

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

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:
HYGINUS U. AGUZIE, :
JENEE HUNT-O'NEAL :
JAMES A. SCOTT :
HOLLEY C. BARNES, : Docket Nos.
: DC-0731-09-0261-R-1
Appellants, : AT-0731-09-0240-I-1
: CH-0731-09-0578-I-1
v. : DC-0731-09-0260-R-1
:
OFFICE OF PERSONNEL MANAGEMENT, :
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Agency. :
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Howard T. Markey
National Courts Building
United States Court
of Federal Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439
Monday, October 18, 2010

THE ORAL ARGUMENT in the above-entitled matter commenced
at 10:03 a.m., pursuant to notice.

APPEARANCES:

Merit Systems Protection Board Members:

SUSAN TSUI GRUNDMANN, CHAIRMAN

ANNE WAGNER, VICE CHAIRMAN

MARY ROSE, MEMBER

On Behalf of the Appellant:

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JEFFREY G. LETTS, ESQ.

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On Behalf of the Agency:

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Amicus Curiae:

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Amicus Curiae NTEU

ANDY GRAJALES, ESQ.

Amicus Curiae AFGE

GREGG AVITABILE, ESQ.

Amicus Curiae Department
of the Treasury

1 PROCEEDINGS

2 THE CLERK: Please be seated.

3 MS. TSUI GRUNDMANN: Good morning. We're on the
4 record.

5 The U.S. Merit Systems Protection Board will now
6 hear oral argument in the cases of Aguzie, Barnes, Scott, and
7 Hunt-O'Neal versus the Office of Personnel Management, MSPB
8 Docket Numbers DC-731-09-260 and 261-R-I-1; CH-731-09-0578-I-
9 1, and AT-731-09-024-I-1.

10 This hearing is conducted pursuant to 5 CFR
11 1201.117(a)2.

12 Here today is the full Board of the MSPB, Vice
13 Chair Ann Wagner, Member Mary Rose, and myself, Susan Tsui
14 Grundmann, the Chairman presiding.

15 As a result of briefing by the parties, it is
16 undisputed that all the Appellants, with the possible
17 exception of Appellant Hunt-O'Neal, are tenured employees, as
18 defined in 5 USC 7511(a)1.

19 OPM has objected to the consolidation of the appeal
20 of Appellant Hunt-O'Neal as the issue of whether she is an
21 employee under the statute is unresolved.

22 We further note that Appellant Scott has objected

1 to the consolidation of his appeal in this oral argument.

2 The parties are represented by counsel. Counsel of
3 the Board will hear first from Mr. Kaplan on behalf of
4 Appellant Barnes.

5 Good morning, Mr. Kaplan.

6 MR. KAPLAN: Good morning, Madame Chairman. And
7 may it please the Board.

8 I'd like to address three issues this morning. The
9 first issue will be related to express statutory authority
10 granted to OPM to direct the actions at issue here.

11 The second will be the Board's jurisdiction of the
12 debarment and cancellation of eligibilities issue.

13 And thirdly, I'd like to address the remedy in this
14 case.

15 Most of the briefings below have addressed the
16 express statutory language of 5 USC Chapter 74, Subchapter 2.

17 But I believe the primary focus of the Board, and the
18 starting place must be with the statutory authority that OPM
19 claims it has to undergird the regulations at issue here, and
20 to direct the actions that it took here.

21 And when we look at 5 CFR 731, OPM states that it's
22 authority emanates from 5 USC 3301.

1 So let's take a look at that statute.

2 Under 5 USC 3301, there are two relevant
3 provisions:

4 Provision No. 1 is that the President may prescribe
5 such regulations for admission of individuals into the Civil
6 Service. This case is not about admissions of individuals
7 into the Civil Service.

8 Non-probationers have already been admitted.
9 They've been hired, they have passed the examination process,
10 which is also a part of the probationary process. They're
11 past that part.

12 Appellant Barnes was more than two years into her
13 employment. So this --

14 MS. TSUI GRUNDMANN: Wouldn't you, in some cases --
15 and I don't know if it would be the Barnes case -- does it
16 not make more sense to give OPM a longer period of time to do
17 that suitability evaluation?

18 For instance, in particular one of the cases that
19 we're hearing today, we had an Appellant who had on three
20 occasions over a one-year period, offered confusing,
21 misleading statements to OPM in response to questions that
22 OPM posed.

1 So it would take longer than a year.

2 MR. KAPLAN: Madame Chairman, if it takes longer
3 than a year, if OPM, whether because of staffing, budgeting
4 inefficiencies, or whatever, cannot undertake the examination
5 process within that probationary period, then the fix is not
6 with the Merit Systems Protection Board.

7 OPM needs to go to the Office of Management and
8 Budget, or it needs to go to the Congress. But it's not for
9 the Board to rewrite the statute to give OPM authority it
10 doesn't have.

11 Now going back to 3301 --

12 MS. WAGNER: But isn't it true that it's, when you
13 talk about 3301 being focused on admission, it's admission
14 subject to investigation.

15 Is it not?

16 MR. KAPLAN: The actual statutory language just
17 says, "Prescribe such regulations for admission of
18 individuals into the Civil Service."

19 We're no longer talking about admission. These
20 words have to be given their plain meaning.

21 MS. WAGNER: But if OPM in issuing regulations, has
22 said that these are appointments subject to investigation,

1 and the investigation isn't completed yet, how can you say
2 that this is still not part of the admission process?

3 MR. KAPLAN: Well, because I figure it stands the
4 plain meaning on its head.

5 And then the other thing it would do, it would turn
6 the entire meaning of probationary period on its head and
7 make it illusory.

8 You could then claim that OPM could take a year,
9 what five years, ten years, 15 years, in order to take this
10 examination process.

11 Someone on the verge of retirement could be subject
12 to unsuitability for something that happened 29 years ago? I
13 don't think so.

14 And I don't think that could be consistent with the
15 plain meaning of the statute.

16 MS. TSUI GRUNDMANN: But if it goes to the heart of
17 federal employee overall, how can you deprive OPM of that
18 authority?

19 MR. KAPLAN: I don't deprive OPM of the authority.
20 I'm not the source of their authority. The Board's not the
21 source of OPM's authority.

22 It is the Congress that is the source of OPM's

1 authority. And it's from the Congress that OPM needs to go,
2 if it needs this authority that it presently doesn't have in
3 statute.

4 VICE CHAIRMAN WAGNER: But Congress hasn't said
5 that OPM has a limited period of time, under 3301, to conduct
6 a suitability investigation. Has it?

7 MR. KAPLAN: Well, that issue put that way has
8 never been addressed.

9 But what Congress has done is set the probationary
10 period for employees, and then said what appeal rights those
11 employees have.

12 CHAIRMAN TSUI GRUNDMANN: Wait. Congress has set
13 the probationary period at one year?

14 MR. KAPLAN: I believe that's correct. Yes. And
15 then for excepted-service employees, two years, of course.

16 The other provision in 3301 is that OPM has the
17 ability to ascertain the fitness of applicants.

18 Again, using just plain language, the plain
19 meaning, non-probationers are not applicants, if they've
20 through that process, if they've through the examination
21 process.

22 So I don't think there's any way that 3301 can be

1 read to give OPM statutory authority.

2 And I think the proof of that, if I may, is in
3 OPM's rebuttal brief to that argument. If you look at page 6
4 of OPM's September 22nd supplemental reply brief, it does not
5 contradict the argument we made that 3301 deals with the
6 application in the admission process.

7 Instead, what does OPM say? It says, "Oh, there
8 are two other statutes that we rely on for our authority.
9 3301 is not the sole."

10 And on page 6, the bottom, they say, "These
11 regulations are also authorized by delegations under 5 USC
12 7301 and 5 USC 1302."

13 Well, let us turn to those briefly. 5 USC 7301
14 allows the President to prescribe regulations for the conduct
15 of employees in the executive branch. And it's very clear,
16 when we look at the types of regulations that have been
17 passed, pursuant to that statutory authority, that we're
18 talking about what happens day to day on the job.

19 So regulations about the drug use, regulations
20 about government ethics, financial disclosures, those sorts
21 of things, that's what 7301 deals with.

22 It's unavailing to OPM as authority to direct

1 employees to be removed for unsuitability.

2 And the last statutory provision they cite is 5 USC
3 1302. And again, that gives OPM the right to issue
4 regulations concerning examinations for competitive service.

5 And as we've already discussed, this is not about
6 examination. That examination ended when Ms. Barnes'
7 probationary period ended.

8 CHAIRMAN TSUI GRUNDMANN: But doesn't the
9 examination begin anew every time, perhaps, an employee
10 applies for another position in federal government?

11 MR. KAPLAN: I don't believe so, because the
12 holding of the Federal Circuit has been that once an employee
13 satisfies the probationary period, that the employee into the
14 competitive service, the employee need not satisfy another
15 one, which I believe means: Once the examination is over,
16 the examination is over.

17 And then what the employee is left with is the
18 adverse action rights under 5 USC Chapter 75.

19 I may also add --

20 CHAIRMAN TSUI GRUNDMANN: Let me ask you a question
21 about case law.

22 MR. KAPLAN: Sure.

1 CHAIRMAN TSUI GRUNDMANN: Because I mean, both
2 parties cite the Folio case. And OPM specifically cites that
3 Congress granted OPM the authority to define the scope of the
4 Board's authority.

5 So the Appellants argue consistently that Folio
6 doesn't apply because Folio was an applicant and not a
7 tenured employee.

8 But the Court never makes that distinction in its
9 case. So other than the fact that Folio was an applicant,
10 why shouldn't we view Folio as controlling?

11 MR. KAPLAN: Because Folio would only apply to
12 OPM's grant to Board jurisdiction, where the Board doesn't
13 otherwise have jurisdiction.

14 And there are many places where that happens.
15 Removals for pre-employment reasons, OPM has granted the
16 Board that type of jurisdiction, but OPM didn't have to.

17 So that that would be our response there.

18 So what we have here is: There is no express
19 statutory authority, allowing OPM to direct employees to
20 remove non-probationers.

21 But in contrast to that, we have specific express
22 statutory language regarding the rights of non-probationer

1 Appellants. And that, of course, is Chapter 75, Subchapter
2 2.

3 And what I would like to point out is that in
4 Section 7512, Congress demonstrated its ability to carve out
5 certain removals from the Chapter 75 process, when it wanted
6 to.

7 It carved out, for examples, removals under 7532,
8 for national security. It carved out separations for
9 reduction in force. It --

10 CHAIRMAN TSUI GRUNDMANN: Let's say we agree with
11 you, all right?

12 So apart from Chapter 75, let's take it one step
13 further. Is there any legislative history that Congress
14 intended to limit OPM's suitability --

15 MR. KAPLAN: There is. And I believe Ms. Alden is
16 going to discuss that, because she raised that in her brief.
17 So I would like to leave it to her.

18 But the answer is that yes, there is.

19 CHAIRMAN TSUI GRUNDMANN: Okay.

20 VICE CHAIRMAN WAGNER: Good. Mr. Kaplan, under
21 7513, Congress gave OPM regulatory authority to implement,
22 according to OPM, Chapter 75, and to, according to OPM,

1 define what actions are covered by 7512.

2 Do you agree with that?

3 MR. KAPLAN: Well, I certainly don't agree that OPM
4 has the authority to, by regulation, determine what is a
5 covered action. That's covered by statute.

6 Where the OPM has the ability due to by regulation
7 -- and it has -- is to tell the agencies what must be done,
8 say in the oral reply stage.

9 So for example, OPM can talk about, if it's not
10 within statute, the length of time an employee has to be
11 given for reply.

12 OPM's regulations state that there must be a record
13 of the oral and written reply, and that must be provided to
14 the Appellant and to the Board.

15 Those are the types of procedural regulations that
16 OPM can promulgate under that authority.

17 What the OPM cannot do is promulgate substantive
18 regulations curtailing the jurisdiction of the Board.

19 VICE CHAIRMAN WAGNER: But if you accept OPM's
20 premise that there's ambiguity with regard to what removal
21 is, under Chapter 75, would OPM then have the authority to
22 issue regulations to define, to delineate and resolve the

1 ambiguity?

2 MR. KAPLAN: The problem with that question, Vice
3 Chairman Wagner, is it's a premise that's important to
4 accept. You can't accept the premise that the term of
5 removal is ambiguous under the statute.

6 It's clearly not.

7 I'd like to turn, if I may, very, very quickly, to
8 one issue which has been almost totally ignored, I believe,
9 in the briefings, but was noted in the remand in Aguzie.

10 And that is: Does the Board have jurisdiction over the
11 debarment and the cancellation of eligibilities?

12 And I would just state, quite briefly, that under
13 the unified penalty theory, that the Board does retain
14 jurisdiction. The federal circuit, in Brewer v. American
15 Battle Monuments Commission, clearly states that when the
16 Agency takes more than one action, it's called a combined
17 penalty.

18 It's what the federal circuit calls it. And when
19 that happens, and at least one of them is an adverse action,
20 then the Board has jurisdiction to review all components of
21 that penalty, in order to determine if it was an appropriate
22 remedy.

1 And in Brewer, the Agency not only reduced the
2 employee in grade, but also reassigned the employee.

3 And the federal circuit held that the Board could
4 also look at the reassignment component of the penalty as
5 part of the penalty determination.

6 CHAIRMAN TSUI GRUNDMANN: But it wasn't a
7 suitability case?

8 MR. KAPLAN: It was not a suitability case. That's
9 clear.

10 And then the last thing I'd like to turn to is the
11 issue of remedy in this case. Because the remedy in this
12 case is not to remand this case to an administrative judge
13 for application of the Douglas Factors to the penalty
14 determination.

15 Rather, the remedy in this case is to vacate the
16 removal and to reinstate the Appellants. Now why do I say
17 this?

18 As a non-probationer, Ms. Barnes is entitled to a
19 constitutionally required pre-termination hearing. That pre-
20 termination hearing concerns not just the facts which gave
21 rise go the issue, but also to the penalty determination
22 itself.

1 And we learned this from Cleveland Board of
2 Education versus Loudermill. And Justice White in that case,
3 writing a near-unanimous Supreme Court, said the following.
4 This is at 105 Supreme Court 1494.

5 CHAIRMAN TSUI GRUNDMANN: Let's talk about
6 Loudermill for a second.

7 MR. KAPLAN: Yes.

8 CHAIRMAN TSUI GRUNDMANN: I mean, it talks about
9 basic due process. And we understand that.

10 But doesn't OPM's suitability regulations -- I'm
11 thinking Subpart C -- don't they provide for basic due
12 process built into the regulations themselves? Thirty days'
13 notice, reasonable time to respond, review of the record,
14 access to employee representation, and a written decision,
15 which is appealable to the Board?

16 MR. KAPLAN: I'm in my rebuttal time, but I
17 certainly will answer the question.

18 CHAIRMAN TSUI GRUNDMANN: Please.

19 MR. KAPLAN: And the answer is no, if we look at
20 Loudermill. And this is what Justice White said in
21 Loudermill:

22 Even where the facts are clear, the appropriateness

1 or necessity of the discharge may not be. In such cases, the
2 only meaningful opportunity to invoke the discretion of the
3 decision-maker is likely to be before the termination takes
4 effect.

5 And in this case with respect to non-probationer,
6 Ms. Barnes, she never was afforded the opportunity below to
7 address the penalty and to assuage the decision-maker as to
8 why removal would not be appropriate.

9 And that's because under OPM's regulations, the
10 penalty issue was off the table. It was not within the
11 discretion of the Agency to discuss or to have Ms. Barnes or
12 any non-probationer raise.

13 So the teaching of Loudermill is that the issue of
14 penalty determination is part of the constitutionally
15 required pretermination process. That was denied here.

16 VICE CHAIRMAN WAGNER: I've got a couple of
17 questions, and I understand that we're getting into rebuttal
18 time.

19 MR. KAPLAN: My time is your time.

20 VICE CHAIRMAN WAGNER: Okay. Okay.

21 But 5 CFR 731.501 does contemplate that OPM and the
22 Agency conceivably could mitigate a removal.

1 Doesn't that -- I mean, if, for example, on remand
2 from the Board's assessment of the suitability determination,
3 can't we assume that that contemplates the possibility that
4 OPM would, in fact, mitigate if the Board did not sustain all
5 the charges?

6 MR. KAPLAN: Well, the problem is it was the Agency
7 here that was directed to take the action. Now the Agency
8 did not have the authority to mitigate a penalty, or to say
9 to OPM, "Well, I know you're telling us to remove Ms. Barnes,
10 but we're not going to listen to you."

11 So --

12 VICE CHAIRMAN WAGNER: But you're talking about
13 Loudermill. Also the deciding official, I mean, presumably
14 the Appellant, Ms. Barnes, could have spoken with OPM to
15 discuss the penalty. I mean, are you saying that Loudermill
16 requires that the Agency be the deciding official in this
17 instance?

18 MR. KAPLAN: OPM has no statutory authority to be
19 the decision-maker in cases of non-probationary employees.

20 So the discussion should be with the Agency.
21 Because that's where the statutory authority lies.

22 VICE CHAIRMAN WAGNER: Why do you say that OPM

1 doesn't have any statutory authority?

2 MR. KAPLAN: Well, it goes back to what I was
3 stating, you know, originally, that OPM tells us right in the
4 regulation what its statutory authority is: 3301.

5 Now I went through that in detail, to indicate that
6 there is nothing in 3301 that would govern someone who's past
7 the application, past the admission process.

8 And if --

9 VICE CHAIRMAN WAGNER: But there's nothing in
10 Chapter 75 that prohibits OPM from being the Agency taking an
11 adverse action.

12 MR. KAPLAN: When it's its own employees, it's
13 certainly can --

14 VICE CHAIRMAN WAGNER: No, there's nothing in the
15 express language of that provision that limits, that defines
16 the Agency as only the employer Agency.

17 CHAIRMAN TSUI GRUNDMANN: Do you agree that OPM
18 could take a suitability action under Chapter 75?

19 MR. KAPLAN: That OPM could take a suitability
20 action under Chapter 75? No.

21 CHAIRMAN TSUI GRUNDMANN: Okay.

22 MR. KAPLAN: I do not.

1 VICE CHAIRMAN WAGNER: Just one more question.

2 Sorry.

3 MR. KAPLAN: Certainly.

4 VICE CHAIRMAN WAGNER: In your briefs, I mean, I
5 know you haven't addressed it here. But you do make the
6 argument, and spend some time making the argument, that the
7 Board should invalidate OPM's regulations in this regard.

8 What would be the basis of our authority to do
9 that?

10 MR. KAPLAN: Well, of course, under 7701(b)3, I
11 believe it is, and also under 5 USC 1204, OPM has different
12 statutory authorities to invalidate OPM regulations.

13 I would also state that it's inherent within the
14 Board's authority in ruling on whether or not a regulation is
15 consistent with a statute, to hold that it's not. And
16 therefore it's of no effect.

17 VICE CHAIRMAN WAGNER: But the Board's authority to
18 invalidate OPM regulations is specific. And in terms of if
19 there's a, you know, prohibited personnel practice, or if
20 it's an employment practice that's deemed to illegal.

21 But what you're talking about is something more in
22 the nature of an APA -- type of analysis. And I just would

1 like to know what basis we would have to invalidate an OPM
2 regulation on that ground?

3 MR. KAPLAN: Well, I think you could certainly
4 state that it violates Merit System principles to remove
5 employees in violation of their statutory rights.

6 I mean, one of the bases for MSPB review of Agency
7 actions is whether or not it constitutes a prohibited
8 personnel practice. That's part of the process.

9 And in fact, when you look at -- I know we're
10 getting way ahead of ourselves -- but when we look at like
11 Allen criteria for reimbursement of attorney fees, one of the
12 things we look at is whether or not the Agency's action was
13 invalid because it violated prohibited personnel practice.

14 So that I believe is how it would implicate the
15 Board's jurisdiction here.

16 CHAIRMAN TSUI GRUNDMANN: We'll give you two extra
17 minutes. I know you'll have something to say after Ms.
18 Alden.

19 MR. KAPLAN: Thank you very much.

20 CHAIRMAN TSUI GRUNDMANN: That's two minutes, MP
21 clerk.

22 THE CLERK: Next up, for Appellant Hunt-O'Neal,

1 Ms. Alden.

2 CHAIRMAN TSUI GRUNDMANN: Good morning.

3 MS. ALDEN: Good morning.

4 May it please the Board, I'm Kristin Alden. I
5 represent Appellant Hunt-O'Neal.

6 I'd like to start with responding to two questions
7 that you asked a few moments ago. And they're interrelated
8 actually.

9 They are whether or not Congress provided any
10 guidance in its legislative history on the point at issue;
11 and whether OPM can take removal actions under Chapter 75 for
12 non-probationary employees.

13 And the legislative history is very helpful in this
14 regard. In at least three ways the legislative history
15 speaks directly to us.

16 The first is that when Congress enacted the Reform
17 Act, it explicitly considered and referenced suitability
18 actions. We concede, as OPM focuses a lot, that the statute
19 itself is silent on suitability.

20 But the legislative history is not. The
21 legislative history explicitly discusses suitability actions
22 within the phrase of adverse actions.

1 It considers a suitability action to be an adverse
2 action.

3 Although we raise this in our brief, OPM did not
4 rebut it all in their counterbrief.

5 Second, we point to adverse actions within Chapter
6 75, and 7511, and the legislative history specifically says
7 that "Any such action where the basis of the Agency action is
8 misconduct or any other cause besides unacceptable
9 performance, is covered under Chapter 75."

10 It's very clear.

11 Chapter 75 includes removals. There is no other
12 place in the statute where removals are referenced.

13 So going back to your question, then, of "Does OPM
14 have authority to take removals under Chapter 75?" The
15 answer is: Only of its own employees.

16 OPM does not have authority to use the suitability
17 mechanism to direct another Agency to fire a tenured
18 employee.

19 VICE CHAIRMAN WAGNER: Well, break that down a
20 little bit, because I'm not following the logic there. The
21 language of 7513 on its face talks about an Agency taking
22 public action.

1 Correct?

2 MS. ALDEN: Yes.

3 VICE CHAIRMAN WAGNER: Where does it say that the
4 Agency has to be the employer Agency?

5 Now I'm not talking about whether a, you know,
6 tenured employees or not. I'm just talking about, you know,
7 this idea that OPM is sort of the uber agency couldn't, you
8 know, take an action that's covered under Chapter 75.

9 MS. ALDEN: I appreciate the phrase of OPM as the
10 uber agency. And I think that's a very important thing to
11 keep in mind.

12 The statute does not exclude OPM from having that
13 authority. However, we go back to the legislative history.
14 The legislative history is very helpful in this.

15 And this is actually not in our brief.

16 But the legislative history talks on the
17 decentralization of the Civil Service reform process. It
18 talks about the goal of the Act was to decentralize the
19 government's personnel functions and eliminate unnecessary
20 bureaucratic procedures with its agencies meeting their own
21 needs under general OPM guidance.

22 That's not my language. That's the language from

1 the legislative history.

2 The legislative history provides that individual
3 personnel actions will be delegated to departments and
4 agencies.

5 So although the statute --

6 VICE CHAIRMAN WAGNER: "Will be delegated." Which
7 means that it's resided in the first instance with whom?

8 MS. ALDEN: Prior to the Civil Service Reform Act,
9 OPM had the authority to do the suitability determinations.
10 But following the Civil Service Reform Act, for non-
11 probationary employees, OPM no longer has authority.

12 CHAIRMAN TSUI GRUNDMANN: So you're saying OPM can
13 never remove an employee post a tenured employee.

14 MS. ALDEN: For suitability.

15 CHAIRMAN TSUI GRUNDMANN: For suitability reasons.

16 MS. ALDEN: Correct. I think the mechanism
17 provided --

18 CHAIRMAN TSUI GRUNDMANN: Never, never, never?

19 MS. ALDEN: Even following OPM's own regulations
20 now, I think the mechanism to be consistent with Act, is that
21 OPM may tell the Agency, "We have a problem with this
22 individual's suitability."

1 And then the Agency can make a determination on
2 their own.

3 CHAIRMAN TSUI GRUNDMANN: But if you go back to
4 Rule 5 and the early rules that predate the CSRA, there is a
5 mechanism built in, if the Agency doesn't agree with OPM,
6 there is an internal mechanism. I think it goes to the
7 comptroller general, or something like that.

8 So there is some sort of anticipated conflict down
9 the road. Doesn't that process resolve the issue?

10 MS. ALDEN: I don't think that process is part of
11 the issue, actually. I think that the Civil Service Reform
12 Act resolved the issue, by saying that removals are covered
13 within Chapter 75, and if there is a removal, it includes
14 suitability-based removals.

15 So you don't need to rely upon the pre-Act
16 regulations, or the pre-Act executive orders. They were
17 superseded by the statute.

18 So we don't have that process any more, for tenured
19 employees.

20 I think that the legislative history also helps us
21 out on this point, because it discusses that the goal of the
22 Civil Service Reform Act was to have OPM be able to

1 concentrate its efforts on planning and administering an
2 effective government-wide program, and not to focus on: OPM
3 is to act "without the demands generated by a heavy day-to-
4 day workload of individual personnel actions.

5 "OPM should provide the President, the Civil
6 Service, and the Nation with an imaginative public personnel
7 administration."

8 And this is the Senate Committee Report at 1470.

9 The legislative history clearly articulates that
10 OPM's not to be bogged down with the day-to-day workload of
11 individual personnel actions.

12 I think that goes directly to the Chairman's
13 earlier question about "Does Chapter 75 give OPM permission?"

14 I don't think the key point is whether or not the
15 statute says Agency shall include or shall not include OPM.
16 I think the legislative history clearly articulates that OPM
17 was designed to be an oversight Agency, giving the individual
18 agencies guidance on how to perform their functions.

19 These interpretations of the Act are actually borne
20 out considerably in OPM's own arguments in their briefs.

21 OPM offers that the Civil Service Reform Act
22 intended to identify and create three separate and distinct

1 tracts for adverse actions. Or that's what their argument
2 says.

3 Now we know that there's Chapter 75 for conduct-
4 based actions. There's Chapter 43 for performance-based
5 actions. And that's what the Act provides.

6 OPM would have us believe that there is Section 31,
7 an additional separate confluence and grouping of rules and
8 regulations that apply in only certain circumstances, and
9 that all of these regulations have the full force and effect
10 and authority as the statute.

11 But if Congress had intended that, Congress would
12 have had a separate Chapter. If Congress had intended
13 conduct actions, performance actions, and suitability actions
14 to each have their own separate set of standards and review,
15 it could have done that, it would have done that.

16 VICE CHAIRMAN WAGNER: Pragmatically speaking, I'm
17 having a hard time a little bit here, because even if 5 CFR
18 731 was the basis for the decision to remove the employee,
19 the fact is, is that even with that, the question to me is:
20 Do we still have to follow Chapter 77 procedures?

21 Right?

22 I mean, does it -- I mean, what's the ultimate

1 difference between it, if it's a Chapter, you know, 5 CFR 731
2 action or a Chapter 75 action, if in either instance -- and I
3 believe that OPM has conceded this, you know, repeatedly in
4 its brief -- that wherever it starts out, we end up at
5 Chapter 7701, with the Board's procedures?

6 And then the question become whether OPM can tell
7 the Board how to carry out its statutory appellate functions
8 under Chapter 7701.

9 CHAIRMAN TSUI GRUNDMANN: And I think that's the
10 real issue.

11 VICE CHAIRMAN WAGNER: So what difference does it
12 make whether we call it a removal under Chapter 75, or a
13 removal, you know, a suitability removal under 731?

14 MS. ALDEN: I think there's two answers to that:

15 The first is Loudermill, as Mr. Kaplan already
16 explained, and an employee's pretermination right to make
17 their presentation;

18 And the second is the statutory authority that the
19 Board has now to review the ultimate penalty determination.
20 Because the OPM regs, as they stand, they don't give the
21 Board that authority. They deprive the Board of that
22 authority.

1 But that authority is provided to the Board by the
2 statute.

3 CHAIRMAN TSUI GRUNDMANN: Let's talk about
4 debarment and that area is interesting.

5 Let's say we find that we have the authority to
6 review the removal under 75. And we find that the removal is
7 unreasonable. Do we then have the ability to mitigate or
8 reverse a disbarment or a cancellation of eligibility, or to
9 mitigate either one of them?

10 Is that part of the remedy?

11 MS. ALDEN: In your exact question, yes. Where the
12 removal is accompanied by debarment or cancellation of
13 eligibilities, yes. Because they fall under a unified
14 penalty arising out of the set of circumstances for which the
15 Appellant was initially found culpable.

16 And that's the language that the Federal Circuit
17 uses in Brewer.

18 However, I would say that if it is just a debarment
19 or a cancellation of eligibilities, not accompanied by a
20 removal, then it would not, because those are not adverse
21 actions under Chapter 75.

22 CHAIRMAN TSUI GRUNDMANN: But Mr. Kaplan also

1 argued that the remedy in this case would be to restore the
2 employee, regardless of those two.

3 Do you agree with that?

4 MS. ALDEN: For me, this case is Ms. Hunt-O'Neal,
5 and I believe it has to be remanded for determination as to
6 whether or not she was probationary at the time.

7 Assuming she was not probationary, assuming Ms.
8 Hunt-O'Neal was a tenured employee, and matches up with the
9 other three Appellants, I believe that because OPM acted
10 after the employees were tenured, OPM did not have authority
11 to order their removal. And therefore the removal actions
12 themselves are a violation and have to rescinded.

13 OPM can then go back and advise the Agency, the
14 individual employing agencies, "We have suitability issues,
15 we are concerned," and the Agency gets to do the entire pre-
16 termination evaluation.

17 VICE CHAIRMAN WAGNER: I'd like to go back to the
18 Loudermill point that you made. Again, the question that I
19 posed to Mr. Kaplan.

20 You know, Loudermill obviously, you know, the whole
21 case is contingent on the existence of a property right,
22 which is in the case of federal employment, premised on a

1 legitimate expectation of continued employment.

2 How can you say that such a property right even
3 exists, if the employee is, you know, in an appointment
4 that's subject to an investigation that hasn't been completed
5 yet?

6 So how does Loudermill even get implicated in this?

7 MS. ALDEN: I hope I'm answering your question.

8 I think the problem with Loudermill and using it to
9 answer all the questions that we have in these cases is that
10 Loudermill made the assumption that the regulations were
11 appropriate in their totality. And we argue that OPM's
12 regulations, in part, are void.

13 Loudermill relied upon those void regulations. It
14 didn't consider whether or not they were legitimate. And I
15 think when you look at the validity of OPM's regulations,
16 that's where we distinguish ourselves from Loudermill.

17 VICE CHAIRMAN WAGNER: Well, Loudermill is
18 basically premised on the idea that the statute under Chapter
19 75 creates a -- because there's a for-cause formulation with
20 regards to termination, that that creates a legitimate
21 expectation of continued employee, absent just cause for
22 removal; that without that sort of legitimate expectation,

1 there is no property interest.

2 And I'm just wondering, how do you get to the
3 expectation of continued employee, if you've been appointed
4 subject to investigation, and the investigation hasn't been
5 completed yet?

6 MS. ALDEN: I think the question assumes that all
7 employees are probationary forever. The statute clearly
8 identifies that you do have the property interest in your job
9 in competitive service after a year.

10 And to read Loudermill that way would negate the
11 probationary period, and the fact that tenure does attach
12 after a year.

13 OPM cannot have free-reign to terminate an employee
14 five, ten, 15, 20 years into their employment, because of
15 something that happened pre-employment as part of the
16 suitability determination.

17 I think that really --

18 CHAIRMAN TSUI GRUNDMANN: The Scott case actually
19 terminated -- he was actually terminated as a result of
20 something he did after his employment, which was fill out
21 another application for his wife, this time.

22 MS. ALDEN: And we're not saying the government

1 doesn't have the authority to remove him upon that, if the
2 government feels that it's appropriate.

3 But OPM does not have that authority. The
4 employing Agency has the authority. And they can do it
5 either as a suitability action, or as a conduct action.

6 CHAIRMAN TSUI GRUNDMANN: Would you like another
7 two minutes -- two more minutes.

8 CHAIRMAN TSUI GRUNDMANN: On behalf of Appellant
9 Scott, Mr. Letts.

10 MR. LETTS: May it please the Board, my name is
11 Jeff Letts. I'm representing James Scott. And I'd be happy
12 to entertain any questions on Appellant Scott that come up.

13 But I'd also like to talk about the issue of
14 Loudermill and due process, in terms of the attachment of
15 their property rights.

16 It is our argument and my argument that when they
17 do complete the probationary period, there is the expectation
18 of continued employee.

19 As I think the co-counsel talked about in the
20 initial argument that, you know, this would allow them to
21 keep that open for five years, ten years, 15 years, I don't
22 know that was ever the intent of Congress.

1 What Congress did in Chapter 75 was talk about, you
2 know, who is an employee? There's no question. These three
3 to four employee meet that definition.

4 Then the issue is: Is it a removal under 7512?
5 That is clearly what the action is. We've documented that in
6 at least Appellant Scott's case. In the Agency Exhibit 2(a),
7 there's an SF-50. Under 5(b) it says "Nature of Action:
8 Removal." So to -- that.

9 And then your 715 13 7513 appeal rights attach.
10 And what our concern is in terms of the due process and why
11 these cases should be overturned in their entirety, is that
12 if the deciding official didn't undertake a question on
13 whether this action promotes the efficiency of the service,
14 then to me, their opportunity to respond is meaningless.

15 And that's what the Board has in front of it to
16 determine under B(2) the response that it does, in fact
17 promote the efficiency of the service. Clearly the deciding
18 official for the Agency has to have that same language.

19 And --

20 CHAIRMAN TSUI GRUNDMANN: What do you think about
21 the additional qualifications OPM puts in their regulation,
22 which is to protect the integrity, or the efficiency of

1 service?

2 Is it the same in your mind?

3 MR. LETTS: Well, no. And I actually, in my brief
4 (laughing) -- and it's not before the Court today -- I think
5 the extent of language on that. I think part of that is
6 actually unconstitutional, which I've argued in the prior
7 brief.

8 But I don't think so. I think what we're looking
9 at here under -- 75 rights go to the employee.

10 CHAIRMAN TSUI GRUNDMANN: It's just the efficiency
11 of service.

12 MR. LETTS: Yeah.

13 CHAIRMAN TSUI GRUNDMANN: Nothing else.

14 MR. LETTS: Exactly. And I think that goes back to
15 the legislative history. You could look at that, when that
16 issue ever comes up.

17 But those 75 rights go to the employee. And once
18 you get that one year in, the Agency has had the opportunity
19 every day to look at these people, to make an assessment.

20 Is this a person who wasn't coming into work again
21 tomorrow?

22 VICE CHAIRMAN WAGNER: What is actually the

1 process? Because under OPM regs?

2 MR. LETTS: Mm-hmm.

3 VICE CHAIRMAN WAGNER: Under 501, it does appear
4 that the -- and that's right in Chapter 731 -- that the
5 Appellant, the employee does have an opportunity to respond
6 to OPM's suitability determination.

7 And so is it your argument that because it's not to
8 the Agency official, that somehow Loudermill is being -- you
9 know, that the rights under the constitutional due process
10 are being violated?

11 MR. LETTS: I would make two arguments there. One,
12 when it goes to OPM, and you know, the response does go to an
13 OPM suitability official, not an Agency -- and in my case was
14 DFAS, Defense Finance and Accounting -- they're not viewing
15 this action on whether the action promotes the efficiency of
16 the service.

17 And that is what's required under 7513(a). So if
18 they didn't even use that framework in that bar, then to me,
19 the response is meaningless.

20 So, (a) they should have done that. And I don't
21 think they will contest that they didn't. They didn't think
22 they had to, they didn't think 75 applied in this case.

1 And then (b), I think it should be an Agency
2 official, because the Fed Circuit in Lachance v Devall talked
3 about that the efficiency of the service is best determined
4 by the employing Agency.

5 That's a '99 case, where they acknowledge that
6 because you've had the opportunity day in and day out -- and
7 in the case of Mr. Scott, it was well over two years, and as
8 was just pointed out by the Chair, it was for post-employment
9 an issue -- that they didn't want to lose this guy.

10 Scott -- 16. The administrator talked about what a
11 good employee, how popular he was, how his bosses liked him.

12 All those sort of things --

13 CHAIRMAN TSUI GRUNDMANN: Yeah. But if you're
14 going to get into the details of the case, there was a
15 determination made that what he did was dishonest.

16 I mean, he embellished his wife's record. He
17 copied wholesale out of the DFAS vacancy announcement.

18 So that inherently makes him -- you can't trust him
19 anymore. And that goes to the heart of his employment, as
20 OPM argues, not just as being a DFAS employee.

21 MR. LETTS: But if that is the determination, that
22 should have been a determination of DFAS. That should have

1 been their determination.

2 And it wasn't their determination. Everybody at
3 DFAS thought the guy was terrific. He's retired Army, he's a
4 terrific guy.

5 So that's a DFAS determination, not OPM.

6 When he got through that first year, it's a 75
7 action, it's a Chapter 75 action. It's a Chapter 75 action.

8 And he gets the efficiency of the service issue, which was
9 not present here.

10 And that's why I think the case should be
11 overturned is that because they never even considered it
12 under that frame that it's efficiency of the service. They
13 didn't think they had to.

14 And I also argue, under, well Lachance v Devall,
15 that it should have been the employing Agency to make that
16 call.

17 And that Agency did not make that call. They
18 absolutely did not. There is no person in DFAS who wanted
19 this gentleman gone. They all wanted him to stay.

20 Day in and day out, he did a great job for them.

21 So to me, that's where OPM, you know, sitting afar
22 as the uber agency that we've talked about, they don't know

1 these people.

2 You know, the whole point of the probationary
3 period is an Agency has the opportunity eight hours a day for
4 a year to look at this person and say, "Is this the person
5 that we trust? Do we trust their judgment, their capability,
6 their skills?"

7 And DFAS said, "Yes, we trust him." And they still
8 trust him to this day.

9 VICE CHAIRMAN WAGNER: But what if the information
10 -- let's say OPM was efficient and expedient in carrying out
11 its suitability assessments. But just by virtue of the
12 perhaps some, you know, effort by the Appellant -- I'm not
13 saying this --

14 CHAIRMAN TSUI GRUNDMANN: This it the Barnes case.

15 VICE CHAIRMAN WAGNER: No, no. No, it's not really
16 a case.

17 But, you know, if the Appellant undertook some
18 effort to hide the information, but five years later, it
19 comes to light that there was a misrepresentation,
20 intentional misrepresentation on the SF-85 or the
21 application, are you saying that OPM cannot take, you know,
22 some suitability --

1 MR. LETTS: Yes. I'm saying that. That's a clear
2 75 action. I think the Board case law is replete with cases
3 on pre-employee misconduct.

4 That's a classic 75 --

5 CHAIRMAN TSUI GRUNDMANN: What's happening
6 throughout the investigation process, the employee started
7 work --

8 MR. LETTS: Mm-hmm --

9 CHAIRMAN TSUI GRUNDMANN: Less than a year, maybe
10 two years. But he or she is providing misleading statements
11 in response to OPM inquiries.

12 And those are after EOD date.

13 MR. LETTS: I would still argue --

14 CHAIRMAN TSUI GRUNDMANN: The employee could
15 feasibly delay the removal one year, two years. Possibly
16 further.

17 MR. LETTS: I would still take the position that
18 after your first year, it's an Agency action.

19 And like I said, the Board case law is clear. You
20 could be successful. The government's successful in removing
21 those employees.

22 If they, in fact, falsify or lie during the

1 investigation, there's, I think, a number of cases on that
2 point.

3 So it would be a Agency action.

4 CHAIRMAN TSUI GRUNDMANN: But DFAS loves Mr. Scott.

5 MR. LETTS: Yep.

6 CHAIRMAN TSUI GRUNDMANN: So even though this
7 happened, and say that we change the facts around, and it was
8 Mr. Scott who is providing these misleading types of
9 answers --

10 MR. LETTS: Yeah --

11 CHAIRMAN TSUI GRUNDMANN: And DFAS still loved him,
12 would you say that even though he's been dishonest in the
13 suitability process, he should be retained, because it's
14 solely within the employing Agency's determination, and OPM's
15 out?

16 MR. LETTS: The short answer's yes. That's what I
17 think, going back to the Civil Service Reform Act -- and we
18 haven't talked about that -- I mean, the idea was to get a
19 more -- if you look into Section 3 and the Statements of
20 Purpose and Findings, you know, the first issue is to get a
21 more efficient work force;

22 Second issue is to use merit system principles;

1 And the third is employee protections and the
2 increased authority of the MSPB.

3 That's what the Civil Service Reform Act is about.

4 If this guy is doing a great job, and his Agency is happy
5 with him, why is the uber agency getting involved in that?

6 CHAIRMAN TSUI GRUNDMANN: So the uber agency stops
7 being the uber agency after one year?

8 MR. LETTS: Yeah. Then it's a 75 action, and
9 that's why I cited the Fed Circuit in 1999 saying the
10 employing Agency is the one to make that call on what
11 promotes the efficiency of the service.

12 I think that's clear that they're the ones who are
13 positioned.

14 VICE CHAIRMAN WAGNER: That might be a better
15 policy.

16 My question is simply that the language of the
17 statute doesn't delineate it that way at all. It doesn't say
18 that an Agency can only be the employer Agency.

19 MR. LETTS: I -- you know -- and now I'm going to
20 apologize and defer. But I mean, I think OPM in their two
21 briefs almost acknowledged -- and that's part of the problem
22 with how our approach is -- that it would be the employing

1 Agency.

2 I mean, there's some tension there.

3 You know, the issue is: Did they get the
4 opportunity to consider whether it promotes the efficiency of
5 the service?

6 And in all four of our cases, the answer is "No,"
7 because the OPM officials didn't think they had to, and the
8 Agencies were left out of it completely.

9 And it's because of that that I think we get back
10 to Loudermill and due process.

11 If you don't have, you know, our response, Mr.
12 Scott's response -- and he talked about his 20 years in the
13 Army and honorable discharge -- and statements from fellow
14 employees and supervisors, and all those things, that are,
15 you know, Douglas-type Factors and efficiency of the service
16 -- and if that's not even a factor here, then to me that's
17 not a meaningful response.

18 And I'm out of time.

19 I thank you so much.

20 VICE CHAIRMAN WAGNER: Thank you.

21 CHAIRMAN TSUI GRUNDMANN: Thank you.

22 The Board will hear from the Amici next. I'd like

1 first Mr. Adkins, NTEU. Good morning, sir.

2 MR. ADKINS: Good morning. May it please the
3 Board, I am Larry Adkins, Counsel for National Treasury
4 Employees Union, coming as amicus today. And NTEU thanks the
5 Board for the opportunity to appear and participate in
6 today's argument.

7 As those who have proceeded me to the podium have
8 discussed, and I think established, Chapter 75 by its terms,
9 by its text, applies to suitability-based removals.

10 Now once you reach that conclusion, there's only
11 one way for OPM to get around it. They have to demonstrate
12 an extraordinary showing in the legislative history that
13 Congress meant to exclude suitability-based removals, and
14 actually meant Chapter 75 to say something other than it
15 actually says.

16 OPM has not made that show, and it's not offered
17 extraordinary showing in the legislative history that
18 Congress meant to say anything other than what it actually
19 said.

20 In fact, as Ms. Alden mentioned a few moments ago,
21 there is legislative history in support of Chapter 75
22 actually applying specifically to suitability-based removals,

1 as she discussed.

2 Congress indicated that it was aware that there was
3 such a thing as a suitability-based removal. And Congress
4 concluded that other than Chapter 43 actions for unacceptable
5 performance, it intended the provisions of Chapter 75 to
6 apply to all other types of removals.

7 So that's certainly an indication that Congress in
8 its legislative history meant the statute to be read
9 consistent with its literal terms.

10 VICE CHAIRMAN WAGNER: Mr. Adkins, could you please
11 answer the question I think that was posed before, which is
12 that: Whether you proceed under 5 CFR 731 or Chapter 75, you
13 still get to 5 USC 7701?

14 Correct?

15 MR. ADKINS: But there's a difference.

16 VICE CHAIRMAN WAGNER: Okay.

17 MR. ADKINS: Under 5 USC 7701, when the Board
18 exercises its full authority the Congress meant it to have,
19 the Board has the ability to mitigate penalties.

20 That doesn't apply under Part 731. Under Part 731,
21 the Board can consider the basis for the suitability
22 determination, but it has no authority to --

1 VICE CHAIRMAN WAGNER: No. I guess what I'm saying
2 is that --

3 MR. ADKINS: Okay --

4 VICE CHAIRMAN WAGNER: Under the statute, it says
5 that the Board's jurisdiction extends to any matter over
6 which it has jurisdiction by law, rule, or regulation.

7 MR. ADKINS: Yes.

8 VICE CHAIRMAN WAGNER: So say its jurisdiction over
9 suitability removal stems from 731. You still get to 5 USC
10 7701, correct, in terms of -- so, you know, whether or not
11 OPM can tell us how to do that, and carry out those
12 procedures is a different question -- but do you agree that
13 you get to 7701?

14 MR. ADKINS: Yes. The Board exercises its
15 authority under Chapter 77. There's no question about that.

16 But the problem here is: Part 731 takes part of
17 that away from the Board. Part 731 by its express terms,
18 says the Board may not engage in an evaluation of the action
19 itself. And that was consistent with the Federal Circuit's
20 decision in Folio that the Board may undertake a review at
21 suitability determination, but it may not undertake a review
22 of the suitability action itself.

1 That stands as --

2 CHAIRMAN TSUI GRUNDMANN: So how do you get around
3 Folio?

4 MR. ADKINS: Pardon me?

5 CHAIRMAN TSUI GRUNDMANN: How do you get around
6 Folio?

7 MR. ADKINS: Well, Folio stands for the proposition
8 -- and an unremarkable proposition -- that the Board's
9 jurisdiction can be derived from many sources.

10 It can be derived from statute, and it can be
11 derived from regulation.

12 And Folio stands for the proposition that OPM does
13 have the right to establish Board regulation, and in the
14 absence of Chapter 75, had the Board said "We hereby vest the
15 Board with the authority to review suitability determinations
16 in Part 731," that would have been a sufficient grant to
17 Board jurisdiction.

18 But here there is something else. Board
19 jurisdiction is a established by Chapter 75, the statute.
20 OPM cannot rely on Folio for the proposition that it can
21 regulate away. Jurisdiction has been vested in the Board by
22 statute.

1 CHAIRMAN TSUI GRUNDMANN: But the Court never makes
2 that distinction.

3 MR. ADKINS: No.

4 CHAIRMAN TSUI GRUNDMANN: I mean, it sort of
5 glosses over it.

6 MR. ADKINS: It does.

7 And I think that's why Folio is not to be read as
8 strongly in support of the OPM's position, as it would like
9 the Board to read it.

10 VICE CHAIRMAN WAGNER: And I didn't see this in any
11 of the briefs, but -- or I take that back, OPM did address it
12 somewhat obliquely -- but the actual language in the
13 regulation says that the MSPB has jurisdiction over the
14 suitability action.

15 And the OPM regs take pains to differentiate
16 between suitability actions and suitability determinations.

17 I mean, what are we supposed to do with that?

18 We've got the language on the face of the statute saying we
19 do have -- and I believe that the language was amended after
20 Folio, I believe. So I'm not sure that Folio was absolutely
21 dispositive on this for us anyway, at this point.

22 Do you have anything to say to that?

1 MR. ADKINS: Well, it makes no sense.

2 The Board's authority, the jurisdiction of the
3 Board, is clearly established by statute. Chapter 75 and 77
4 say that the Board has jurisdiction over appeals from people
5 who satisfy the determination of employee in 7511, when they
6 are removed.

7 That's what it says.

8 And to the extent that the OPM regulations muddy
9 that, I think you should disregard them. I think you should
10 act, based on the authority given to you by the statute.

11 And OPM says that you can't really do that, because
12 it's impossible for what Congress had intended for
13 suitability-based removals to have been mitigated.

14 Well, that really misses the point. Under the
15 Board's authority in Chapter 75 and 77, it is only actions
16 that are taken for such cause as to promote the efficiency of
17 the service that will be of help;

18 And if a suitability-based removal does promote the
19 efficiency of the service, the Board has no authority, and
20 will not mitigate the removal.

21 It will stand.

22 The Douglas Factors only come into play in two

1 instances:

2 Number one, where the Factors are not considered at
3 all;

4 And number two, when the Factors are implied such
5 that the Board determines that a penalty of removal exceeds
6 the tolerable limits of reasonableness.

7 VICE CHAIRMAN WAGNER: Okay. I have a quick
8 question before your time runs out.

9 MR. ADKINS: It's already out.

10 VICE CHAIRMAN WAGNER: Do you know how, you know,
11 when the Board has exercised its jurisdiction under Chapter
12 75 and 77 --

13 MR. ADKINS: Right --

14 VICE CHAIRMAN WAGNER: To review terminations due
15 to intentional misrepresentation on applications -- which it
16 has, you know, often in the past -- what percentage of
17 removals get mitigated?

18 Do you have any idea, under --

19 MR. ADKINS: Well, I don't. But the question
20 underscores an important point, Vice Chair Wagner. The fact
21 is the Board routinely considers these types of things, when
22 evaluating removal actions.

1 And in a sense, when you think about it, if the
2 determination is based on falsification or dishonesty, the
3 Board's actions toward a suitability-based removal on those
4 terms, are really no different than the Board's actions based
5 on an acknowledged adverse action for post-employment
6 falsification, or something like that.

7 The Board does look, and can look all the time at
8 these removal cases, based on falsification, and applies the
9 Douglas Factors. And if the application of the Douglas
10 Factors shows that the penalty of removal that was imposed
11 does not exceed the tolerable limits of reason, the Board
12 will uphold it.

13 CHAIRMAN TSUI GRUNDMANN: But doesn't OPM also have
14 built into their regulations a mini-Douglas Factors?

15 MR. ADKINS: There are some mini-Douglas Factors to
16 be applied at the Board's sole discretion. It's not the
17 same.

18 CHAIRMAN TSUI GRUNDMANN: The Board's sole
19 discretion?

20 MR. ADKINS: That's what the regulations say.

21 CHAIRMAN TSUI GRUNDMANN: Okay.

22 MR. ADKINS: Not the Board's discretion. It should

1 be OPM's sole discretion. I misspoke.

2 Thank you.

3 CHAIRMAN TSUI GRUNDMANN: Thank you, Mr. Adkins.

4 MR. ADKINS: All right. Thank you for your --

5 VICE CHAIRMAN WAGNER: Thank you very much.

6 CHAIRMAN TSUI GRUNDMANN: Next up for AFGE. Mr.

7 Grajales? Welcome back.

8 MR. GRAJALES: Thank you. May it please the Board,
9 I'm Andy Grajales, and I am here on behalf of the American
10 Federation of Government Employees.

11 There's one thing that we would like to pick up
12 from what the Appellants argued, assuming arguendo, that OPM
13 does have the power to take a removal action for suitability
14 reasons.

15 There is no parade of horrors here. We think it
16 should be very clear that suitability removals are a subset
17 of a subset of suitability actions taken by OPM. And
18 applying Chapter 75 will not prevent OPM from taking a
19 suitability action.

20 All that applying Chapter 75 would do is allow the
21 Board to conduct the review that it is statutorily obligated
22 to conduct. And not to put too fine a point on it, this is

1 something I believe we have been reaching toward.

2 OPM loses this issue at Chevron, Step 1.

3 There is a collision between their regulations and
4 the plain language of Chapter 75. OPM is not entitled to any
5 deference. When it comes to Chapter 75 that deference -- to
6 this Board, and there is nothing that gives OPM the authority
7 to override what is given to this Board by statute.

8 The suitability issue is a gate-keeping function.
9 Once an individual becomes an employee, the power of this
10 gate-keeping function as a barrier to entry into the federal
11 service is diminished.

12 The individual in question has entered the federal
13 service as a tenured employee, and is entitled by statute to
14 the rights that come with that employee's status.

15 VICE CHAIRMAN WAGNER: So Congress hasn't actually
16 given OPM a time limit for conducting an investigation to
17 determine suitability?

18 Is that correct?

19 MR. GRAJALES: Congress has not done so directly,
20 but what Congress hasn't said done is spoken 7511, by setting
21 a time limit, and the circumstances under which an individual
22 becomes an employee of the federal service.

1 7511 is also where the employee derives the
2 property interest from. That is where the time limit
3 resides, and that is where the expectation of continued
4 employment resides, in 7511.

5 And so this means that in order to remain valid,
6 OPM's power over suitability inquiries must be harmonized
7 with the rights that are expressly granted to the employees
8 by statute, by Chapter 75.

9 In order to do this, the Board must apply Chapter
10 75 to the appeals of tenured federal employees, who are
11 removed at the direction of OPM, following a suitability
12 determination.

13 VICE CHAIRMAN WAGNER: What everybody seems to
14 agree here is that if you get to Chapter 75, the only thing
15 that an Appellant gets is mitigation, a potential mitigation
16 by the Board.

17 Correct?

18 MR. GRAJALES: I believe that also you get in
19 addition to that, if you look at OPM's regulations at
20 731501(b), there are other changes in there from what an
21 employee would get under Chapter 75, predominantly the fact
22 that once the review is completed, the Board must remand in

1 certain circumstances to an Agency or to OPM for action, if
2 not all charges are sustained, that is then unreviewable.

3 That cannot co-exist with what Chapter 75 and
4 Chapter 77 say. It cannot.

5 And since OPM does not have any statutory grant of
6 authority to craft suitability regulations for tenured
7 employees, the regulations must cede to the statutory rights.

8 CHAIRMAN TSUI GRUNDMANN: Let me ask the question
9 that's come up with the other Appellants, the question of
10 remedy.

11 Do you have any thoughts if we were to determine
12 that the removal were unreasonable, could we reach mitigating
13 debarment and cancellation of eligibility? Or throwing it
14 out altogether?

15 Can we restore an employee without debarment? And
16 then can OPM turn around and institute another suitability
17 action? Are they all related?

18 MR. GRAJALES: I think you would have a collision
19 there. Because once the person is an employee, debarment and
20 eligibility lose some relevance, because they're already a
21 tenured employee.

22 And so you would be unlikely to find a circumstance

1 where you would have mitigation in conjunction with that.

2 However, once the Board has jurisdiction or the
3 power to reach the remedy, that would be part and parcel of
4 the Board's power to craft a remedy.

5 I see that I've exceeded already my time. And I
6 thank the Board for their time.

7 Thank you.

8 VICE CHAIRMAN WAGNER: Thank you.

9 CHAIRMAN TSUI GRUNDMANN: Thank you.

10 Now the Board will hear from the Office of
11 Personnel Management. Ms. Kaplan?

12 MS. KAPLAN: Good morning. And may it please the
13 Board, I am Elaine Kaplan, and I represent what is, I'm sure,
14 affectionately being termed the uber agency.

15 (Laughter.)

16 MS. KAPLAN: The Office of Personnel Management.

17 Now for over 60 years, including the more than 30
18 years since the Civil Service Reform Act was enacted, OPM
19 directed suitability removals, and Agency-initiated adverse
20 actions have been adjudicated under separate procedures.

21 OPM or Civil Service Commission-directed removals
22 have never been processed under Chapter 75 of the Civil

1 Service Reform Act, or under the regulatory provisions for
2 Agency-initiated adverse actions.

3 Since the passage of the Civil Service Reform Act,
4 OPM's regulations, the MSPB's regulations, the decisions of
5 both the Board and the Federal Circuit have always
6 categorized and treated these cases as actions arising under
7 Part 731, not Chapter 75.

8 Now despite this long and uninterrupted history,
9 and the absence of any indication that Congress intended to
10 alter this distinction -- and I will talk about Chapter 75 --
11 the Appellants and their Amici are arguing first that OPM
12 lacks the authority to direct suitability removals by
13 statute. I think that's what Mr. Kaplan argued.

14 And second, that the plain language of the statute
15 requires that OPM's suitability actions be adjudicated under
16 Chapter 75.

17 And now I'm going to tell you why they're wrong.
18 And there are a number of reasons.

19 Let me start out with the argument that Mr. Kaplan
20 was making, which I believe has really nothing to do with the
21 Civil Service Reform Act. And the same argument probably
22 could have been made before the Civil Service Reform Act was

1 enacted.

2 And that is that OPM doesn't have the authority to
3 direct Agencies to remove tenured employees.

4 Well, if we go look at 5 USC 3301, what it says is
5 that the President has the authority to "prescribe such
6 regulations for the admission of persons into the Civil
7 Service, as will best promote the efficiency of the Service."

8 The President has in turn delegated his authority
9 to OPM to require that appointments be made after
10 investigation in order to enable OPM to determine after
11 appointment that the requirements of law are met.

12 The President gave the Civil Service Commission
13 before OPM existed, the authority to direct removal "whenever
14 the Commission finds that an employee serving under such an
15 appointment is disqualified for federal employment. It may
16 instruct the Agency to remove him."

17 CHAIRMAN TSUI GRUNDMANN: But doesn't your
18 statutory scheme under 1103 also contain an exception with
19 respect to functions for which the MSPB and the Office of
20 Special Counsel have primary responsibility?

21 It's an exception in the statute?

22 MS. KAPLAN: In 3301?

1 CHAIRMAN TSUI GRUNDMANN: 1103.

2 MS. KAPLAN: Okay.

3 CHAIRMAN TSUI GRUNDMANN: Which is the basis of
4 your authority to execute, administer, and enforce Civil
5 Service rules.

6 MS. KAPLAN: So 1103. I'm sorry, could you give me
7 this?

8 CHAIRMAN TSUI GRUNDMANN: Mm-hmm, 1103.

9 MS. KAPLAN: Okay (examining document.)

10 Well, 1103 --

11 CHAIRMAN TSUI GRUNDMANN: a(5).

12 MS. KAPLAN: a(5). Okay.

13 Okay. Well, neither the Merit Systems Protection
14 Board or the Office of Special Counsel is primarily
15 responsible for investigating qualifications to be admitted
16 to the Civil Service. That's a function that's given to the
17 President.

18 So that's not primarily a function of --

19 VICE CHAIRMAN WAGNER: Well, it is primarily the
20 function to adjudicate employee appeals from adverse actions.

21 That's the Board's function.

22 And the --

1 MS. KAPLAN: Well, that's right.

2 VICE CHAIRMAN WAGNER: And the Board has statutory
3 authority to issue regulations governing that process. And
4 it would appear that --

5 MS. KAPLAN: That's right --

6 VICE CHAIRMAN WAGNER: OPM is exceeding its
7 authority in directing us in how we are to handle employee
8 appeals in removal cases.

9 MS. KAPLAN: Well, okay.

10 There are several things going on here. One, we're
11 not relying on Section 1103 as grant of authority.

12 CHAIRMAN TSUI GRUNDMANN: But it's part of the
13 statutory scheme.

14 MS. KAPLAN: Well, it is, but --

15 (Simultaneous conversation.)

16 MS. KAPLAN: There's a separate section, which is
17 3301, which provides to the President the authority to issue
18 rules governing the admission of persons to the Civil
19 Service.

20 And he has in turn delegated that authority to OPM.

21 So we're not relying on our separate authority
22 under Section 1101.

1 CHAIRMAN TSUI GRUNDMANN: So you're just going to
2 ignore it?

3 MS. KAPLAN: Well, I'm not ignoring it. I'm saying
4 we don't have to rely on it. What we're relying on is the
5 grant of authority that we get in Section 3301, which is a
6 derivative of the authority that the statute grants to the
7 President.

8 And it's the authority that has always been relied
9 upon by OPM, and previously the Civil Service Commission in
10 order to direct removals.

11 VICE CHAIRMAN WAGNER: And I want to go to that.
12 Because OPM in its brief argues, I think, that in enacting
13 the Civil Service Reform Act, Congress in essence ratified
14 the existing regulations governing the suitability.

15 Is that correct?

16 MS. KAPLAN: What we said was that there's a
17 savings provisions in the Civil Service Reform Act, which
18 provides that except as expressly provided in the statute
19 that the existing authorities of the President under the
20 Civil Service laws, are preserved, yes.

21 We are relying upon that.

22 VICE CHAIRMAN WAGNER: Can I just follow through on

1 that?

2 MS. KAPLAN: Yes.

3 VICE CHAIRMAN WAGNER: Because actually the pre-
4 existing regulations provided that there was an automatic
5 expiration of the investigatory period after one year of an
6 appointment.

7 And so if, in fact, the existing parameters of the
8 authority on OPM and previous to that in the Civil Service
9 Commission were to be incorporated into the statute, why
10 shouldn't we assume that Congress intended to limit OPM's
11 authority with regard to suitability investigations to a
12 year?

13 MS. KAPLAN: Well, let's talk about Chapter 75,
14 because in some ways it always circles back to the question
15 of: What does Chapter 75 mean? And was it intended to be
16 all-encompassing, so that an employee could never be removed
17 except pursuant to the provisions of Chapter 75?

18 In some ways, some of this other stuff starts to
19 beg the question.

20 I started out by responding to what Mr. Kaplan said
21 about whether OPM has this authority to remove employees,
22 pursuant to 3301, derivative of the President's authority.

1 But we always end up circling back to, "Well, didn't the
2 Civil Service Reform Act change that, because Chapter 75
3 talks about removal?"

4 So let me talk about Chapter 75. And I think that
5 our response to the argument is that when an employee is
6 removed at the direction of OPM, it is OPM and not the
7 employing Agency that is taking the action.

8 And under Chapter 75, 7513, 7512, 7514, it's clear
9 to us that the text, its structure, and its language show
10 that it was intended to provide the procedures that must be
11 followed when an action is taken against an employee by their
12 employing Agency and not by OPM.

13 It says that under Rules Prescribed by OPM, an
14 Agency may take an action against an employee, and then sets
15 forth the procedures that the Agency must follow when it's
16 taking such action.

17 "Agency" in this context has to mean the employing
18 Agency. That's what it meant all along, before the Civil
19 Service Reform Act was passed.

20 And if the Congress had intended the procedures to
21 apply to OPM-directed suitability actions, then we believe it
22 would have so specified.

1 Up until the Civil Service Reform Act was enacted,
2 the regulations clearly distinguished between Agency-
3 initiated adverse actions and those initiated by the Civil
4 Service Commission.

5 VICE CHAIRMAN WAGNER: Then what was the basis for
6 that distinction? I mean, could it have been -- and I don't
7 know, because it really wasn't addressed in the briefs -- but
8 prior to that, the Civil Service Commission had a process
9 whereby if it directed a suitability removal, the appeal went
10 to the Federal Employee Appeals Authority.

11 Correct?

12 MS. KAPLAN: Right.

13 VICE CHAIRMAN WAGNER: And again, under those
14 regulations, there was no restriction on that entity's
15 ability to review the suitability removal.

16 So is it possible that the distinction between the
17 two types of removals, you know, misconduct and suitability,
18 was simply because the Civil Service Commission did not want
19 to be in that sort of compromising situation of reviewing an
20 action that it itself had directed?

21 MS. KAPLAN: Well, actually the Civil Service
22 Commission, or part of the Civil Service Commission was

1 responsible for reviewing the suitability of removals of
2 employees before the Civil Service Reform Act was passed.

3 So it's not as though it were not reviewable.

4 And it continues to be the case that the MSPB, now
5 standing in the shoes of the Civil Service Commission, is
6 getting to review these suitability removals. It's just
7 under a slightly different procedural posture.

8 And -- yes?

9 MS. ROSE: What you were saying about Chapter 75,
10 you said that this is the statute, this is the law. But the
11 regulations do not trump statute.

12 And are we to assume what Congress thinks, or is
13 Congress responsible for making it clear what they think?

14 I'm --

15 MS. KAPLAN: Oh, we're not arguing that our
16 regulations trump the statute. That would be a stupid
17 argument (laughing).

18 What we're arguing is that the meaning of the
19 statute is different than the meaning that is being ascribed
20 to it by the Appellants.

21 And what we're arguing is that if look at Chapter
22 75, what's it all about, if you look at it in its history and

1 you look at its text, it's clearly about actions taken by
2 Agencies against their own employees.

3 It doesn't make any sense otherwise. Because if we
4 apply the statute to OPM-directed removals -- unless we also
5 want to categorize OPM as an Agency, which I think is
6 something that you were suggesting before, Vice Chair Wagner
7 -- I'm not sure whether that's what the Appellants are
8 saying.

9 They're saying several different things.

10 It sounds to me like what they're saying is: Well,
11 the Agency is taking the action. OPM-directs the Agency to
12 take the action, but in effect the Agency is taking the
13 action. And thereafter, all the procedures apply, so that
14 there's a response to the Agency. And the Agency gets to
15 look at the response, and so forth.

16 But that doesn't make any sense, because it's
17 really not the Agency taking the action in these cases. It's
18 clearly OPM taking the action.

19 All the Agency is doing is: It's basically cutting
20 the paperwork. It's affecting the action.

21 And if that's true, then Appellant's construction
22 of the statute is really not helpful to the employees,

1 because it's putting the employees in a position where the
2 response to the action taken by OPM has to go to their
3 employing Agency.

4 Their employing Agency lacks the authority to
5 reverse OPM's action. And therefore their employing Agency
6 -- that whole part of the due process is completely
7 meaningless.

8 Because the employee provides a response to the
9 employing Agency, and the employing Agency says "That's
10 interesting, but OPM has directed us to take this action.
11 We're going to have to take this action anyway"

12 In addition, it would require the employing Agency
13 to defend OPM's determination before the MSPB.

14 CHAIRMAN TSUI GRUNDMANN: Can we get back to what
15 the Vice Chair was asking a little bit earlier?

16 MS. KAPLAN: Yes.

17 CHAIRMAN TSUI GRUNDMANN: We were talking about
18 ratification through your savings clause. The question is:
19 At the time that the CSRA was passed, your regulation
20 provided for a one-year investigation period.

21 And there's no dispute now that we're beyond the
22 year two, three, whatever.

1 MS. KAPLAN: Right.

2 CHAIRMAN TSUI GRUNDMANN: To what extent, then --
3 can it be argued that Congress ratified the one year?

4 MS. KAPLAN: Well, my understanding -- perhaps I
5 may have -- maybe I'm wrong about this -- but my
6 understanding of the previous regulations was that the
7 investigation that an employee could be removed after the
8 one-year period was over, for suitability reasons, just as
9 we're arguing is the case today. And that is my
10 understanding.

11 And that's what we're urging here should continue
12 to be the case. Now if I understand you correctly, there's
13 arguments about probationary status and so forth, and so on.

14 As you can see, I'm receiving some assistance from
15 -- from the peanut gallery.

16 (Laughter.)

17 MS. KAPLAN: Even if the investigation ends, that
18 doesn't have a bearing, really, on the action that can be
19 taken after a year.

20 And I guess my point was that the actions were
21 still being taken after the one-year period was over.

22 VICE CHAIRMAN WAGNER: Well, and I think it was

1 limited though, as the current regulations are somewhat too.

2 MS. KAPLAN: Yeah.

3 VICE CHAIRMAN WAGNER: Only if there was an
4 intentional misrepresentation --

5 MS. KAPLAN: That's correct --

6 VICE CHAIRMAN WAGNER: In regard to the
7 application.

8 MS. KAPLAN: That's right.

9 VICE CHAIRMAN WAGNER: Okay.

10 And, you know, even under the current regs, I think
11 that OPM's ability to direct removal of a tenured employee is
12 limited to that circumstance, if there's a statutory bar?

13 MS. KAPLAN: Right.

14 There are three circumstances: Fraud, or
15 dishonesty in the examination; a statutory bar to employment;
16 and refusal to furnish testimony to the MSPB, or to the
17 Office of Special Counsel.

18 CHAIRMAN TSUI GRUNDMANN: So does it ever end,
19 though?

20 VICE CHAIRMAN WAGNER: Yeah. Does it have a limit?

21 CHAIRMAN TSUI GRUNDMANN: Yeah, I mean, Scott is a
22 good example. I mean, here you have an employee -- and it's

1 not his application that's being questioned, it's his wife's
2 application.

3 MS. KAPLAN: Well, you know, Scott is going to be
4 briefed separately. Scott is a little bit different, because
5 the misconduct occurred after the employee was on the job.

6 Okay?

7 So let's leave Scott aside, because these other
8 cases --

9 CHAIRMAN TSUI GRUNDMANN: Let's take Scott out for
10 the time being.

11 MS. KAPLAN: Take Scott out.

12 These other cases involve situations, where the
13 misconduct occurred before the employee became an employee.
14 And it's fraud in the examination, it's dishonesty.

15 Those are the kinds of cases that OPM has reserved
16 to itself to take removal actions, even after the one-year
17 probationary period ends, because those go to the heart of --

18 CHAIRMAN TSUI GRUNDMANN: But is it four years? Is
19 it five years? As Aguzie argues? It could be five, ten, 15,
20 30 years. When does it end?

21 MS. KAPLAN: Well, I mean, it doesn't end. Because
22 if there's been fraud in the examination -- if I procured my

1 job through dishonesty, by embellishing my credentials, it
2 really doesn't matter if I've been on the job for ten or 15
3 years.

4 Go with me on this.

5 CHAIRMAN TSUI GRUNDMANN: Okay.

6 MS. KAPLAN: If I'm a really good employee, and
7 I've really done a great job, and everybody likes me, okay,
8 you got your job through fraud, you got your job through
9 dishonesty.

10 It undermines the credibility of the entire system,
11 if people can look and say, "Hey, if I can be really sneak
12 enough and I get my job through lying about my background,
13 and I'm on the job for ten or 15 years, and I do a really
14 good job, I'm going to get a pass.

15 And it's going to be up to the Agency. It's not
16 going to be up to the uber agency. It's going to be up to
17 the Agent employing me.

18 CHAIRMAN TSUI GRUNDMANN: Okay. So but it's the
19 uber agency. And this kind of ties into what Mr. Aguzie says
20 in his brief.

21 I mean, this is just dilatory process on the part
22 of the uber agency.

1 Why can't you accomplish it in a year?

2 MS. KAPLAN: The uber agency is never dilatory. I'm
3 sure --

4 (Laughter.)

5 MS. KAPLAN: This is not -- well, it's not
6 necessarily dilatory, frankly. I mean, it's going to depend
7 on the circumstances.

8 Fraud by definition, is something that people try
9 to cover up.

10 VICE CHAIRMAN WAGNER: Well, wait.

11 MS. KAPLAN: Yeah.

12 VICE CHAIRMAN WAGNER: Ms. Barnes was accused of
13 misrepresenting that she had been under academic suspension.

14 How hard could it have been for somebody at OPM to call up
15 Boston University and find that out?

16 MS. KAPLAN: Well, I don't know what the situation
17 was with respect to Ms. Barnes, with respect to why it took a
18 little bit longer. And maybe it shouldn't have taken as long
19 as it did.

20 Maybe OPM should have done it more quickly. I
21 don't know.

22 But I do know that that really has nothing to do

1 with the basic question here.

2 VICE CHAIRMAN WAGNER: But it does, really, because
3 what we're talking about is that the Congress has really said
4 that there is a period of time, after which an employee does
5 develop a legitimate expectation of continued employment.

6 MS. KAPLAN: Right.

7 VICE CHAIRMAN WAGNER: Congress defined it
8 statutorily in terms of probationary periods, and what not.

9 So there is sliding scale, or a sliding slope, or
10 something sliding --

11 (Simultaneous conversation.)

12 VICE CHAIRMAN WAGNER: It's a slippery slope or
13 something, where you've got, you know, Congress saying,
14 "Okay, it's you know, within that first year, the government
15 has the -- you know, we're giving the benefit of the doubt to
16 the government to, you know, make this assessment.

17 After that, the employee has the benefit of the
18 reasonable expectation of continued employment.

19 MS. KAPLAN: Yeah.

20 VICE CHAIRMAN WAGNER: So it does matter.

21 MS. KAPLAN: Well, I think we're kind of mixing
22 apples and oranges here. And this is a very -- a large part

1 of the argument has to do with: What does it mean when you
2 finish your probationary period, and you're a tenured
3 employee?

4 The upshot of the Appellant's argument is that if
5 OPM doesn't discover the employee's fraud or ineligibility
6 before the probationary period ends, it can take no action,
7 because Congress intended employees to have tenure.

8 But Congress --

9 VICE CHAIRMAN WAGNER: No. I mean, is that your
10 understanding of their argument, that no --

11 MS. KAPLAN: Well, the Agency has to take the
12 action.

13 VICE CHAIRMAN WAGNER: Well, but it doesn't mean
14 that the government cannot take an action. It just means
15 that it gets reviewed as a Chapter 75 removal.

16 It doesn't mean that the government is precluded
17 from taking an action.

18 MS. KAPLAN: That's right. But it's a little
19 different, because then it gets up to the Agency, and the
20 Agency can say, "This is a good employee, and I like the
21 employee, and even though they got their job through
22 dishonesty" --

1 VICE CHAIRMAN WAGNER: Does that happen a lot? I
2 mean, if the OPM were to go to the Agency and say, "Okay, and
3 we found out that this guy, you know, procured his position
4 through intentional misrepresentation."

5 And do you get a lot of --

6 MS. KAPLAN: It happens sometimes. And that's why
7 our regulations really treat the Agency as not an adverse
8 party, but as a party that doesn't have interests coincident
9 with OPM.

10 We let the Agency respond.

11 It does happen, yes. The Agency may disagree about
12 whether they really think there was fraud.

13 MS. ROSE: What if the Agency decides not to remove
14 the employee? What happens?

15 MS. KAPLAN: Well, if the Agency were to decide not
16 to? Well, the way it works is, in assuming that the Agency
17 determines or that OPM has determined that there has been
18 fraud in the examination process, the case should be referred
19 to OPM, because that's one of the things over which we
20 reserve authority.

21 The OPM will go through the due process procedure
22 that's set forth in our regulations of notifying the

1 employee, if they're a current employee and they've passed
2 their probationary period, that of what we've discovered,
3 giving them an opportunity to reply.

4 And the they end up in front of the Merit Systems
5 Protection Board, if that's what they like.

6 But let me just try to go back to this distinction
7 between the probationary period and why the fact that someone
8 has completed the probationary period doesn't really speak to
9 whether OPM should be able to direct a suitability action
10 against them.

11 As I said, the probationary period is intended as a
12 trial period that allows agencies to decide whether new
13 employees can perform their jobs, before giving them rights
14 of tenure.

15 OPM-direct suitability actions, on the other hand,
16 are really about whether someone should have been admitted to
17 the position to begin with, or whether they gained it through
18 dishonesty or fraudulent conduct.

19 Successful completion of a probationary period has
20 no bearing on whether an employee secured their job through
21 dishonesty or fraudulent conduct.

22 So we can't mush these two separate concepts

1 together as the Appellants would like to do. It's never been
2 done that way. And to do that would undermine in many ways
3 the Merit System

4 Because --

5 CHAIRMAN TSUI GRUNDMANN: Let me ask -- let's go
6 with your argument. Let's say we agree with you.

7 MS. KAPLAN: Yes.

8 CHAIRMAN TSUI GRUNDMANN: Test how far this goes.
9 All right? We have the existing regulation. Could you, say,
10 tomorrow revise your regulations to preclude any review of
11 suitability actions by the Board?

12 MS. KAPLAN: I think that someone might argue if we
13 did that, if we precluded any suitability review of any MSPB.
14 Then somebody might have a Loudermill argument.

15 CHAIRMAN TSUI GRUNDMANN: Okay.

16 Now let's flip it around. Can you now, tomorrow or
17 day after tomorrow, revise your regulations to provide for a
18 full review of suitability actions by the Board?

19 MS. KAPLAN: Well, we almost have full review. But
20 yes, we can, because it's within OPM's prerogatives.

21 CHAIRMAN TSUI GRUNDMANN: So you take final action
22 on anything we remand to if we find at least one of the

1 actions sustained?

2 MS. KAPLAN: Right. If you find OPM shows by
3 preponderant evidence that one of the actions is sustained
4 and that one of the actions is sufficient to demonstrate that
5 somebody's not suitable for their job, then it's up to OPM to
6 decide whether they should be removed, or --

7 CHAIRMAN TSUI GRUNDMANN: But you could provide for
8 full review as well?

9 MS. KAPLAN: Yeah, we could.

10 CHAIRMAN TSUI GRUNDMANN: Okay.

11 MS. KAPLAN: We could.

12 VICE CHAIRMAN WAGNER: What happens if the Board
13 finds that none of the charges is sustainable?

14 MS. KAPLAN: If the Board finds that not, then
15 OPM's determination of unsuitability is reversed. And
16 there's no action that could be taken against them.

17 VICE CHAIRMAN WAGNER: So it's all or nothing?

18 MS. KAPLAN: Yeah. Although one or two of the
19 charges could go away. Let's say there's two or three suit
20 charges involved in the suitability removal.

21 OPM might decide it's conceivable on remand, well
22 you know, if the two of the most serious ones are gone, maybe

1 OPM would decide the one left is not enough --

2 VICE CHAIRMAN WAGNER: Can I have the mic?

3 MS. KAPLAN: Yeah.

4 VICE CHAIRMAN WAGNER: Hypothetical is the Board
5 finds that there is no preponderant evidence to support any
6 of the charges, then it's reversed, by the Board.

7 MS. KAPLAN: Yes.

8 VICE CHAIRMAN WAGNER: Okay.

9 CHAIRMAN TSUI GRUNDMANN: So that is still within
10 our jurisdiction?

11 MS. KAPLAN: Yes. Yes. That's what Folio says is
12 the Board has the authority to review the suitability
13 determination.

14 And which, you know, to talk again about the
15 Douglas Factors and how to some extent -- I mean, there is a
16 difference, a little difference, but it's not a major
17 difference, because the Board does have the authority -- OPM
18 will review some of the factors similar to the Douglas
19 Factors in reviewing whether someone is unsuitable for
20 employee.

21 CHAIRMAN TSUI GRUNDMANN: We don't apply a 201,
22 though -- 202, which is your semi-pseudo-Douglas Factors?

1 MS. KAPLAN: Well, no, you can review OPM's
2 applications of our semi-pseudo-Douglas Factors.

3 (Laughter.)

4 MS. KAPLAN: As you like to call them.

5 You know, the thing about --

6 (Simultaneous conversation.)

7 CHAIRMAN TSUI GRUNDMANN: Are there not? There's
8 rehabilitation that's built, in seriousness of misconduct?

9 MS. KAPLAN: That's right. That's correct.

10 CHAIRMAN TSUI GRUNDMANN: You know, length of time?

11 MS. KAPLAN: That's correct.

12 And in some cases, it might -- you know, they may
13 find this hard to believe -- but in some cases it actually
14 can work to the benefit of the employee, because Douglas is
15 not the most generous standard of review for employees.

16 Douglas says that you can reverse the penalty, or
17 mitigate the penalty, where it's beyond the bounds of
18 reasonableness;

19 Whereas, under the suitability regulations, some of
20 the similar factors that are similar to Douglas really go
21 into the determination itself, which we have to prove by
22 preponderant evidence.

1 Now it's not always true, and there are some
2 differences. But it's not a case where OPM, the uber agency,
3 is coming in and trying to trample people and take away their
4 due process rights, their rights under Loudermill.

5 Now I understand your concern. I do understand
6 your concern about people who have been on the job for a long
7 period of time. And it is possible that it will -- you know,
8 there may be someone who didn't cover up the fraud the whole
9 time.

10 I don't know. And it may look unfair. Well, it's
11 something that OPM can take into consideration, because one
12 of the considerations, I believe, is the recency of the
13 conduct.

14 So it's not completely irrelevant; it's something
15 that OPM may want to look at.

16 You know, but frankly, the Board itself and the
17 Federal Circuit have upheld removals based on falsification,
18 that are pretty old.

19 And so it's not unheard of, and it's because of
20 what --

21 CHAIRMAN TSUI GRUNDMANN: Done that under Chapter
22 75.

1 MS. KAPLAN: No. But it would the same -- it's a
2 very, sort of a similar standard, it's an efficiency of the
3 service, efficiency or integrity of the service standard.
4 It's not really that different.

5 And so my only point is that the fact that
6 something occurs much later, particularly when it involves
7 falsification, it may not be as unfair as some other kinds of
8 things.

9 And again, OPM is only reserving the authority in
10 cases that go to the heart of the examination process, or to
11 the Merit System.

12 The one other thing is when someone refuses to
13 furnish testimony to the Board, or to the Office of Special
14 Counsel. Well, under this argument over here, the decision
15 whether to take an action against an employee is solely that
16 of the Agency.

17 The Agency may stand to benefit from a refusal to
18 furnish testimony.

19 VICE CHAIRMAN WAGNER: But I want to be clear.

20 So you're saying that OPM could actually expand
21 that what now appears to be a somewhat limited list of
22 factors for removing a tenured employee on a suitability

1 basis?

2 OPM reserves to itself the right to expand that
3 list?

4 MS. KAPLAN: Well, it's a part of our delegation of
5 authority from 3301 to the President, OPM, is to you know,
6 issue rules and regulations governing the admission of
7 persons to the Civil Service.

8 And speaking of which, I did want to respond to
9 something that Mr. Kaplan had said at the very outset, which
10 is the argument that 3301 is not implicated, when OPM seeks
11 to remove a current employee, because the current employees
12 are already admitted to the Civil Service?

13 Vice Chair Wagner, I think you pointed out that the
14 appointment is subject to investigation.

15 But even more than that, I think the argument is a
16 bit of a -- is a non sequitur, because prescribing the rules
17 governing of the admission of individuals to Civil Service,
18 those rules may have to be enforced after an individual
19 becomes an employee, where he or she procures his position
20 through fraud.

21 So it's not outside the scope of the statutory
22 grant of authority for the action concerning the admission of

1 someone to the Civil Service to be taken after they have been
2 on the job for a year.

3 (Simultaneous conversation.)

4 VICE CHAIRMAN WAGNER: But -- to hammer home the
5 point.

6 But I mean, we're not saying that a suitability
7 issue such as that couldn't be addressed separate -- I mean,
8 I don't hear the Appellants saying that.

9 The question isn't: Can suitability issues escape
10 review? It's that after a year, does the employee have a
11 right to the full statutory reviews that -- Congress, you
12 know, established for?

13 MS. KAPLAN: Well, that's right.

14 But when the Agency takes an action under Chapter
15 75, that's not a suitability action any more. That's an
16 adverse action.

17 So the standards that would apply to the Agency --

18 VICE CHAIRMAN WAGNER: But it's a removal -- I
19 mean, if it's a removal --

20 MS. KAPLAN: It's a removal.

21 VICE CHAIRMAN WAGNER: So whether we call it
22 suitability or misconduct is not --

1 MS. KAPLAN: Well, it's a little bit different,
2 because the Agency --

3 VICE CHAIRMAN WAGNER: To the employee I think it's
4 a removal.

5 MS. KAPLAN: Oh, it's the same to the employee, no
6 question about it. It's a removal.

7 But in terms of the procedures that have been set
8 up, it is a little odd to turn it over exclusive -- it's not
9 odd, we could have done it that way, okay?

10 But there's a good reason for us to reserve the
11 authority in this limited category of cases for OPM to make
12 the determination about whether someone should be --

13 (Simultaneous conversation.)

14 VICE CHAIRMAN WAGNER: The question that we have to
15 answer is: What did Congress do? And --

16 MS. KAPLAN: Oh, yeah.

17 VICE CHAIRMAN WAGNER: And what Congress appears to
18 have done is to actually give that, you know, to define -- it
19 didn't support the definition of removal to, you know -- well
20 it did in the sense of there were Chapter 43 removals for
21 performance, and then everything else.

22 MS. KAPLAN: Yeah. We're not --

1 VICE CHAIRMAN WAGNER: But there's nothing else in
2 this statute that supports this idea that there is actually
3 this other third type of removal that's a suitability.

4 MS. KAPLAN: Well, no. Actually I guess I have to
5 disagree with that.

6 I think that there's on question that the clients
7 have been removed. There's no question that some of them
8 were tenured employees. The question is whether it is a
9 removal that has been done by an agency, whether that agency
10 has removed the employee, as opposed to removal by OPM, and
11 whether OPM was supposed to be what Congress intended, when
12 it enacted Chapter 75 to prescribe procedures for OPM taking
13 a removal when it said an Agency may remove an employee.

14 CHAIRMAN TSUI GRUNDMANN: Let's say, for instance,
15 there may be -- perhaps it is a statutory mechanism for you
16 to be involved as the uber agency.

17 Doesn't 7701 allow the director to intervene pretty
18 much as a manner of right in any kind of action where Civil
19 Service rules, laws, regulations are being implicated, where
20 OPM is strictly in charge of it?

21 It allows for that mechanism.

22 And it's almost a reciprocal mechanism, because we

1 have to notify the director whatever an issue raises that
2 type of concern.

3 So hasn't Congress already provided for you in 75,
4 77, in our process to intervene and to speak and to actually
5 participate as a party?

6 MS. KAPLAN: Well, but that intervention is for a
7 different purpose, I think. That intervention is for
8 purposes of OPM weighing in when there is a decision that
9 interprets a Civil Service law, rule, or regulation in a way
10 that's going to have an impact on the whole Civil Service or
11 on lots of people.

12 The kinds of cases we're talking about here are not
13 necessarily cases -- suitability removals don't necessarily
14 involve broad issues of law.

15 There, what we're doing is we're really affecting
16 what we believe is also part of our function, which is to
17 protect the examination process. And it may be very fact-
18 specific.

19 It's not the kind of case, necessarily, for which
20 the reconsideration function was designed.

21 CHAIRMAN TSUI GRUNDMANN: So you're saying
22 suitability is outside the 7701, where it specifically

1 mentions the director?

2 MS. KAPLAN: No, I'm not saying that. I think in a
3 suitability case, if there were a decision by the MSPB in a
4 suitability case, that interprets Civil Service law, rule, or
5 regulations -- a case like this one, for example, God forbid
6 (laughing) --

7 CHAIRMAN TSUI GRUNDMANN: Exactly --

8 MS. KAPLAN: That OPM could come in and, you know,
9 seek reconsideration and take the case to the Court of
10 Appeals.

11 But what I'm saying is that even in cases where
12 it's not a big Civil Service issue, it's not a big legal
13 issue, OPM has a role to play where the question is whether
14 someone should have gotten there job to begin with;

15 Whether they have engaged in fraud in the
16 examination, whether they have refused to provide testimony
17 to the MSPB or the Office of Special Counsel.

18 And so that's what this is about.

19 And I think that I understand the argument about
20 how Chapter 75 talks about removals, and there is an
21 exceptions clause, and all of that.

22 But I think it really begs the question of whether,

1 when Congress enacted Chapter 75, what it had in mind was to
2 reach OPM-directed suitability removals.

3 And the reason I say that it didn't have that in
4 mind, or it didn't necessarily have that in mind, is because
5 when we look at the history proceeding the Civil Service
6 Reform Act, the removals for these limited purposes were
7 always treated differently than Agency-initiated adverse
8 actions.

9 And you don't have to read Chapter 75 the way that
10 the Appellants are reading Chapter 75. You don't. Because
11 you can read the reference to an Agency to mean an employing
12 agency, which is really the way it makes the most sense, if
13 you look at the history.

14 And so that being true, you don't have to read it
15 the way that they read it. And if you do read it the way
16 that they read it, what you're doing is you're undermining
17 this long-standing authority, you're almost invalidating
18 executive orders, as a matter of fact;

19 Which provide that OPM can direct suitability
20 removals. You're undermining that, because you're saying
21 that, "Yes, OPM, you direct the suitability removal," but
22 then somehow the employing agency comes in and gets in front

1 of it.

2 It doesn't make any sense. And so our argument is:
3 You don't read Chapter 75 the way that they read Chapter 75.
4 We're not trying to override a statute with a regulation; we
5 don't read the statute the way that they read the statute.

6 The exceptions clause, which they rely upon, while
7 it's very easy to reconcile the exceptions clause with the
8 argument that we're making, what that is, is if you look at
9 it, each of those exceptions are other statutory procedures
10 for removal that Congress was creating when it passed the
11 Civil Service Reform Act.

12 It listed those. It listed those because it wanted
13 to make it clear that an Agency doesn't have to remove
14 somebody under 75 procedures. They can use these other
15 procedures.

16 It doesn't necessarily speak to the question of
17 whether OPM's longstanding scheme of suitability removals,
18 which are by regulation, which were not touched by the Civil
19 Service Reform Act, survive, or whether they were intended to
20 be covered by Chapter 75.

21 So the plain language argument, which is the
22 strongest argument of the Appellants, I think is very,

1 somewhat simplistic.

2 And if we want to take the plain-language argument
3 a little bit further, and if, let's say we want to say, as
4 you were suggesting, Vice Chair Wagner, that OPM can be the
5 Agency, all right, in that case, then OPM would be the
6 Agency, OPM would be directing the removal.

7 And answer would come back to OPM; the employee's
8 response; OPM would make a determination. Kind of the way it
9 works now, with a small distinction, which is that under our
10 regs, there's no provision for an oral reply.

11 All right, then OPM defends the case in front of
12 the Merit Systems Protection Board, just like OPM has do now.

13 The only thing left is, well, do the Douglas
14 Factors apply now? Because it's an action under Chapter 75.

15 Well, it doesn't follow that the Douglas Factors
16 would necessarily apply, if OPM is an Agency taking an action
17 under Chapter 75, because if you go back and you look at the
18 Douglas case, and you look at the Lisiecki case, and other
19 cases that have interpreted those factors, the whole reason
20 those factors exist is because historically they were the
21 factors, the Civil Service Commission looked at, when it was
22 reviewing Agency-initiated removals.

1 VICE CHAIRMAN WAGNER: Okay. I have a question,
2 though. Apart from, again -- even assuming 5 CFR 731, is the
3 source of the Board's subject matter jurisdiction to look at
4 suitability actions -- or, suitability removal? Okay?

5 You've still got the statutory construct that says,
6 "Okay, or yes, we get the jurisdiction from 731, but once we
7 have it, 7701 dictates to us what we do with it."

8 And under 5 USC 7701, we cannot sustain an action
9 that is not proven by a preponderance of the evidence. And
10 yet under your regulations, you would have it that if, you
11 know, if OPM alleged ten charges, and only one was sustained,
12 it would still be a matter that would have to go back to you
13 on remand.

14 MS. KAPLAN: Well --

15 VICE CHAIRMAN WAGNER: Which is contrary to what
16 7701 --

17 MS. KAPLAN: No, because you would be reviewing our
18 suitability determination to figure out whether it was
19 supported by preponderant evidence. If you decide that eight
20 or nine of the charges are not supported by a preponderance
21 of evidence, those are gone.

22 Then on remand, there's the once charge, which the

1 Board has found is supported by preponderant evidence. Then
2 what we get to decide is what action is taken.

3 So we're not subverting 7701, and the way that it
4 works if you agreed with us that is not a Chapter 75 action,
5 and the Board has, you know, such jurisdiction as is granted
6 to it by OPM, it's not inconsistent 7701, because you still
7 are going to be looking at these charges to see if they're
8 supported by preponderant evidence.

9 The only thing that you're not looking at -- and
10 you don't even look at this in performance cases, by the way
11 -- performance cases you don't mitigate --

12 (Simultaneous conversation.)

13 CHAIRMAN TSUI GRUNDMANN: -- statutory provision
14 for it --

15 MS. KAPLAN: Well, but are they not reviewing under
16 7701? I think they are, as well. And it's the same kind of
17 thing.

18 So you know, they don't really conflict with each
19 other.

20 CHAIRMAN TSUI GRUNDMANN: When we remand back to
21 you the one charge, do you then go back and reapply 202,
22 731202?

1 MS. KAPLAN: We would look at the whole thing all
2 over again. We would say, "Okay, this is the only thing
3 that's left." It's do we still -- the Board has now found
4 that the individual is not suitable.

5 But that shows not suitable for employment.

6 Okay, is it the kind of thing, do we want to remove
7 the person? Maybe we do.

8 Do we want to debar them? Do we want to -- usually
9 -- let me frank with you -- usually they come together, all
10 three things are done.

11 If the Board remands it and sends it back, and we
12 find the person unsuitable, we're going to apply all three of
13 the remedies.

14 VICE CHAIRMAN WAGNER: But, you know, I realize
15 that in your brief, you sort of pass this off. But the
16 actual plain language of the regulation says that what is
17 coming to us is the suitability action for review.

18 MS. KAPLAN: Yeah.

19 VICE CHAIRMAN WAGNER: And it's I think a little
20 too simplistic, to use your own term, to say, "Well, that
21 doesn't mean suitability action, it just really means
22 determination," when OPM took pains in its regs to

1 differentiate between those two things.

2 MS. KAPLAN: Well, you know, if I had it to do all
3 over again, I think that that created some confusion,
4 obviously.

5 But still, if you look at the scope of the Board's
6 review, which is much more specific, the section, and in the
7 current regulations as well, they talk about the Board, you
8 know, reviewing the determination and not reviewing the
9 specific actions.

10 So that was -- I think, what was trying there is
11 not entirely clear, by now, characterizing as a suitability
12 action.

13 But I can tell you in the Preamble, I mean, I think
14 we said we were still adopting the standard of review in
15 Folio. And there was no intention to change Folio.

16 And that's what our regulations mean.

17 And you know, it might deserve a little revisit,
18 but I don't think -- I still think that, you know, the use of
19 the phrase, "suitability action" in the regulations doesn't
20 change the Board's scope of review, which is specifically
21 also addressed, even in the current regulations.

22 CHAIRMAN TSUI GRUNDMANN: Can I take you to a different

1 direction?

2 We have a history of reviewing removals, when the
3 third parties actually made the decision, the underlying
4 decision to remove an employee;

5 Such as loss of driver's license, such as maybe
6 loss of a bar certificate, if you're an attorney.

7 So a third party entity has made that
8 determination. Yet the Agency takes the removal action. And
9 we still review it under Chapter 75.

10 MS. KAPLAN: Mm-hmm.

11 CHAIRMAN TSUI GRUNDMANN: It's more like a
12 condition of employment, my driver's license, by driving a
13 truck.

14 MS. KAPLAN: Mm-hmm. It's a qualification.

15 CHAIRMAN TSUI GRUNDMANN: It's a qualification for
16 employment.

17 So is there a distinction between suitability for
18 federal employment and eligibility to occupy a position?

19 MS. KAPLAN: There is a distinction between
20 suitability for federal employment, which really goes to your
21 character and your conduct, and qualifications for
22 employment.

1 I don't know about eligibility. I'm sure that the
2 people at OPM, who know this stuff like much better than I do
3 would be able to draw a distinction between eligibility
4 qualifications, examination, and suitability.

5 But suitability is about character and conduct.
6 It's not about qualifications.

7 CHAIRMAN TSUI GRUNDMANN: So, but I'm just saying
8 that, again, a third party has made that determination we're
9 using. You're using the Agency as the vehicle to remove the
10 employee.

11 MS. KAPLAN: Well, but that's different than
12 suitability, because suitability is about -- you know, the
13 fact that you don't have a driver's license doesn't, you
14 know, speak to your character and your conduct to hold the
15 position.

16 CHAIRMAN TSUI GRUNDMANN: What if I lost my
17 driver's license, because I lied on some sort of -- my
18 driver's license?

19 MS. KAPLAN: There you go, bringing it right back.

20 (Laughter.)

21 CHAIRMAN TSUI GRUNDMANN: There you go.

22 MS. KAPLAN: Okay. I think my time is up.

1 Thank you very much.

2 (Laughter.)

3 MS. KAPLAN: Oh, is that an actual question? Do
4 you want --

5 (Laughter.)

6 CHAIRMAN TSUI GRUNDMANN: No. Thank you very much.

7 MS. KAPLAN: Thank you.

8 CHAIRMAN TSUI GRUNDMANN: Okay.

9 I believe we're on Amici for OPM, Department of
10 Treasury, Mr. Avitabile?

11 MR. AVITABILE: Thank you.

12 May it please the Board, my name is Greg Avitabile,
13 and I'm here today for Amicus Department of Treasury.

14 Before I turn to my prepared remarks, I just wanted
15 to call your attention -- I know one of the central issues
16 here has been whether the intent of Chapter 75 was to apply
17 to actions taken by the employing agency on the one hand
18 versus OPM on the other.

19 And I think, if I could just call your attention to
20 pages 6 and 7 of the brief that we filed, I cite to several
21 passages from the legislative history in the Senate report
22 that I think strongly counsel for that finding that it would

1 apply only to adverse actions taken by Agencies.

2 In one passage --

3 CHAIRMAN TSUI GRUNDMANN: What page is that again?

4 MR. AVITABILE: Well, it's page 6 and 7 of the
5 amicus brief filed by the Treasury Department.

6 In one passage, there's an observation made that
7 the new CSRA Section 71513 procedures, requiring that
8 agencies take adverse action only for cause, are identical to
9 current statutory provisions relating to adverse actions,
10 indicating that there was a recognition that at least with
11 respect to Chapter 75, which also pre-existed the Civil
12 Service Reform Act, there was an intended continuity in the
13 purpose of that section, as to its application to employment
14 agencies.

15 And then on page 7, there's just frankly a number
16 of different references to the impacts on the employing
17 agency of various circumstances that can arise under Chapter
18 75, implying once again that the understanding of Congress
19 was that this was really a Chapter applicable to the
20 employing agency.

21 VICE CHAIRMAN WAGNER: But I thought -- I'm not
22 sure if it was OPM -- but somebody argued the point that pre-

1 CSRA, that this was really delegated authority that was being
2 exercised, that it was, you know, pre-CSRA, it was a
3 centralized personnel authority, and that the CSRA was in
4 fact intended to decentralize that authority.

5 So, which is it? Is it that, you know, what
6 Congress intended to do was to perpetuate a centralized
7 authority construct?

8 MR. AVITABILE: I think what Congress intended to
9 do, at least with respect to Chapter 75, was to continue to
10 have adverse actions taken, based on misconduct, to be taken
11 by the employing agency, and it left in place -- and I don't
12 really want to repeat OPM's argument, that's not what I'm
13 here for -- but it really left in place the longstanding pre-
14 existing practice, based again on Section 3301, delegated by
15 the President to OPM, previously to the Civil Service
16 Commission, to determine fitness for federal employment, and
17 the entire construct relating to fitness was separate from
18 the construct concerning adverse actions that could be taken
19 by an Agency.

20 And I believe the legislative history, the language
21 that I cited, demonstrates that the intent was to continue
22 that distinction. Because Chapter 75 was recognized as an

1 adverse action taken by the employment Agency, whereas
2 suitability determinations would be made by OPM, for other
3 reasons.

4 VICE CHAIRMAN WAGNER: But fitness determinations
5 can also give rise to adverse actions. Correct? I mean, an
6 employee can become unfit for duty in the course of --

7 MR. AVITABILE: There's no question that an
8 employing agency could, based on the same conduct that OPM
9 identified, also would choose to take an adverse action.

10 But the problem with that, which gets more probably
11 to what I was intending to talk about, is the distinction
12 between the interest OPM is intended to serve versus what the
13 Agency's interests are;

14 Agencies, as you know, that will take adverse
15 actions based on the managerial discretion, whether they
16 think a particular adverse action promotes efficiency of the
17 service -- in other words, how's it going to impact on the
18 conduct, on the operation of the Agency, and -- of the
19 Agency's mission?

20 OPM on the other hand, as I mentioned a moment ago,
21 has a duty that was granted to the President by Congress and
22 then delegated by Congress to provide to OPM to ensure that

1 the character and conduct of applicants make them fit for
2 federal employment.

3 So OPM is concerned with the integrity of the
4 application in the examination process, and by extension
5 protects the interests of the federal government at large.

6 Agencies, on the other hand, are going to try to
7 protect their own parochial interests in their own mission.

8 And the problem you get when you have that
9 diversion of interests in having an Agency defend OPM's
10 suitability decision, is that you risk the possibility of
11 undermining the integrity of the work force.

12 As we know from the regulations, already, Agencies
13 do not always support OPM's determination that an employee
14 should be removed, based on suitability.

15 And an Agency that wished to retain an employment
16 would not be able to retain an employee would not be able to
17 effectively represent OPM's interests as the defender of the
18 decision.

19 There's also other practical obstacles we see to be
20 representation of OPM's interest before the MSPB by the
21 Agency. Even assuming, for instance, that OPM could, in
22 addition to their other statutory duties, prepare employing

1 agencies to defend OPM's position, the employing agency could
2 never be as effective a representative of OPM's interests.

3 VICE CHAIRMAN WAGNER: I mean, these are pretty
4 broad statements about the relative ability of OPM and
5 Agencies, and what not;

6 And their interests and lack of -- you know, I
7 mean, it's a broad swipe at agencies and their willingness to
8 ensure the integrity of the federal work force.

9 And you know, if you really want us to -- is this
10 case turning on --

11 MR. AVITABILE: No. My intent is not in any way to
12 impugn any particular agency's interest in maintaining
13 employees that, you know, clearly would be inappropriate.

14 But I think it's been established by a number of
15 individuals who have spoken here today that there are
16 circumstances, particularly where an employee has been
17 working for a year or more, that an Agency might have
18 interests in retaining the employee, that they might consider
19 to be paramount over what OPM would deem to be the
20 appropriate outcome, based on their statutory mandate to
21 protect the integrity of the federal workforce.

22 CHAIRMAN TSUI GRUNDMANN: And in those

1 circumstances, then OPM's concern would override any Agency
2 concerns?

3 MR. AVITABILE: I think it should. And that's why
4 it is OPM's responsible to make those determinations.

5 I think also --

6 CHAIRMAN TSUI GRUNDMANN: I think you're out of
7 time.

8 MR. AVITABILE: Oh, all right.

9 CHAIRMAN TSUI GRUNDMANN: So I'll give you about 30
10 seconds.

11 MR. AVITABILE: No, that's okay. I mean, that's
12 fine. I don't mean to --

13 (Laughter.)

14 CHAIRMAN TSUI GRUNDMANN: Do you want to wrap up?

15 MR. AVITABILE: The only other point I was going to
16 make, you know, related to the problems of mitigation and the
17 application of Douglas Factors.

18 I think that's really been covered already.

19 CHAIRMAN TSUI GRUNDMANN: Okay.

20 MR. AVITABILE: So I appreciate your time.

21 CHAIRMAN TSUI GRUNDMANN: Thank you --

22 MR. AVITABILE: Thank you.

1 CHAIRMAN TSUI GRUNDMANN: We're back to Mr. Kaplan.

2 MR. KAPLAN: No, Ms. Alden.

3 CHAIRMAN TSUI GRUNDMANN: Oh, Ms. Alden, two
4 minutes.

5 MS. ALDEN: Thank you. We switched.

6 CHAIRMAN TSUI GRUNDMANN: Okay.

7 MS. ALDEN: Thank you.

8 Going back to 7513, and the Agency, I think that
9 Department of Treasury's reference to the legislative history
10 again is quite helpful.

11 The statute is clear. It says an Agency may take
12 an action covered by the subchapter. I believe Treasury's
13 right. That applies to the employing agency.

14 And that is because the legislative history is also
15 equally clear that OPM isn't supposed to be taking these
16 actions.

17 That doesn't apply to OPM. After the employee
18 becomes tenured, OPM no longer has authority to require that
19 an employee be removed.

20 And a lot of what we've been talking about here
21 today is policy issues. In those circumstances where OPM
22 believes that they don't have this tenured employee is

1 unsuitable, but the Agency may feel differently.

2 There's the tension there.

3 There is a tension there in terms of the policy.

4 But the statute has no tension. The statute is clear. So if

5 that policy tension causes a problem, we are not the people

6 to resolve that. The Board is not the right place to resolve

7 it. The Fed Circuit is not the right place to resolve it.

8 That has to go back to Congress. If the Congress

9 wants to resolve it by amending the Act, that's appropriate.

10 But the Act as it stands is quite clear, and it does not

11 give OPM the authority to terminate tenured employees.

12 Again, focusing on the legislative history just for

13 a moment, as I stated in my principle argument, OPM did not

14 rebut our legislative history in its briefs. It also didn't

15 rebut the legislative history here.

16 The legislative history is really powerful. And I

17 submit that that is the Appellants' strongest argument.

18 The legislative history is unambiguous that removal

19 actions include suitability determinations.

20 That's my two minutes. Thank you.

21 CHAIRMAN TSUI GRUNDMANN: Thank you very much.

22 Mr. Kaplan has the last word.

1 MR. KAPLAN: Thank you.

2 OPM says that Chapter 75 doesn't apply to it; it
3 applies to the Agencies. Well, then that begs the question
4 of what statutory authority applies to OPM to allow it to
5 direct these actions here.

6 And as I've discussed in my principle argument,
7 Section 3301 that it relies on, doesn't help it.

8 The word, "fitness," ascertain fitness for
9 employment, is only discussed one place. And it's 5 USC
10 3301, number 2. And it's "ascertain the fitness of
11 applicants." Tenured federal employees are not applicants.

12 My first point.

13 Second point. To the extent that it may be good
14 policy to remove federal employees many years down the road,
15 when you find out that they've committed fraud in their
16 employment application, that's a policy issue;

17 And Congress needs to decide if OPM has the
18 statutory authority to do that. As of right now, it doesn't
19 under the clear reading of the language.

20 Agencies remove employees for falsification in
21 employment applications. Right now today, the Board hears
22 those cases.

1 So the fact that someone has passed their
2 probationary period doesn't mean that employees aren't
3 removed for falsifying those employment applications or that
4 that happens.

5 You ask, can OPM expand, you know, the factors for
6 consideration? It can. It can also contract them.

7 And lastly, the President can't delegate to OPM
8 authority that he doesn't have. The President is constrained
9 by Section 3301.

10 Let me close by saying this. The Board has the
11 choice of two paths to resolve this case: The path suggested
12 by OPM is one marked by silence, innuendo, implication,
13 inference.

14 The path suggested by Appellants is a path
15 illumined by clear, express statutory language. I urge that
16 you follow the path illuminated by the Appellants' argument
17 and the clear expression of Congress.

18 Thank you.

19 CHAIRMAN TSUI GRUNDMANN: Thank you.

20 The Board thanks the Counsel and the Amici for the
21 time and the detail they put into their briefs and their
22 argument today, to better inform the Board of our decision.

1 In particular, we thank Ms. Kristin Alden and Mr.
2 Joe Kaplan, who contributed their time pro bono in their
3 representation of Ms. Barnes and Ms. Hunt-O'Neal.

4 This hearing is adjourned.

5 (Whereupon, at 11:53 a.m. the oral arguments
6 hearing was adjourned.)

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