

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

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

DEC 7 2009

BRIEF FOR THE OFFICE OF PERSONNEL MANAGEMENT

Introduction

On October 15, 2009, the Merit Systems Protection Board (MSPB; the Board) granted the Office of Personnel Management's (OPM's) motion to reopen in these two appeals. It consolidated the appeals for adjudication and granted OPM 45 days to file a brief responding to the two questions presented in its opinions and orders in these cases:

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

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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).

On October 15, 2009, the Board consolidated *Aguzie* and *Barnes* with the appeal of *James A. Scott v. Office of Personnel Management*, No. CH-0731-09-0578-I-1. On October 22, 2009, the Board consolidated to *Aguzie*, *Barnes*, and *Scott* the appeal of *Jenee Ella Hunt-O'Neal v. Office of Personnel Management*, No. AT-0731-09-0240-I-1.¹

STATEMENT OF THE CASE

A. Background

On December 15, 2008, OPM informed the appellant *Aguzie*, who had been hired by the United States Commission on Civil Rights on May 17, 2006, that it had found him

¹ OPM submits that the order consolidating the *Hunt-O'Neal* appeal to the other three appeals may have been improvidently granted. Appellant *Hunt-O'Neal* apparently would not, based on her service history, meet the definition of an "employee" in 5 U.S.C. § 7511(a)(1)(A). See *Hunt-O'Neal* Agency File, tabs 2a, 2n (Notification of Personnel Action forms showing that Ms. *Hunt-O'Neal* was appointed January 7, 2008 subject to a one-year probationary period, and removed less than one year later, on January 5, 2009).

unsuitable for his position under 5 CFR Part 731. OPM charged Aguzie with making material, intentional false statements in his employment application, which is one of eight specified grounds for determining an individual unsuitable for federal employment under 5 C.F.R. § 731.202(b)(3).

Similarly, on December 1, 2008, OPM informed the appellant Barnes, who had been hired by the Department of Homeland Security on November 12, 2006, that it had found her unsuitable for her position under 5 C.F.R. part 731. OPM charged Barnes with making material, intentional false statements on an SF-86 Questionnaire for National Security Positions and in a "Personal Subject Interview."

Consistent with the procedural safeguards provided to employees by 5 C.F.R. §§ 731.302-303, both Aguzie and Barnes were afforded notice and an opportunity to respond. Thereafter, as required by 5 C.F.R. § 731.304, OPM issued decisions based on the evidence of record concerning the material, intentional false statements, in each case taking into account the "additional considerations" enumerated at 5 C.F.R. § 731.202(c) that it deemed pertinent. OPM directed both Aguzie's and Barnes' employing agencies to remove them from the rolls under 5 CFR § 731.304. OPM also cancelled any reinstatement eligibility obtained from the

appointments or any other eligibilities Aguzie or Barnes may have had for positions in the competitive service; and debarred each of them from competition for, or appointment to, any covered position for a period of three years.

Aguzie, 112 M.S.P.R. at 277; *Barnes*, 112 M.S.P.R. at 274.

B. The Board's Decisions

The Board's initial decisions sustained OPM's suitability removal actions in both *Aguzie* and *Barnes*. Both appellants filed petitions for review.

The Board found that neither petition met the Board's criteria for review and it denied both. Nonetheless, the Board reopened the cases on its own motion to "address the question, not raised below or on petition for review, of whether the appellant is entitled to appeal his [or her] removal to the Board as an adverse action under 5 U.S.C. chapter 75, subchapter II." *Aguzie*, 112 M.S.P.R. at 277-78; *Barnes*, 112 M.S.P.R. at 275.

The Board observed that the appellants occupied competitive service positions and had completed their probationary periods "therefore satisf[ying] the definition of an 'employee' at 5 U.S.C. § 7511(a)(1)(A)." *Aguzie*, 112 M.S.P.R. at 278; *Barnes*, 112 M.S.P.R. at 275. The Board noted that removals may fall within the scope of Chapter 75 of Title 5 and that "an employee against whom a[]

[Chapter 75] action is taken is entitled to certain procedural protections" *Aguzie*, 112 M.S.P.R. at 278. Therefore, the Board suggested, "notwithstanding OPM's characterization of the removal as an action under 5 C.F.R. part 731," the appellants "may have a statutory right to appeal [their] removal as an adverse action under chapter 75, subchapter II." *Aguzie*, 112 M.S.P.R. at 278; *Barnes*, 112 M.S.P.R. at 275.

As the Board recognized, "[t]he distinction [between a removal under Chapter 75 of Title 5 and one under 5 C.F.R. Part 731] is not merely academic." *Aguzie*, 112 M.S.P.R. at 278. The Board's Chapter 75 jurisdiction includes the authority to mitigate penalties under the factors articulated in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 296 (1981). By contrast, its jurisdiction under Part 731 is limited to determining whether the underlying suitability determination is supported by preponderant evidence. 5 C.F.R. § 731.501; see also *Folio v. Dep't of Homeland Sec.*, 402 F.3d 1350, 1354-55 (Fed Cir. 2005). In addition, the respondent in an adverse action under Chapter 75 would not be OPM, but would be the employing agency "as it was the latter agency that effected the removal action, even if it did so at OPM's direction" under 5 C.F.R. § 731.304 ("the employing agency must remove

the appointee or employee from the rolls within 5 work days of receipt of OPM's final decision"). *Aguzie*, 112 M.S.P.R. at 278.

The Board acknowledged that OPM's suitability regulations preclude taking a removal action under both 5 C.F.R. Part 731 and Part 752. It opined that "[t]o the extent § 731.204(f) may purport to carve out an exception to the Board's statutory jurisdiction under 5 U.S.C. § 7513(d), the validity of the regulation is in doubt." *Id.* at 278-79. Based on this discussion, the Board posed the two questions that we now address in this brief.²

SUMMARY OF ARGUMENT

The Office of Personnel Management is authorized by statutes and Presidential executive orders that pre-date the Civil Service Reform Act to regulate suitability and to

² The *Aguzie* and *Barnes* petitions failed to meet the Board's criteria for review. *Aguzie*, 112 M.S.P.R. at 277; *Barnes*, 112 M.S.P.R. at 274. Accordingly, OPM requests that after the Board resolves the two questions presented in OPM's favor, it should do no more than issue final orders under 5 C.F.R. § 1201.113(c) informing the appellants of their right to judicial review under 5 U.S.C. § 7703. However, petitions for review are still pending in the *Hunt-O'Neal* and *Scott* appeals, and after the Board resolves the two questions presented, it should order additional briefing to allow OPM to address those petitions for review on the merits.

OPM notes that additional cases have been stayed before Judge Weiss of the Board's Office of Regional Operations pending the outcome of this litigation, and after the Board resolves the two questions presented, it should order Judge Weiss to lift the stays.

direct the removal of an employee who is disqualified on suitability grounds. OPM's suitability regulations in 5 C.F.R. Part 731 and OPM's adverse action regulations in 5 C.F.R. Part 752 dictate that an OPM directed suitability removal may not be adjudicated under the adverse action procedures of Chapter 75. In fact, the Board's own jurisdictional regulations in 5 C.F.R. Part 1201 are to the same effect, precluding the Board from adjudicating a suitability appeal as anything other than a suitability appeal.

The Board's *sua sponte* suggestion in this case that OPM's suitability regulations appear to carve out an exception to its statutory jurisdiction under Chapter 75 is, of course, contrary to these regulations. It is also inconsistent with a long line of heretofore unquestioned Board and Federal Circuit precedent under which suitability removals have been adjudicated for decades pursuant to 5 C.F.R. Part 731, rather than 5 U.S.C. Chapter 75.

In fact, OPM-directed suitability removals and agency-initiated adverse actions have long coexisted under civil service law and are equally grounded in statute. Therefore, under the Federal Circuit's ruling in *Lovshin v. Department of the Navy*, 767 F.2d 826 (Fed. Cir. 1985) (*en banc*), the Board cannot require suitability actions to be

adjudicated as adverse actions. Rather, the Board must adjudicate suitability actions under the standards and procedures that OPM has prescribed in Part 731.

Indeed, it is not possible for suitability appeals initiated by OPM to be adjudicated under Chapter 75 as adverse action appeals. The latter are initiated by the employing agency and may result in penalty mitigation. By contrast, an employing agency exercises no management judgment in enforcing OPM's suitability removal order, and may even oppose it. OPM's regulatory enforcement interest in taking a suitability action is not the same as the employing agency's management interest, nor is it legally possible to "mitigate" a directed suitability removal.

ARGUMENT

A. OPM's Broad Authority to Regulate Suitability Actions Has a Distinct Basis in Statutes and Executive Orders that Pre-Date Chapter 75

The authority of OPM to initiate suitability removal actions (and that of its predecessor, the Civil Service Commission) has a long history whose genesis is in statutorily-based Executive Orders that preceded the passage of the Civil Service Reform Act of 1978 by several decades.

Section 3302 of title 5, U.S. Code authorizes the President to "prescribe rules governing the competitive service" and 5 U.S.C. § 7301 authorizes the President to "prescribe regulations for the conduct of employees in the executive branch." Section 3301 further authorizes the President to "prescribe such regulations for the admission of individuals into the civil service . . . as will best promote the efficiency of that service" and to "ascertain the fitness of applicants as to . . . character." See also 5 U.S.C. § 1104 (generally authorizing the President to delegate to OPM "in whole or in part, authority for personnel management functions").

Pursuant to these authorities, President Eisenhower issued Executive Order (E.O.) 10577 on November 22, 1954.³ Rule V of E.O. 10577 provided that "[t]he Commission . . . may require appointments to be made subject to investigation to enable the Commission to determine, after appointment, that the requirements of law or the Civil Service Rules and Regulations have been met." It further provided the Civil Service Commission with the authority to direct the removal of employees who were found unsuitable

³ See E.O. 10577, auth. cit., 3 C.F.R. 218 (1954-58) (citing the Civil Service Act of 1883, *codified in relevant part, as amended, at 5 U.S.C. § 3302*, and citing R.S. 1753, *codified as amended at 5 U.S.C. §§ 3301, 7301*).

for Federal employment, stating that "[w]henver the Commission finds that an employee serving under such an appointment is disqualified for Federal employment, it may instruct the agency to remove him, or to suspend him pending an appeal from the Commission's finding"

In Executive Order 12107 of December 28, 1978, the President modified the language of Civil Service Rule V but its import (a delegation of independent authority governing suitability removals) remains the same. It now reads, in relevant part, as follows: "The Director [of OPM] is authorized to ensure enforcement of the civil service laws, rules, and regulations, and all applicable Executive orders, by . . . [i]nstructing an agency to separate or take other action against an employee serving an appointment subject to investigation when the Director finds that the employee is disqualified for Federal employment." See E.O. 10577, r. V, § 5.3(a)(1), *reprinted as amended*, 5 U.S.C.A. § 3301, *codified as amended*, 5 C.F.R. § 5.3(a)(1).

In addition to authorizing OPM to direct an agency to remove an employee found unsuitable for employment, Rule V delegates broad rulemaking and enforcement authority to OPM. It states that OPM "shall promulgate and enforce regulations necessary to carry out the provisions of the

Civil Service Act . . . , the Civil Service Rules, and all other statutes and Executive orders conferring responsibilities on the Office." Civil Service Rule V, § 5.1, *reprinted as amended*, 5 U.S.C.A. § 3301, *codified as amended*, 5 C.F.R. § 5.1.⁴

The suitability rulemaking authority the President delegated in E.O. 10577 is complemented by independent statutory grants of rulemaking authority to OPM. Thus, OPM's suitability regulations also cite as authority, 5 U.S.C. § 1302, a provision of the Civil Service Act which directs OPM, "subject to the rules prescribed by the President under this title for the administration of the competitive service," to "prescribe regulations for,

⁴ Other Civil Service Rules under E.O. 10577, as amended, address OPM's suitability standard-setting and suitability investigative authority. See 5 C.F.R. §§ 2.1(a), 5.2(a). See also section 8(b) of E.O. 10450 of April 27, 1953, 3 C.F.R. 936 (1949-1953), *reprinted as amended in* 5 U.S.C. § 7311, making OPM primarily responsible for investigations of persons "entering or employed in the competitive service;" sections 2.3(b) and 3(a)(i) of E.O. 13467 of June 30, 2008, 73 Fed. Reg. 38103 (July 2, 2008), reaffirming E.O. 10450 and 10577, designating OPM as "suitability executive agent," and stating that OPM "will continue to be responsible for developing and implementing uniform and consistent policies and procedures to ensure the effective, efficient, and timely completion of investigations and adjudications relating to determinations of suitability;" and section 5 of E.O. 13488 of January 16, 2009, 74 Fed. Reg. 4111 (Jan. 22, 2009), vesting OPM with responsibility to promulgate public trust reinvestigation standards "to ensure . . . suitability for continued employment."

control, supervise, and preserve the records of, examinations for the competitive service." See also, 5 U.S.C. § 1103(a)(5) (directing OPM to "execut[e], administer[], and enforc[e] . . . the civil service rules and regulations of the President and the Office and the laws governing the civil service"); 5 U.S.C. § 1104(b)(3) (separately directing OPM "to ensure compliance with the civil service laws, rules, and regulations" *independent* of any delegation by the President or by OPM under subsection (a)).

B. OPM's Regulations, as Well as Those of the MSPB Distinguish Between OPM Initiated Suitability Removals and Adverse Actions Taken By Employing Agencies

OPM's regulations implementing its suitability removal authority reflect its distinct basis and differentiate such removals from those that find their basis in Chapter 75. Indeed, the MSPB's own regulations recognize the same distinction.

OPM's suitability regulations are contained at 5 C.F.R. Part 731. They provide that OPM may "take a suitability action . . . against an employee based on the criteria of § 731.202(b)(3), (4), or (8)." 5 C.F.R.

§ 731.105(d). An "employee" is defined as "a person who has completed the first year of a subject-to-investigation appointment," and a "suitability action" includes a "[r]emoval." 5 C.F.R. §§ 731.101(b), 731.203(a)(2).

The procedures that apply to OPM initiated suitability actions are set forth at 5 C.F.R. Part 731, Subpart C. The MSPB's jurisdiction over OPM initiated suitability actions is provided by 5 C.F.R. Part 731, Subpart E. As the Federal Circuit has recognized, the Board's jurisdiction over suitability appeals "is not plenary, but is limited to those matters over which it has been given jurisdiction by law, rule, or regulation" *Folio v. Dep't of Homeland Sec.*, 402 F.3d 1350, 1353 (Fed. Cir. 2005). Section 731.501 "was promulgated by OPM and . . . Congress granted OPM the authority to define the scope of the Board's authority." *Folio*, 402 F.3d at 1355.⁵

⁵ OPM amended section 731.501 in 2008. The Board appears to ask whether OPM, in amending its regulations, intended to alter the Federal Circuit's conclusion in *Folio* that the Board lacks jurisdiction to review the appropriateness of the suitability action taken. *Aguzie*, 112 M.S.P.R. at 277 n.1. Although not directly relevant to the question presented in this appeal, the answer is that OPM intended no such thing. OPM amended the regulation to state that a suitability "action" was appealable to the Board (i.e., that a final agency action triggers the right of appeal), but the supplementary information does not state OPM intended to expand the Board's jurisdiction to allow it to review the appropriateness of the Agency's choice of an "action." The text of the amended regulation

The regulations at Part 731 distinguish between the OPM-initiated suitability actions against employees and adverse actions taken by agencies. They provide that "an agency may not take a suitability action against an employee" but that "[n]othing in this part precludes an agency from taking an adverse action against an employee under the procedures and standards of part 752 of this title. . . ." 5 C.F.R. §731.105(e). OPM's regulations further state that "an action to remove an . . . employee for suitability reasons under this part is not an action under part . . . 752 of this chapter." 5 C.F.R. §731.203(f) (emphasis in original).

Chapter 75 of title 5 delineates the procedures that an agency must follow and the standards that apply when it takes an adverse action against one of its employees. Section 7513(a) provides that "[u]nder regulations

itself precludes an expansion of the Board's jurisdiction, since it explicitly allows the Board to review only whether "one or more of the charges . . . is supported by a preponderance of the evidence," and explicitly allows only OPM or the employing agency to review "whether the suitability action taken is appropriate." See 5 C.F.R. § 731.501(b). Moreover, if OPM had meant to alter the *Folio* holding or analysis, or to give the Board appellate jurisdiction over the appropriateness of a suitability action, it would have stated that explicitly. OPM, like Congress, does not "alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions - it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001).

prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service."

OPM's regulations implementing this authority for agency-initiated adverse actions are codified at 5 C.F.R. Part 752. As those regulations specify, Chapter 75's adverse action procedures do not apply to actions "taken or directed by the Office of Personnel Management under part 731 . . . of this chapter." 5 C.F.R. 752.401(b)(10); see also 5 C.F.R. § 731.203(f) ("an action to remove an appointee or an employee . . . under this part is not an action under part . . . 752 of this chapter").

Finally, although the Board made no reference to its own regulations in the *Aguzie* and *Barnes* decisions, those regulations are consistent with OPM's. They incorporate the same distinction between removals effected by employing agencies under Chapter 75 "for such cause as will promote the efficiency of the service" (5 C.F.R. § 1201.3(a)(2)), and "the disqualification of an employee or applicant because of a suitability determination" ordered by OPM or by an agency acting pursuant to authority delegated by OPM. 5 C.F.R. § 1201.3(a)(7), citing 5 C.F.R. § 731.501 (OPM

regulation granting Board jurisdiction over appeals from suitability actions).⁶

C. In the Civil Service Reform Act of 1978, Congress Ratified the Use of Separate Procedures for Directed Suitability Removals and Adverse Actions

Notwithstanding the regulatory scheme outlined above, in these cases the Board *sua sponte* suggested that the validity of the separate suitability appeals process and of OPM's regulations "is in doubt" because they allegedly "purport to carve out an exception to the Board's statutory jurisdiction under 5 U.S.C. §7513(d)." *Aguzie*, 112 M.S.P.R. at 279. The Board's suggestion collides, of course, with the well-established principle that the regulations of an agency exercising rulemaking authority delegated to it by Congress are entitled to great deference. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

It also ignores the long line of both Board and Federal Circuit precedent under which suitability removals have been adjudicated for decades. *See, e.g., Doerr v.*

⁶ The Board's jurisdiction over suitability appeals is derivative of OPM's grant of a right of appeal. Moreover, as the Federal Circuit has held, the Board is bound to its regulation and cannot amend it through adjudication: "the Board's regulation is the governing law and may not be overturned by the Board outside the procedural requirements of section 553." *Tunik v. Soc. Sec. Admin.*, 407 F. 3d 1326, 1341 (Fed. Cir. 2005).

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). See also *Kissner v. Office of Personnel Management*, 792 F.2d 133 (Fed. Cir. 1986); and *Shelton v. Office of Personnel Management*, 42 M.S.P.R. 214, 221 (1989), *aff'd*, 904 F.2d 46 (Fed. Cir. 1990) (table). These removals have not been adjudicated under the adverse action procedures set forth in Chapter 75, but rather under Title 5, Part 731 of the Code of Federal Regulations.⁷

In fact, the directed removal authority in Civil Service Rule V has long coexisted with and does not facially conflict with other directed and agency-initiated removal authorities. As the Federal Circuit has recognized, civil service rules that do not "facially conflict" with civil service statute and that have long "coexisted" with them have an independent vitality. *Lackhouse v. Merit Sys. Prot. Bd.*, 773 F.2d 313, 316 (Fed.

⁷ See generally *Shelton*, 42 M.S.P.R. at 221 (explaining that "the Board has no precedent for applying the *Douglas* case [which applies to Chapter 75 adverse actions] 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").

Cir. 1985). Congress is presumed to be aware of the existence of the Civil Service Rules in enacting statutes and, if it intends to amend or repeal them, will so indicate. *Lackhouse*, 773 F.2d at 316 n.6, 317.

Here, there is not only a lack of evidence that Congress intended to repeal Civil Service Rule V, there is affirmative evidence that Congress *ratified* it. In reauthorizing Civil Service law in the Civil Service Reform Act of 1978, Congress directed OPM to "execut[e], administer[], and enforc[e]" the existing Civil Service Rules, which would, of course, include Rule V. It further authorized OPM "to prescribe regulations and to ensure compliance with" the existing Civil Service Rules. Finally, in substituting OPM for the Civil Service Commission, it empowered OPM to regulate and control competitive examinations "subject to" the existing Civil Service Rules, including Rule V. Pub. L. No. 95-454, §§ 201(a), 906(a)(2), 92 Stat. 1111, 1119, 1121, 1224, 5 U.S.C. 1103(a)(5), 1104(b)(3), 1302(a).

"The normal assumption, where Congress amends one part of a law leaving another part unchanged, is that 'the two were designed to function as parts of an integrated whole' and each should be given 'as full a play as possible'

. . . . It is elementary that repeals by implication are not favored and are permitted only to the extent of clear repugnancy Neither chapter . . . is without function nor meaningless in light of the other. They function well as alternative procedures." *Lovshin v. Dep't of the Navy*, 767 F.2d 826, 842 (Fed. Cir. 1985) (quoting *Markham v. Cabell*, 326 U.S. 404, 411 (1945) and citing *Georgia v. Pa. R.R. Co.*, 324 U.S. 439, 456-57 (1945)). By analogy to *Lovshin*, the restriction on OPM's authority suggested in the Board's question "is a limitation of sweeping proportions If Congress intended such a major change, one would expect a clear statutory provision or at least a single specific statement by Congress to the effect that" suitability actions could no longer be used for removal actions. See *Lovshin*, 767 F.2d at 840 (citing *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 550 (1978)); accord, *Lackhouse*, 773 F.2d at 316 n.6, 317.

Thus, the notion that OPM's suitability regulations have carved out some exception to Chapter 75, is misguided. The suitability removal process is based on an independent authority that Congress intended would continue to exist alongside the process established in Chapter 75 for agency-initiated adverse actions.

The Federal Circuit's *en banc* decision in *Lovshin* provides firm support for this conclusion. In that case, the Federal Circuit held that the Board was not required to use Chapter 43's procedures to adjudicate an adverse action based on poor performance that the agency chose to bring under Chapter 75. It noted that "Chapters 43 and 75 establish separate procedural mechanisms, both of which can be used to obtain the objectives Congress sought in enacting the CSRA" and that "there is no necessary conflict in utilizing both chapters for such actions." *Lovshin*, 767 F.2d at 829. The Court reasoned that "[w]hichever action an agency chooses to pursue, it will have to comply with the procedural requirements of that Chapter." Thus, "[i]f an agency sees some advantage in pursuing performance-based action under Chapter 75, it is not inconsistent with the Act so long as the agency meets the higher burden of proof and the more difficult standard of demonstrating that the action will promote 'efficiency of the service'." 767 F.2d at 837, favorably quoting *Wells v. Harris*, 1 M.S.P.R. 208, 249 (1979), *modified in part*, *Gende v. Dep't of Justice*, 23 M.S.P.R. 604, 610 (1984), *overruled in part*, 767 F.2d at 843) (internal quotations omitted).

Thus, as in *Lovshin*, the Board's suggestion here that a suitability action *must* be adjudicated as an adverse

action, would "read into Chapter 75 a limitation which Congress expressed nowhere in the statute itself or in the legislative history." *Lovshin*, 767 F.2d at 840. It would be similarly "a limitation of sweeping proportions," given the fact that the Board has never purported to adjudicate suitability appeals as adverse action appeals. *Id.* at 840.

There is no merit to the Board's suggestion that the reasoning of *Lovshin* might not apply to suitability removal actions because 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*, 112 M.S.P.R. at 278 n.2. First, this observation fails to take cognizance of the independent statutory and regulatory bases that exist for OPM-directed suitability removals, which do, in fact, explicitly preclude the use of Chapter 75 standards for such suitability removals. But more to the point, even if it were possible to bring an OPM-initiated suitability removal action under Chapter 75 (because there was no statutory bar to doing so), the primary point of *Lovshin* is that where there exists a choice of adjudicatory procedures, it is up to the agency initiating the action to decide which one to follow. Under *Lovshin*, so long as the employee subject to Part 731 action receives all of the procedural protections

applicable to that type of action, the Board has no authority to require that it be adjudicated under Chapter 75.

Finally, in that regard, it bears noting that - on balance - Part 731 procedures are neither more nor less favorable to the employee than those provided by Chapter 75. Instead they are simply different because the underlying actions themselves are different. To be sure, in Chapter 75 appeals the Board has limited authority, under *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981), to mitigate a penalty. Yet in a suitability action the Board may weigh some of the same or similar factors prescribed by 5 C.F.R. § 731.202(c) that OPM deems pertinent to the action and relies on, such as whether the employee has been rehabilitated. It considers such factors as part of the *merits* of the suitability action (rather than as a penalty mitigating factor). See *Folio v. Dep't of Homeland Sec.*, 402 F. 3d 1350, 1353-55 (Fed. Cir. 2005).

Further, under Chapter 75 an agency may take an adverse action against one of its employees for almost any type of misconduct, provided that there is a nexus between the conduct and the efficiency of the service. Under the suitability regulations, however, OPM not only is limited by the substantive standard to "protect the integrity or

promote the efficiency of the service," but is permitted to take action and to prove facts underlying that action only for conduct specifically set forth in 5 C.F.R.

§ 731.202(b).

D. Under Civil Service Rule V, a Directed Removal Cannot be an Adverse Action, Because it is Not Initiated by the Employing Agency and Cannot be Mitigated

Finally, in suggesting that OPM's regulations have the effect of carving out an exception to the Board Chapter 75 jurisdiction, the Board has failed to appreciate that suitability procedures and adverse action procedures serve distinct purposes under Civil Service law.

As described in detail above, OPM is the agency charged with enforcing suitability requirements. Where OPM directs the removal of an employee under Civil Service Rule V, the employing agency has no alternative, because it is in receipt of a lawful order with which it "shall comply." 5 C.F.R. § 5.3(b). The employing agency's responsibility, when in receipt of an order to remove its employee, is ministerial, and is not based on its own determination that the employee's removal promotes the efficiency of the service.

For these reasons, it would make little sense to have an employing agency that did not take any suitability

action against an employee (and may not have wished to take any action) serve as a party respondent, as would be required under Chapter 75. The result would be to hold the agency responsible for defending an action it did not take, under authority and standards not bestowed upon the agency by law, and holding the agency liable if it does not prevail.

Similarly, if an employing agency takes an adverse action, "penalty determinations are 'judgment calls' within the discretion of the employing agency," as "'the employing (and not the reviewing) agency is in the best position to judge the impact of employee misconduct upon the operations of the agency.'" *Lachance v. Devall*, 178 F.3d 1246, 1251 (Fed. Cir. 1999) (quoting *Beard v. Gen. Serv. Admin.*, 801 F.2d 1318, 1321-22 (Fed. Cir. 1986)). By contrast, in directing an employee's removal, OPM gives an employing agency no discretion to tailor a penalty to the agency's unique operational circumstances. Rather, the agency must remove its employee or face sanctions; OPM may certify the Agency's failure to remove the employee to the Comptroller General, and the employee is not entitled to be paid. Civil Service Rule V, 5 C.F.R. § 5.3(c). Moreover, OPM's implementing regulation in 5 C.F.R. § 731.203(a) provides the employing agency no alternative "penalty" that is

consistent with continued employment; the only other suitability actions prescribed by regulation serve to prevent the employment of a disqualified applicant or employee following his nonselection or removal. See 5 C.F.R. §§ 731.203(a)(1), (3), (4) (authorizing cancellation of eligibilities on registers and certificates, cancellation of reinstatement eligibilities, and debarments from examination and appointment).

Just as Civil Service Rule V recognizes that OPM's interest as a regulatory enforcement agency does not necessarily correspond with the employing agency's management interest, OPM's suitability regulations likewise reflect the distinction between OPM's and the employing agency's interest by giving the employing agency an opportunity to respond in opposition to suitability charges brought by OPM. 5 C.F.R. § 731.303(b). The Board's suggestion - that OPM-initiated suitability appeals must be adjudicated under Chapter 75 - obliterates these distinctions, and should not be adopted.

E. The Remedies of Debarment and Cancellation of Eligibilities Would Not Be Available Under Chapter 75

The Board's second question concerned whether debarment and cancellation of eligibilities would be

available if it adjudicated OPM-initiated suitability actions under Chapter 75. The Board has authority to adjudicate debarment and cancellation of eligibilities only because OPM has conferred jurisdiction upon it to do so under Part 731. If the Board deems this case to be a Chapter 75 action, of course, it may not reach issues not reposed in it under Chapter 75.

As noted *infra*, OPM's suitability regulations give the Board appellate jurisdiction over OPM's final action in a suitability case so that the Board may review the appropriateness of the underlying disqualification. OPM's regulations do not allow the Board to review the appropriateness of the choice of removal rather than some other suitability action. OPM's exercise of discretion to take multiple examination-related suitability actions in concert with a directed removal does not thereby create a multiplicity of appealable claims.

CONCLUSION

For the reasons stated 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.

Respectfully submitted,



Elaine Kaplan
General Counsel



Steven E. Abow
Assistant General Counsel
for Merit Systems and
Accountability



Darlene M. Carr
Agency Representative
Office of the General Counsel



Robert J. Girouard
Agency Representative
Office of the General Counsel

Enclosure: certificate of service