactment of the CSRA in 1978 extensively rewrote the standards and procedures governing performance-based and misconduct-based adverse actions taken by executive agencies, but it did not disturb, and indeed was completely silent on, the suitability authority inherited from the CSC by the newly created OPM. No changes were made to EO 10577, which remains in force to this day. The legislative history indicates that Congress intended Chapter 75 and the related Chapter 77 appeals process to apply only to actions initiated by employing agencies. *See* S.Rep. No. 969, 95th Cong., 2nd Sess. 51 (noting that the section 7513 right to counsel “does not authorize an employing agency to pay the cost”, and explaining that the Chapter 77 appeals process is “intended to give agencies greater ability to remove or discipline expeditiously

employees who engage in misconduct”); *Id.* at 54 (describing the Chapter 77 appeals procedure as applying “when an agency takes adverse action against one of its employees”).

Following enactment of the CSRA, OPM has maintained the basic regulatory framework that distinguishes between OPM suitability determinations and directed removals on the one hand, and agency adverse actions on the other. *See* 5 C.F.R. § 731.302(c) (1980) (same as 1975 version); 5 C.F.R. § 752.401(c)(4)(1980) (Chapter 75 notice, answer, decision and appeals procedures do not apply to “[a]ction taken or directed by the Office of Personnel Management under Part 731 or Part 754 of this title”). As explained by OPM over a decade ago,

[s]uitability-based removals have always been exempted from agency initiated removal procedures; see 5 C.F.R. § 731.302(c)(1991). . . . [S]uitability actions are taken under authority delegated to OPM by the President. These actions are taken by OPM in the exercise of its government wide function of safeguarding the appointment process to positions in the competitive service. They are not chapter 75 adverse actions at all. Accordingly, chapter 75 of title 5 does not apply to suitability actions.

61 FR 395-01 (January 5, 1996).

As the agency authorized to promulgate regulations under the CSRA, OPM’s construction “governs if it is a reasonable interpretation of the statute-not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts.” *Entergy Corp. v. Riverkeeper, Inc.*, 129 S.Ct. 1498, 1505 (2009); *see also Amgen, Inc.*, 902 F.2d at 1538; *Folio*, 402 F.3d at 1355 (explaining that in construing a statute, courts look to “the construction placed on the statute by the agency which administers it”). OPM’s construction of the CSRA as not applying Chapter 75 to

suitability determinations and actions is reasonable in light of the statutory and regulatory history, as well as the practical considerations discussed herein.¹

Finally, Chapter 75, including section 7512, has been amended numerous times since 1978. *See, e.g.* Pub. L. 101-12, section 9(a)(2), Apr. 10, 1989, 103 Stat. 35; Pub. L. 101-376, Sec 2(a), Aug. 17, 1990, 104 Stat. 461; Pub. L. 108-271, Sec 8(b), July 7, 2004, 118 Stat. 814. Notwithstanding the extensive modifications imposed by the CSRA and the multiple subsequent amendments, Congress has never reversed or contradicted the historical and regulatory bar against Chapter 75 review over suitability determinations. It has instead left in place the long standing regulatory distinction between suitability determinations and actions, and adverse actions. “[S]uch a long-standing administrative interpretation, applying to a substantially re-enacted statute, is deemed to have received congressional approval and has the effect of law.”

Commissioner of Internal Revenue v. Estate of Noel, et al., 380 U.S. 678, 682 (1965).

C. The Board Should Not Exercise Chapter 75 Jurisdiction over OPM-Directed Suitability Actions for Compelling Practical and Policy Reasons.

The fact that an agency can remove a tenured employee for suitability reasons only at the direction of OPM creates a significant practical impediment to applying Chapter 75 review standards and procedures to the agency’s action. To require an agency

¹ In contrast, a Board decision to exercise Chapter 75 jurisdiction over suitability actions would be entitled to no deference. The Board is authorized to promulgate regulations “necessary for the performance of its functions.” 5 U.S.C. § 1204(h); *see also* S.Rep. No. 969, 95th Cong., 2nd Sess. 51 (Board’s regulatory authority extends to “the procedures under which it reviews matters appealed to it”). The Board has no regulatory authority to expand its own jurisdiction. *See Jerome*, 42 F.3d at 1374 (“The Board cannot use section 1204(a)’s very general grant of authority to create a power of review where the statutory scheme indisputably contemplates no such power.”). Moreover, even if the Board’s assessment of its own jurisdiction would otherwise be relevant, the Board has long incorporated OPM’s suitability regulations into its own regulations. *See, e.g.*, 66 FR 30635-01 (June 7, 2001); 51 FR 25149-01 (July 10, 1986). A decision to now ignore OPM authority would represent a change in the Board’s construction of the statute. *Lovshin v. Department of the Navy*, 767 F.2d 826, 840 (Fed. Cir. 1985).

to defend a decision it did not make and over which it had no control would place it in an untenable position.

The problem is compounded by the incompatibility between OPM's stated grounds for taking suitability actions and the criteria governing the Board's review of adverse agency actions. An adverse agency action taken under 5 U.S.C. § 7513 must promote the efficiency of the service, whereas a suitability action may be taken where "the action will protect the integrity *or* promote the efficiency of the service." 5 C.F.R. § 731.201 (2010) (emphasis supplied). Under the Chapter 75 standard, an action that was directed by OPM solely to protect the integrity of the service, but that did not also incidentally promote the efficiency of the service, would not be sustained. Board review in such a case would therefore usurp from OPM its presidentially delegated authority to establish the bases for suitability actions.

Similarly, the Board could not exercise its Chapter 75 mitigation authority in the context of a suitability removal without also interfering with OPM's undisputed exclusive authority to make suitability determinations. When OPM makes a negative suitability determination, it finds that an individual is not suitable for federal employment. If the OPM-directed removal of such an individual were mitigated by the Board to a suspension or lesser penalty, it would not change OPM's finding that the individual is unsuitable for federal employment. In the absence of the ability to remove such an individual, the authority to declare him unsuitable is meaningless and the presidential intent to protect the integrity of the federal service is grossly undermined, if not vitiated.

The fact that agencies sometimes do not wish to take the suitability action directed by OPM highlights another problem with the application of Chapter 75

procedures and standards to suitability actions. As the respondent in a Chapter 75 appeal, an agency might very well choose not to contest the appeal or the effort at mitigation in order to retain the employee. Such a scenario would eviscerate EO 10577, which, perhaps for that very reason, assigned to an independent body the role of making suitability determinations and directing agencies to take suitability actions.

The Federal Circuit's analysis in *Lisiecki v. Merit Systems Protection Board*, 769 F.2d 1558 (Fed. Cir. 1985), confirms that the Board has no authority to mitigate suitability actions. The *Lisiecki* court held that the MSPB did not have jurisdiction to mitigate removals for poor performance under Chapter 43. It reasoned that the three principal factors supporting the Board's authority to mitigate penalties imposed by agencies in adverse action proceedings have no applicability to Chapter 43 cases. The considerations similarly are inapplicable in the context of suitability actions. The factors discussed in *Lisiecki* were: (1) the CSC had mitigated agency adverse action penalties in Chapter 75 actions and the Board had inherited the authority; (2) continued exercise of the authority under the CSRA was not inconsistent with the language of Chapter 75 or its legislative history; and (3) the historic relationship of the penalty to the efficiency of the service standard in Chapter 75 actions. *Lisiecki*, 769 F.2d at 1566. The first two factors are inapplicable to suitability cases, because they are premised on the CSC having exercised Chapter 75 review of agency adverse actions. As explained previously, the CSC did not have Chapter 75 review authority over suitability determinations or actions. The third factor's reliance upon the efficiency of the service standard is directly contrary to OPM's consideration of the integrity of the service in suitability actions.

For all of these reasons, it is poor policy as well as beyond the Board's jurisdiction for it to consider a tenured employee's appeal of an OPM-directed suitability separation under Chapter 75 review authority.

IV. CONCLUSION

The Board must apply Part 731 in reviewing appeals from OPM-directed separations of tenured employees for suitability reasons. OPM was empowered by Congress to determine the scope of the Board's review authority in such cases, and it promulgated Part 731 as the exclusive procedure. Its exercise of that authority is a congressionally sanctioned continuation of the historical distinction between OPM suitability determinations and actions and agency-initiated adverse actions. Application of separate procedures to each class of cases also serves practical ends. Since only OPM, and not agencies, can take suitability actions against tenured employees, it is inappropriate for agencies to serve as respondents in suitability appeals. The basis for OPM suitability determinations and the standard of review of agency-initiated adverse actions are also incompatible. Moreover, mitigation is inappropriate because it would be

incongruous for the Board to concur with OPM that the employee is unsuitable for Federal service and yet decide to retain the employee in the service, as part of any mitigated penalty.

Respectfully submitted,

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