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COMMENTS:

Re: Hyginus U. Aguzie, Holley C. Barnes, Jenee Ella Hunt-O'Neal
and James A. Scott v. Office of Personnel Management

Docket Nos: OC-0731-09-0261-R-1, OC-0731-09-0260-R-1,
AT-0731-09-0240-I-1, CH-0731-09-0578-I-1

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

Hyginus U. Aguzie, Holley C. Barnes, Jenee Ella Hunt-O'Neal, and James A. Scott,)	Docket Nos.
)	
)	DC-0731-09-0261-R-1
Appellants,)	DC-0731-09-0260-R-1
)	AT-0731-09-0240-I-1
v.)	CH-0731-09-0578-I-1
)	
Office of Personnel Management,)	FEB 4 2010
)	
Agency.)	
)	

REPLY BRIEF FOR THE OFFICE OF PERSONNEL MANAGEMENT

Introduction

On January 14, 2010, the Merit Systems Protection Board (MSPB; the Board) granted the Office of Personnel Management's (OPM's; the Agency's) request for leave to file a reply to Appellant Hyginus U. Aguzie's January 4, 2010 response brief and Appellant James A. Scott's January 5, 2010 response brief in the above-captioned consolidated appeal.¹ Appellant Aguzie and Appellant Scott responded to OPM's December 7, 2009 opening brief on the questions presented in the consolidated appeal, namely:

1. Whether the appellant is entitled to invoke the adverse action procedures of 5 U.S.C. § 7513(d)

¹ Appellants Holley C. Barnes and Jenee Ella Hunt-O'Neal did not file responsive briefs.

to appeal his or her removal, notwithstanding that the removal was ordered by OPM pursuant to its suitability regulations at 5 C.F.R. Part 731, and if so,

2. Whether review of 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.

Aguzie v. Office of Pers. Mgmt., 112 M.S.P.R. 276, 279 (2009); *Barnes v. Office of Pers. Mgmt.*, 112 M.S.P.R. 273, 275 (2009).

In his response brief, Appellant Scott also addressed unrelated matters, namely, his continuing opposition to consolidation of the appeal, and the merits of his petition for review. (Scott Res. Br. 1-8, Jan. 5, 2010.)

Consolidation was appropriate, since the threshold questions of law presented in the *Aguzie* appeal are unavoidable in the *Scott* appeal. (See Agency Mot. for an Extension of Time to File a Resp. to the Pet. for Review, & Statement of Good Cause 5, paras. 3-5, Oct. 15, 2009).

Further, with respect to Appellant Scott's petition for review, the Agency stated in its opening brief that "after the Board resolves the two questions presented [by the consolidated appeal], it should order additional briefing

to allow OPM to address [Appellant's] petition[] for review on the merits." (Agency Opening Br. 6 n.2, Dec. 7, 2009.)² This reply brief is therefore limited to the questions presented, *infra*, in the *Aguzie* appeal.³

² The Agency contends that Appellant Scott's petition is not ripe for review on the merits until the threshold issue presented in *Aguzie* is resolved. If the Board does choose to consider Appellant Scott's petition for review without further briefing, however, it should deny the petition for failing to meet the criteria for review in 5 C.F.R. § 1201.115(d) or, in the alternative, should affirm the presiding administrative judge's thorough and well-reasoned initial decision.

³ In limiting itself to the questions presented, the Agency also declines to respond to Appellant *Aguzie*'s argument that suitability actions should be limited to the first year of Federal employment as a matter of equity and efficiency, as this is essentially a policy argument, rather than a legal one. (See *Aguzie* Res. Br. 15-21.) In any event, his policy argument is not well taken because, in fact, OPM's regulations already limit the circumstances under which suitability actions may occur after the first year of Federal employment. Under 5 C.F.R. §§ 731.105(d) and 731.203(d), OPM may take a suitability action against an employee who has completed the first year of appointment in only three circumstances that go to the heart of the Civil Service examining and staffing system: 1) material, intentional false statement, or deception or fraud in examination or appointment; 2) refusal to furnish testimony as required under Civil Service Rule V; or 3) a statutory or regulatory bar preventing employment in the position. See *Kissner v. Office of Personnel Management*, 792 F.2d 133, 134 (Fed. Cir. 1986) (an employee's falsification of his or her employment documents does not disappear as a basis for a suitability action during subsequent Federal employment).

ARGUMENT

- A. The Appellants Fail to Establish that OPM's Suitability Removal Authority is Contrary to Statute; Instead, the Appellants Provide Additional Legal Support for the Argument that the Civil Service Reform Act of 1978 Expressly Reserved OPM's Existing Authority to Take Suitability Removal Actions Independent of 5 U.S.C. Chapter 75**

Appellant Aguzie argues that "[s]ince Congress did not exclude suitability determinations from" the Civil Service Reform Act of 1978 (CSRA), "it follows that OPM's suitability determinations are subject to the [CSRA], including Chapter 75 of Title 5 of the U.S. Code." (Aguzie Res. Br. 6, Jan. 4, 2010). Yet as the Agency argued in its opening brief, OPM's authority to take suitability actions derives from Civil Service Rule V of Executive Order (E.O.) 10577, as amended, which the President issued pursuant to applicable statutory authority, see 5 U.S.C. §§ 3301, 3302, and 7301; and which OPM implemented pursuant to Executive Order and its own statutory rulemaking and enforcement authority. (Agency Opening Br. 9-12.) Further, in passing the CSRA Congress ratified Civil Service Rule V by requiring OPM to "execut[e], administer[], and enforc[e]" the Civil Service rules, including Rule V; "to prescribe regulations and to ensure compliance with" the Rules; and

to regulate and control competitive examinations "subject to" the Rules. (*Id.* 17-18, quoting the CSRA, §§ 201(a) and 906(a)(2), 92 Stat. 1111, 1119, 1121, 1224, codified, in relevant part, at 5 U.S.C. §§ 1103(a)(5), 1104(b)(3), 1302(a)).

In support of his argument, Appellant Aguzie submits that E.O. 12107, reprinted as amended in 5 U.S.C. § 1101, which conferred upon OPM the authority formerly exercised by the Civil Service Commission to take suitability actions under rule V, also provided, in section 2-402, that the Order would continue in effect only "until modified, terminated, or suspended," "in accord with section 902(a) of" the CSRA. (Aguzie Res. Br. 7 n.3.) The Appellant misconstrues this as a sunset provision when it is in fact a savings provision.

Section 902(a) of the CSRA, titled "Savings Provisions," provided in relevant part that "all executive orders, rules, and regulations affecting the Federal service shall continue in effect, according to their terms, until modified, terminated, superseded, or repealed by the President, [or] the Office of Personnel Management. . . ." 92 Stat. 1223, 5 U.S.C. § 1101 note. Thus, section 902(a) of the CSRA had the effect of reserving the existing suitability program until such time as the President chose

to amend Civil Service Rule V or OPM chose to amend its regulations.⁴

Structurally, section 902(a) of the CSRA, which reserved the Civil Service Rules and regulations, complemented sections 201(a) and 906(a)(2) of the CSRA which, as previously noted, required OPM to execute, administer, and enforce the Rules and to promulgate regulations consistent with the Rules.⁵ It also complemented section 904 of the CSRA, 92 Stat. 1224, 5 U.S.C. § 1101 note, titled "Powers of the President Unaffected Except by Express Provisions," which reserved the President's existing authorities and delegations

⁴ As applicable here, section 902(a) of the CSRA reserved the following regulations: 5 C.F.R. Part 731, Suitability, §§ 731.201, 731.302(b), (c) (1978) (governing the Commission's jurisdiction to direct suitability removals under Part 754, and distinguishing such removals from actions "initiated by an agency" under Part 752); 5 C.F.R. Part 752, Adverse Actions by Agencies, § 752.103(b)(2) (1978) (excluding, from the definition of such adverse actions, "[a]n action taken by an agency pursuant to instructions from the Commission"); and 5 C.F.R. Part 754, Adverse Actions by the Commission, § 754.101(a) (1978) (establishing the procedures to be followed when the Commission directed the removal of an employee under 5 C.F.R. § 5.4 or 731.302(b)).

⁵ The Appellant also cites E.O. 12107's reference to 5 U.S.C. § 7135(b). (Aguzie Res. Br. 7 n.3.) This is a savings provision for pre-CSRA labor-management relations policies, regulations, and procedures with no relevance to this appeal.

"[e]xcept as otherwise expressly provided in" the CSRA (emphasis supplied).⁶

In further support of his argument, Appellant Aguzie argues that "if Congress had intended to exclude OPM's suitability decisions from [the CSRA's adverse action provisions] it would have so stated" (Aguzie Res. Br. 6.) Yet as OPM noted in its opening brief, the applicable principle of statutory interpretation, set forth by the Federal Circuit in *Lackhouse v. Merit Systems Protection Board*, points in the opposite direction: Congress is presumed to be aware of the Civil Service Rules in enacting statutes and, if it intends to amend or repeal a Rule, will so indicate. *Lackhouse*, 773 F.2d 313, 316 n.6, 317 (Fed. Cir. 1985). Appellant Aguzie's attempt to distinguish *Lackhouse* on grounds that Civil Service Rule V "facially conflict[s]" with 5 U.S.C. chapter 75 is unavailing, for as OPM argued in its opening brief, OPM's authority to initiate suitability removals as a regulatory enforcement function is grounded in statute, and does not conflict with employing agencies' separate authority to

⁶ As applicable here, section 904 of the CSRA reserved the President's authority to direct the removal of an employee on grounds of suitability, and his delegation of that authority to the Commission in Rule V of E.O. 10577, as amended.

initiate adverse action removals as a management function.

(Aguzie Res. Br. 12; Agency Opening Br. 7-8, 17-19, 23-25.)

B. The Appellants Fail to Establish that in Passing the CSRA, Congress Implicitly Intended for Suitability Appeals to be Adjudicated as Adverse Actions Under 5 U.S.C. Chapter 75

Appellant Aguzie argues that Congress intended 5 U.S.C. Chapter 75 to comprehensively address the rights of permanent Federal employees facing removal, and that "OPM is attempting to 'carve out' an exception to" those statutory rights. (Aguzie Res. Br. 9-10.) In support of his argument he quotes *Lovshin v. Department of the Navy*, where the Federal Circuit noted that "'Chapter 75 was revised to spell out with greater particularity the procedural rights of employees when action is taken thereunder'" including "'minimum rights . . . set out in § 7513(b).'" (Aguzie Res. Br. 12-13, quoting *Lovshin*, 767 F.2d 826, 834-35 (Fed. Cir. 1985)). He further argues that *Lovshin* stands for the proposition that "an employee's 'substantive rights' under the civil service laws may not be abridged by an agency's use of different rules and procedures regarding discipline." (Aguzie Res. Br. 13, citing and quoting 767 F.2d at 841-42.)

The appellant's first point begs the question, as a suitability removal action is not an action taken "under" Chapter 75; rather, it is taken under Civil Service Rule V and 5 C.F.R. Part 731. (Agency Opening Br., *passim*.) The appellant's second point similarly begs the question because suitability actions are not "disciplinary" actions. In any event, and more to the point, the *Lovshin* Court did not say in the text cited by the appellant that "an employee's 'substantive rights' under the civil service laws may not be abridged by an agency's use of different rules and procedures regarding discipline." Instead, the Court stated that pursuant to 5 U.S.C. § 7701(c)(2)(B), an employee may, in appealing a personnel action to the Board, raise an affirmative defense that the agency engaged in a prohibited personnel practice, to protect his "substantive rights" under 5 U.S.C. chapter 23. *Lovshin*, 767 F.2d at 841-42. It is undisputed that an affirmative defense may be raised in any MSPB appeal, including an appeal of a suitability action, so it is unclear what point the appellant is trying to make here. See 5 U.S.C. § 7701(a) (giving the Board appellate jurisdiction over "any action which is appealable to the Board under any law, rule, or regulation") and § 7701(c)(2) (providing that in any such

appeal, "the agency's decision may not be sustained" if the employee succeeds in his affirmative defense); 5 C.F.R. § 731.501(a) (making suitability actions appealable to the Board, and therefore subject to affirmative defenses).

In further support of his argument that Congress intended 5 U.S.C. Chapter 75 to comprehensively address the rights of permanent Federal employees facing removal, Appellant Aguzie argues that "chapter 43 and chapter 75 procedures are, by statute, mutually exclusive. . . . By contrast, there is no statutory provision that would preclude a removal action ostensibly taken under 5 C.F.R. part 731 from being adjudicated under chapter 75 standards." (Aguzie Res. Br. 14-15, citing 110 M.S.P.R. at 278 n.2 (citing 5 U.S.C. § 7512).) Section 7512 of Title 5 enumerates certain actions that are excluded from the definition of an "adverse action," including, in paragraph (D), a performance-based removal under 5 U.S.C. § 4303. Yet there is no indication that the list in § 7512 is intended to be exhaustive, with everything not specifically enumerated constituting an "adverse action." As a matter of statutory interpretation, "[n]ot every silence is pregnant. . . . In some cases, Congress intends silence to rule out a particular statutory application, while in others Congress' silence signifies merely an expectation

that nothing more need be said in order to effectuate the relevant legislative objective. An inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent." *Burns v. United States*, 501 U.S. 129, 136 (1991) (internal citations and quotations omitted).

As noted *infra*, the context of section 204(a) of the CSRA, by which 5 U.S.C. § 7512 was enacted, included: 1) section 904 of the CSRA, which reserved the President's authorities and delegations; 2) section 902(a) of the CSRA, which reserved the existing Civil Service Rules and regulations governing suitability removals; and 3) sections 201(a) and 906(a)(2) of the CSRA, which required OPM to execute, administer, and enforce those Rules and to promulgate regulations consistent with them. Further, the history of the statute shows that there was a legislative purpose in specifically excluding certain actions, such as Chapter 43 performance actions, from the Chapter 75 definition of an adverse action. Prior to the enactment of the CSRA, agencies were required to take performance actions under Chapter 75, a requirement that the CSRA eliminated. See *Lovshin*, 767 F.2d at 830-31; See also S. Rep. No. 95-969 (1978), at 39-40, as reprinted in 1978

U.S.C.C.A.N. 2723, 2761-62. Nothing needed to be said about the existing suitability program to meet the legislative objective of distinguishing the new performance actions established by the CSRA from adverse actions, because the suitability program was already distinct.

More broadly, the exceptions in section 7512 served to "conform[] this section to other provisions in title V" governing removals. S. Rep. No. 95-969, at 50, as reprinted in 1978 U.S.C.C.A.N. at 2772. It was unnecessary to list suitability removals to effectuate this legislative objective, because the suitability removal authority was reserved by uncodified provisions of the CSRA, not by codified provisions requiring conforming language.⁷

In 5 U.S.C. §§ 7513(a) and 7514, Congress gave OPM the authority to interpret any ambiguity in § 7512's coverage, and OPM's reasonable interpretive regulations are entitled to deference. (See Agency Opening Br. 16, citing *Chevron*

⁷ Foreclosing OPM-initiated suitability actions would appear to be unnecessary for achieving the CSRA's overarching goal of empowering agencies to take actions against unsatisfactory employees without unnecessary delays. See, e.g., S. Rep. No. 95-969, at 3-4, 9-10, 40, as reprinted in 1978 U.S.C.C.A.N. at 2725-26, 2731-32, 2762, 2773; H.R. Rep. No. 95-1403, at 2, 4, 7 (1978), and President's March 2, 1978 Message to Congress therein, as reprinted in Staff of H. Comm. on Post Office & Civil Service, 96th Cong., Legislative History of the Civil Service Reform Act of 1978, at 636, 639, 641, 644 (Comm. Print 1979).

U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984).) If there is any doubt about whether a suitability action is an "adverse action" under 5 U.S.C. § 7512, it is resolved by OPM's interpretive regulations at 5 C.F.R. § 752.401(b)(10), which exclude a suitability action taken under 5 C.F.R. Part 731 from Chapter 75's definition of an adverse action. (Agency Opening Br. 14-15.)⁸

C. The Appellants Fail to Establish that the Board's and the Federal Circuit's Case Law Recognize Suitability Removals as Adverse Actions

Appellant Aguzie argues that "in many cases involving permanent Federal employees, suitability removals are processed under 5 C.F.R. part 752 and include consideration of the Douglas factors." (Aguzie Res. Br. 12.) In support, he cites *Kissner v. Office of Personnel Management* as having applied the Douglas factors applicable to Chapter 75 removals in reviewing the Agency's suitability action. (*Id.* 11-12, citing *Kissner*, 792 F.2d 133, 134-35 (Fed. Cir. 1986).)

⁸ The Agency's suitability regulations, likewise, exclude a suitability action from the definition of an adverse action, and the Board's own jurisdictional regulations treat an adverse action under Chapter 75 and a suitability action under 5 C.F.R. Part 731 as distinct appealable actions. (See Agency Opening Br. 14-15, 16 & n.6, citing 5 C.F.R. §§ 731.203(f), 1201.3(a)(2), 1201.3(a)(7).)

These arguments are unavailing, for when the Board had this question squarely before it, the Board concluded, as the discussion below will demonstrate, that it had no basis to attempt to "mitigate" the suitability actions that resulted from the determinations of unsuitability the Board was reviewing. See *Shelton v. Office of Personnel Management*, 42 M.S.P.R. 214, 221 (1989), *aff'd*, 904 F.2d 46 (1990) (table). This holding was reaffirmed by the Federal Circuit's decision, in *Folio v. Department of Homeland Security*, that the Board's jurisdiction to review suitability determinations is limited by OPM regulation and does not include the authority to review the suitability action taken. 402 F.3d 1350, 1355 (Fed. Cir. 2005). Consistent with *Folio*, the Board has recognized that it has no jurisdiction to review the appropriateness of a suitability action, and that if fewer than all the charges are sustained, the Board must remand the case to OPM for a determination of the appropriateness of the action. *Doerr v. Office of Pers. Mgmt.*, 104 M.S.P.R. 196, 202 (2006); *Sosa v. Office of Pers. Mgmt.*, 101 M.S.P.R. 583, 585 (2006).

The Agency is unaware of any case in which the Board or the Federal Circuit has reviewed a suitability removal as an adverse action under Chapter 75. The Agency

previously noted that the Board and the Federal Circuit have only cited 5 C.F.R. Part 731, not Part 752, as the regulation governing the Agency's action or the Board's appellate jurisdiction in suitability removal appeals.

(See Agency Opening Br. 16-17, citing *Doerr v. Office of Pers. Mgmt.*, 104 M.S.P.R. 196 (2006); *Sosa v. Office of Pers. Mgmt.*, 101 M.S.P.R. 583 (2006); *McClain v. Office of Pers. Mgmt.*, 76 M.S.P.R. 230 (1997); *Kissner v. Office of Pers. Mgmt.*, 792 F.2d 133 (Fed. Cir. 1986); *Shelton v. Office of Pers. Mgmt.*, 42 M.S.P.R. 214, 221 (1989), *aff'd*, 904 F.2d 46 (Fed. Cir. 1990) (table).)⁹

To be sure, the Federal Circuit in *Kissner*, and the Board in three of the other early cases, *Swift*, *Morderosian*, and *McCreary*, appeared to assume that Douglas factor balancing was applicable to Part 731 actions, without suggesting that a Part 731 action could be adjudicated under Chapter 75. See *Kissner*, F.2d at 134-35 (finding that the petitioner failed to establish his

⁹ See also *Reed v. Office of Pers. Mgmt.*, 74 M.S.P.R. 616 (1997); *Swift v. Office of Pers. Mgmt.*, 48 M.S.P.R. 441 (1991); *Morderosian v. Office of Pers. Mgmt.*, 42 M.S.P.R. 371 (1989); *Logan v. Office of Pers. Mgmt.*, 38 M.S.P.R. 615 (1988); *DeAngelis v. Office of Pers. Mgmt.*, 28 M.S.P.R. 456 (1985); *Kissner*, 28 M.S.P.R. 392 (1985) (also citing OPM's former suitability regulation in Part 754), *aff'd*, 792 F.2d 133; *McCreary v. Office of Pers. Mgmt.*, 27 M.S.P.R. 459 (1985).

potential for rehabilitation); *Swift*, 48 M.S.P.R. at 446, and *McCreary*, 27 M.S.P.R. at 462 (finding that the administrative judge appropriately considered mitigating factors in reviewing the appropriateness of the suitability action); *Morderosian*, 42 M.S.P.R. at 374-75 (finding that the administrative judge appropriately applied aggravating factors in reviewing the appropriateness of the suitability action). Yet when the issue was directly presented, as noted above, the Board stated that it had no basis in case law to engage in *Douglas* balancing in reviewing an action under Part 731.

In *Shelton v. Office of Personnel Management*, for example, in a non-precedential decision, a Federal Circuit panel remanded a suitability removal to the Board and ordered it to mitigate the action. *Shelton*, 809 F.2d 787 (Fed. Cir. 1986) (table) (affirming in part, reversing in part, and remanding 28 M.S.P.R. 389 (1985)). On remand, the Board mitigated the removal to a suspension, but did so only "[i]n compliance with the Court's unpublished remand decision," stating that the Board's Opinion and Order, "like the court's unpublished opinion, is limited to the specific circumstances of this case, and will not be considered precedential or binding in future cases." 34 M.S.P.R. 356 (1987) (NP).

In a precedential decision reviewing appellant Shelton's request for attorney fees, however, the Board then noted that it "has no precedent for applying the Douglas case to mitigate an OPM action under 5 C.F.R. part 731, once OPM has determined that an employee or applicant is unsuitable for Federal employment. Although OPM sets forth factors it must consider in determining whether its action under part 731 will promote the efficiency of the service, those factors go to the very essence of the suitability determination in the first instance, and not to the propriety of the 'penalty' flowing therefrom." 42 M.S.P.R. 214, 221 (1989), *aff'd*, 904 F.2d 46 (1990) (table); *accord*, *Hutchcraft v. Dep't of Transp.*, 55 M.S.P.R. 138, 143 (1992), *aff'd*, 996 F.2d 1235 (Fed. Cir. 1993) (table).

Subsequent case law reaffirms that there is no basis in regulation or judicial precedent to mitigate a suitability removal under Part 731, let alone treat such a removal as an adverse action subject to Chapter 75 procedures. In particular, the Federal Circuit has adopted this principle.

The Federal Circuit ruled in *Folio v. Department of Homeland Security* that "Congress granted OPM the authority to define the scope of the Board's authority" to review

suitability determinations, and that under OPM's regulations in 5 C.F.R. § 731.501, "the Board may consider all aspects of a suitability determination, except the actions taken pursuant to it." (See Agency Opening Br. 13, citing *Folio*, 402 F.3d 1350, 1355 (Fed. Cir. 2005).)

The Board has appropriately applied *Folio* as sustaining a limited scope of review. Citing *Folio*, the Board recently ruled that the Board cannot review the appropriateness of a suitability removal action when all of the charges are sustained; and that the Board must remand the case to OPM for a determination of the appropriateness of the removal action when fewer than all of the charges are sustained, rather than reviewing the appropriateness of the action itself. *Sosa*, 101 M.S.P.R. at 585; *Doerr*, 104 M.S.P.R. at 202. Appellant Aguzie's attempt to distinguish *Folio*, *Sosa*, and *Doerr* on the facts misapprehends the nature of the decisions, which recognize fundamental limitations on the Board's appellate jurisdiction over suitability determinations. (See Aguzie Res. Br. 8-9, 11.)

D. The Appellants Fail to Establish that OPM's Suitability Regulations Violate Employees' Fifth Amendment Due Process Rights, or Require a Standard of Proof Inconsistent with 5 U.S.C. § 7701

Appellant Scott argues that suitability removals violate procedural due process under the Fifth Amendment because they are undertaken by OPM rather than by the employing agency, thereby allegedly denying the employee an adequate opportunity to respond to the charges. (Scott Res. Br. 11-12.) OPM's suitability regulations are clearly constitutionally adequate because they afford a tenured civil servant facing removal a pre-termination notice and an opportunity to respond to charges, as well as a post-termination hearing. See 5 C.F.R. §§ 731.302 to 731.304, 731.501; *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545-46 (1985).

Appellant Aguzie similarly argues that OPM's suitability regulations are procedurally inadequate because the Agency need only prove its case by substantial evidence. (Aguzie Res. Br. 14.) The Appellant, however, is simply mistaken as to this point. Under 5 U.S.C. § 7701(c)(1)(B), except in the case of a Chapter 43 performance action, "the decision of the agency shall be sustained . . . only if the agency's decision . . . is

supported by a preponderance of the evidence." This standard of proof is equally applicable in adverse action appeals and suitability appeals. (See Agency Opening Br. 26.)

Conclusion

For the reasons stated in the Agency's opening brief and in this brief, an individual removed under Civil Service Rule V and 5 C.F.R. Part 731 is entitled to appeal his removal under Part 731, and may not appeal his removal under 5 U.S.C. § 7513(d). The Board must review whether an unfavorable suitability determination is supported by preponderant evidence under the standards OPM has prescribed in 5 C.F.R. Part 731. When the Board sustains an unfavorable suitability determination, the Board is foreclosed from reviewing the appropriateness of a removal action taken pursuant to that determination.

Enclosure: certificate of service

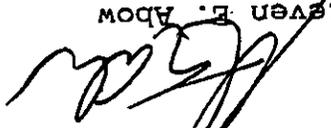
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Respectfully submitted,