

**THE UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2011 MSPB 10

Docket Nos. DC-0731-09-0261-R-1
DC-0731-09-0260-R-1

**Hyginus U. Aguzie,
Holley C. Barnes,
Appellants,**

v.

**Office of Personnel Management,
Agency.**

January 26, 2011

John E. Carpenter, Esquire, Washington, D.C., for appellant Aguzie.

Joseph V. Kaplan, Esquire, Washington, D.C., for appellant Barnes.

Elaine Kaplan, Esquire, Robert J. Girouard, Esquire, Darlene M. Carr, and Joyce B. Harris-Toukara, Esquire, Washington, D.C., for the agency.

Andres M. Grajales, Esquire, Washington, D.C., for *amicus curiae*, American Federation of Government Employees.

Gregory O'Duden, Esquire, and Larry J. Adkins, Esquire, Washington, D.C., for *amicus curiae*, National Treasury Employees Union.

Mark Guberman, Esquire, Rockville, Maryland, *amicus curiae* in his individual capacity.

Gregg Avitabile, Esquire, and William Way, Esquire, Washington, D.C., for *amicus curiae*, Department of the Treasury.

Will A. Gunn, Esquire, Washington, D.C., for *amicus curiae*, Department of Veterans Affairs.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 These appeals present the question of whether, when the Office of Personnel Management (OPM) directs an agency to remove a tenured employee¹ pursuant to its authority under 5 C.F.R. part 731, the removal action is subject to the requirements of 5 U.S.C. chapter 75 subchapter II, including the Board appeal rights guaranteed under [5 U.S.C. § 7513](#)(d). For the reasons set forth below, we answer in the affirmative.

BACKGROUND

¶2 The Board first addressed the question at hand in the case of *Aguzie v. Office of Personnel Management*, [112 M.S.P.R. 276](#) (2009). Mr. Aguzie was employed in the competitive service as a Budget Analyst with the U.S. Commission on Civil Rights (USCCR). More than 2 years after his appointment, OPM informed Mr. Aguzie that it had found him unsuitable for any covered position² in the federal service on the grounds that he had made material, intentional false statements on several forms submitted in connection with his application and appointment. OPM further informed Mr. Aguzie that it had taken

¹ For purposes of this decision, we will use the term “tenured employee” to refer to an individual who satisfies the definition of “employee” at [5 U.S.C. § 7511](#)(a)(1).

² Title [5 C.F.R. § 731.101](#) defines a “covered position” as “a position in the competitive service, a position in the excepted service where the incumbent can be noncompetitively converted to the competitive service, and a career appointment to a position in the Senior Executive Service.”

the following actions: (1) directed USCCR to remove him from the rolls within 5 days of receipt of its decision, pursuant to [5 C.F.R. § 731.304](#); (2) cancelled any reinstatement eligibility obtained from his appointment or any other eligibilities he may have had for covered positions; and (3) debarred him from competition for, or appointment to, any covered position for a period of 3 years.

¶3 Mr. Aguzie appealed the suitability actions to the Board pursuant to [5 C.F.R. § 731.501](#). Following a hearing, the administrative judge issued an initial decision finding that OPM’s suitability determination was supported by a preponderance of the evidence. The administrative judge did not review the suitability actions themselves, citing *Folio v. Department of Homeland Security*, [402 F.3d 1350](#), 1353-55 (Fed Cir. 2005), for the proposition that the Board’s review of a suitability determination includes an evaluation of the criteria set forth in [5 C.F.R. § 731.202](#), but does not extend to the ultimate action taken by OPM.³ The administrative judge further found that Mr. Aguzie failed to prove his affirmative defenses of harmful error and discrimination based on race and national origin.

¶4 The Board denied Mr. Aguzie’s petition for review but reopened the case on its own motion to address the question, not previously raised by the parties, of whether Mr. Aguzie was entitled to appeal his removal as an adverse action under 5 U.S.C. chapter 75 subchapter II. The Board noted that at the time of his removal Mr. Aguzie was an “employee” under [5 U.S.C. § 7511\(a\)\(1\)\(A\)](#) and that

³ OPM’s suitability regulations, as revised effective June 15, 2008, now state that it is the “suitability action” which may be appealed to the Board. [5 C.F.R. § 731.501\(a\)](#). In our original decisions in these appeals, we raised the question of whether that revision altered the scope of the Board’s regulatory jurisdiction, thereby superseding *Folio*. See *Aguzie*, [112 M.S.P.R. 276](#), ¶¶ 1 n.1, 7; *Barnes v. Department of Homeland Security*, [112 M.S.P.R. 273](#), ¶ 6 (2009). On reconsideration, OPM states that the revision was not intended to expand the Board’s review authority beyond the merits of the underlying suitability determination. See OPM Brief at 13, n.5. Because we find that the appellants’ removals are reviewable under [5 U.S.C. § 7513\(d\)](#), we do not decide at present whether this is a permissible construction of 5 C.F.R. § 731.501.

removal actions generally fall within the scope of [5 U.S.C. § 7512](#). Thus, the Board reasoned, it appeared Mr. Aguzie might have a statutory right to appeal his removal under [5 U.S.C. § 7513\(d\)](#), in which case the Board would have the authority to review and potentially mitigate the removal action. The Board remanded the appeal to provide the parties an opportunity to brief the question of whether Mr. Aguzie is entitled to appeal his removal under [5 U.S.C. § 7513\(d\)](#) and, if so, whether the other actions on appeal remain within the Board's jurisdiction under [5 C.F.R. § 731.501](#). *Aguzie*, [112 M.S.P.R. 276](#), ¶ 7.

¶5 That same day, the Board issued a companion decision in *Barnes v. Office of Personnel Management*, [112 M.S.P.R. 273](#) (2009), remanding that appeal for consideration of the same issues. Ms. Barnes, a competitive service employee of the Department of Homeland Security, Citizenship and Immigration Services (CIS), had completed her probationary period when OPM found her unsuitable for her position based on a charge of material, intentional false statement or deception or fraud in examination or appointment. Pursuant to that determination, OPM took the following actions: (1) directed CIS to remove her from the rolls within 5 work days of its receipt of the decision; (2) cancelled any reinstatement eligibility obtained from her appointment or any other eligibilities she may have had on existing competitive registers; and (3) debarred her from competition for, or appointment to, any position in the competitive service for a period of 3 years. *Id.*, ¶ 2. As in *Aguzie*, the administrative judge sustained the suitability determination without reviewing the propriety of the suitability actions. *Id.*, ¶ 4.

¶6 OPM subsequently filed a request to reopen *Aguzie* and *Barnes* for adjudication by the full Board. The Board granted OPM's request and consolidated the appeals pursuant to [5 U.S.C. § 7701\(f\)\(1\)](#). The Board later added two additional cases, *Scott v. Office of Personnel Management*, MSPB Docket No. CH-0731-09-0578-I-1, and *Hunt-O'Neal v. Office of Personnel*

Management, MSPB Docket No. AT-0731-09-0240-I-1, to the consolidated appeal, over the objections of Mr. Scott and OPM, respectively.

¶7 The Board identified the question raised in *Aguzie* and *Barnes* for oral argument and issued a Federal Register notice soliciting amicus briefs. 75 Fed. Reg. 20,007 (April 16, 2010); *see also* 75 Fed. Reg. 29,366 (May 25, 2010) (extending the filing deadline). After receiving briefs from the parties and amici, the Board held oral argument on October 18, 2010.⁴ Having decided the question identified for oral argument, we now sever *Scott* and *Hunt-O’Neal* from the consolidation. We will issue separate decisions addressing the issues unique to those appeals.

ANALYSIS

¶8 It is axiomatic that the interpretation of a statute begins with the language of the statute itself. *Van Wersch v. Department of Health & Human Services*, [197 F.3d 1144](#), 1148 (Fed. Cir. 1999). Where the language provides a clear answer, the inquiry ends, and the plain meaning of the statute will be regarded as conclusive. *Id.*

¶9 Turning to the language of the statute, [5 U.S.C. § 7513\(a\)](#) provides that, “[u]nder regulations prescribed by [OPM], an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.” Title [5 U.S.C. § 7513\(d\)](#) in turn provides that “[a]n employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701.” Section 7513 does not authorize or refer to any action that is not subject to the efficiency of the service standard of [5 U.S.C. § 7513\(a\)](#). Consequently, the right of appeal under [5 U.S.C. § 7513\(d\)](#) applies where an action falls under [5 U.S.C. § 7513\(a\)](#), i.e.,

⁴ We give special thanks to Joseph Kaplan, Esq., and Kristin Alden, Esq., for providing *pro bono* representation for Ms. Barnes and Ms. Hunt-O’Neal.

where the action is: (1) taken by an “agency”; (2) covered by 5 U.S.C. chapter 75 subchapter II; and (3) taken against an “employee” as defined for purposes of 5 U.S.C. chapter 75 subchapter II. We address these requirements in turn.

The OPM-directed removal of an employee pursuant to 5 C.F.R. § 731 is an action taken by an “agency.”

¶10 We first find that an OPM-directed removal for suitability reasons is an action taken by an “agency.” OPM has disputed this point, arguing that the term “agency,” as used in chapter 75 subchapter II, refers exclusively to an employing agency, and therefore does not refer to OPM outside its capacity as an employer. We need not decide the merits of that argument, for it is clear from the language of OPM’s suitability regulations, as well as their underlying authority at Civil Service Rule V, that when OPM directs the removal of an employee for suitability reasons, it is the employing agency that ultimately takes the action. *See* Civil Service Rule V, § 5.3(1), *codified at* [5 C.F.R. § 5.3](#)(1) (authorizing the Director of OPM to instruct an agency to “separate or take other action” against an employee found disqualified for federal employment); [5 C.F.R. § 731.304](#) (providing that “the employing agency must remove the . . . employee” pursuant to OPM’s decision); *see also* [5 C.F.R. § 752.401](#)(b)(10) (referring to actions “taken or directed” under part 731). It is true that OPM makes the underlying decision and the role of the employing agency is essentially ministerial. However, [5 U.S.C. § 7513](#) does not require that the agency taking the action be the same agency that makes the decision underlying the action.

¶11 In our original decisions in *Aguzie* and *Barnes*, we speculated that if an OPM-directed removal were appealable under [5 U.S.C. § 7513](#)(d), the employing agency would be the proper respondent on the grounds that it effected the action. *Aguzie*, [112 M.S.P.R. 276](#), ¶ 5; *Barnes*, [112 M.S.P.R. 273](#), ¶ 5. Upon further consideration, we are now persuaded that this is not the case. While we are aware of no statute or regulation defining which agency is the proper respondent in an appeal before the Board, we observe that under [5 U.S.C. § 7701](#)(c), it is the

“decision of the agency” which the Board will sustain or not sustain. In the case of a directed suitability removal, the action, though effected by the employing agency, is the result of a decision by OPM - a decision with which the employing agency had no choice but to comply and which it may or may not care to defend. We therefore find that, regardless of whether a directed removal action for suitability reasons is appealable under [5 U.S.C. § 7513\(d\)](#), it is incumbent on OPM to support the underlying decision by a preponderance of the evidence. *See* 5 U.S.C. § 7701(c)(1)(B).⁵

Title 5 U.S.C. chapter 75 subchapter II covers suitability-based removals.

¶12 The next question to be considered is whether an OPM-directed removal⁶ for suitability reasons is an action covered by 5 U.S.C. chapter 75 subchapter II. Title [5 U.S.C. § 7512](#) provides that, with certain enumerated exceptions, chapter 75 subchapter II covers the following actions: a removal, a suspension of more than 14 days, a reduction in grade, a reduction in pay, and a furlough of 30 days or less. The complete list of exceptions is as follows:

(A) a suspension or removal under section 7532 of this title;

⁵ We recognize the peculiarity of finding that the term “agency” means the employing agency in the context of [5 U.S.C. § 7513\(a\)](#), but OPM in the context of [5 U.S.C. § 7701\(c\)](#). That result, however, is a consequence of Civil Service Rule V and OPM’s own regulations, which deprive the employing agency of the discretion to take or not take an OPM-directed removal. In its amicus brief, the Department of the Treasury suggests that the term “agency” as used in 5 U.S.C. chapter 77 applies exclusively to employing agencies, and therefore cannot refer to OPM outside its capacity as an employer. There is no merit to that argument, as it is well-established that appeals of OPM retirement decisions are governed by [5 U.S.C. § 7701](#). *See Garza v. Office of Personnel Management*, [83 M.S.P.R. 336](#), ¶ 16 (1999), and cases cited therein. Therefore, OPM is an “agency” for purposes of chapter 77, regardless of the capacity in which it acts in a particular case.

⁶ It is well settled that a dismissal based on material misrepresentation in appointment constitutes a removal action, not a voiding of the appointment. *See Devine v. Sutermeister*, [724 F.2d 1558](#), 1563-64 (Fed. Cir. 1983), *superseded by rule on other grounds as stated in Bloomer v. Department of Health & Human Services*, 966 F.2d 1436 (Fed. Cir. 1992).

- (B) a reduction-in-force action under section 3502 of this title;
- (C) the reduction in grade of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title if such reduction is to the grade held immediately before becoming such a supervisor or manager;
- (D) a reduction in grade or removal under section 4303 of this title; or
- (E) an action initiated under section 1215 or 7521 of this title.

Notably, the list does not include suitability actions taken under 5 C.F.R. part 731 or any of its underlying authorities. Under canons of statutory interpretation, where a statute enumerates certain exceptions to a general rule, other unenumerated exceptions are excluded. *Andrus v. Glover Const. Co.*, [446 U.S. 608](#), 616-17 (1980). Applying that principle, we may readily infer that OPM-directed removals under 5 C.F.R. part 731 are among the actions covered by the subchapter.

¶13 Notwithstanding the clear language of the statute, OPM has promulgated regulations that purport to exempt removals under 5 C.F.R. part 731 from coverage under 5 C.F.R. part 752, which incorporates 5 U.S.C. chapter [75 subchapter II](#). *See C.F.R. § 752.301*. Specifically, [5 C.F.R. § 731.203\(f\)](#) provides that “an action to remove . . . an employee for suitability reasons under . . . part 731 is not an action under part 752.” Title [5 C.F.R. § 752.401\(b\)\(10\)](#) similarly provides that part 752 procedures do not apply to actions “taken or directed by [OPM] under part 731 . . . of this chapter.” These regulations, if valid, would preclude the Board from adjudicating an OPM-directed removal pursuant to 5 C.F.R. part 731 under the procedures and standards applicable to adverse actions under 5 U.S.C. chapter 75 subchapter II. OPM concedes, as it must, that its regulations cannot override statute. *See Oral Argument Transcript at 66*. We are therefore faced with the question of whether OPM’s regulations at 5 C.F.R. §§ 731.203(f) and 752.401(b)(10) can be reconciled with [5 U.S.C. § 7512](#).

¶14 In defense of its regulations, OPM appeals to the fact that the regulatory distinction between suitability actions and adverse actions predates the enactment of the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111. See [5 C.F.R. §§ 731.302\(c\)](#), 752.103(b)(2) (1978) (excluding removals directed by the Civil Service Commission from coverage under part 752). OPM first contends that Congress preserved that distinction through the Savings Provision at § 902(a) of the CSRA, which provides that “[e]xcept as otherwise provided in this Act . . . all executive orders, rules, and regulations affecting the Federal service shall continue in effect, according to their terms, until modified, terminated, superseded, or repealed by the President [or OPM].” See [5 U.S.C. § 1101](#) note. However, OPM neglects to consider that it long ago rendered the Savings Provision moot by modifying its own regulations to implement the relevant portions of the CSRA, including [5 U.S.C. § 7512](#). See 44 Fed. Reg. 47,029 (Aug. 10, 1979) (implementing subchapters I and II of chapter 75); see also 44 Fed. Reg. 47,523 (Aug. 14, 1979) (modifying 5 C.F.R. part 731 to recognize transfer of function from Civil Service Commission to OPM). Having modified its regulations following enactment of the CSRA, OPM can no longer rely on the Savings Provision.

¶15 OPM goes on to cite *Lackhouse v. Merit Systems Protection Board*, [773 F.2d 313](#) (Fed. Cir. 1985), for the proposition that Congress is presumed to be aware of the existence of civil service rules in enacting statutes and, if it intends to amend or repeal them, will so indicate. See *id.* at 316 n.6, 317 (finding that the Veterans Preference Act of 1944 did not alter the co-existence of the “rule of three” with recognition of veterans’ preference). Congress, OPM rightly observes, has not expressed an intent to repeal Civil Service Rule V, which is the immediate source of OPM’s authority to make suitability determinations and to direct employing agencies to remove employees found to be disqualified for federal service. See [5 C.F.R. §§ 5.2\(a\)](#), 5.3(1). Rule V, however, is silent on the question of whether the OPM-directed suitability

removal of a tenured employee is covered by 5 U.S.C. chapter 75 subchapter II. The implementing regulations at [5 C.F.R. §§ 731.304](#)(f) and 752.401(b)(10), which purport to exclude suitability actions from coverage under the subchapter, are not civil service rules, nor have they ever had that status. Furthermore, unlike the “rule of three” at issue in *Lackhouse*, the regulations at issue here facially conflict with the relevant portions of the CSRA. *Cf. Lackhouse*, 773 F.2d at 316 (relying on the absence of a facial conflict between the “rule of three” and the portions of the CSRA concerning veterans’ preference).

¶16 OPM further appeals to the principle that the regulations of an agency exercising rulemaking authority delegated to it by Congress are generally entitled to deference. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, [467 U.S. 837](#), 843-44 (1984). It is true that Congress has expressly authorized OPM to prescribe regulations implementing 5 U.S.C. chapter 75 subchapter II, except with respect to matters within the Board’s rulemaking authority. *See* [5 U.S.C. § 7514](#). However, when reviewing an agency’s construction of a statute, “[f]irst, always, is the question whether Congress has spoken directly to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron*, 467 U.S. at 842-43. Only if the statute is silent or ambiguous with respect to the specific issue will the inquiry proceed to the question of whether the agency’s interpretation is based on a permissible construction of the statute. *Id.* Hence, in order to establish that its regulations at [5 C.F.R. §§ 731.203](#)(f) and 752.401(b)(1) are entitled to *Chevron* deference, OPM must, as a threshold matter, establish that, notwithstanding the plain language of [5 U.S.C. § 7512](#), Congress has not directly addressed the question of whether chapter 75 subchapter II covers suitability-based removals of tenured employees.

¶17 In support of that effort, OPM cites *Burns v. United States*, [501 U.S. 129](#) (1991), *superseded by rule as stated in United States v. Carey*, [382 F.3d 387](#)

(3d Cir. 2004), for the proposition that, as a matter of statutory interpretation, “not every silence is pregnant,” and that “[a]n inference drawn from congressional silence cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent.” *Id.* at 136. Here, OPM contends, the contextual evidence establishes that Congress did not intend to place suitability actions within the scope of 5 U.S.C. chapter 75 subchapter II. Congress, OPM explains, crafted the list of exceptions under [5 U.S.C. § 7512](#) in order to conform the section with other provisions of Title 5, including the new removal and demotion provisions at 5 U.S.C. chapter 43. *See* [5 U.S.C. § 7512](#)(D); S. Rep. No. 95-969 at 50, *as reprinted in* 1978 U.S.C.C.A.N. at 2772. By contrast, OPM argues, Congress had no occasion to specify that suitability removals were not covered, because suitability procedures were not codified under Title 5 and had already long coexisted with chapter 75 as a distinct basis for removal. Thus, OPM contends, the absence of suitability actions from the list of exclusions under 5 U.S.C. § 7512 does not require a finding that suitability actions are covered under the subchapter. *See* OPM Reply Brief at 10-12.

¶18 We are not persuaded by OPM’s analysis. In *Burns*, the Court interpreted a federal rule of criminal procedure, which at that time provided a defendant the right to comment on a proposed departure from sentencing guidelines, but did not explicitly require the court to notify the defendant that it was considering such a departure. The majority read a notice requirement into the rule, reasoning that without a right to notice, the right to comment would be meaningless and thus not to infer a right to notice “would render what Congress has *expressly* said absurd.” *Burns*, 501 U.S. at 135-36 (emphasis in original). That rationale does not apply here, however, for OPM has not shown that reading [5 U.S.C. § 7512](#) to cover suitability removals would render it or any other express statutory provision meaningless or absurd. The statutes underlying OPM’s authority to direct suitability removals, [5 U.S.C. §§ 1302](#), 3301, and 7301, are completely silent on the question of whether such actions are covered by 5 U.S.C. chapter 75

subchapter II. OPM also neglects to consider that in *Burns*, the Court found that due process considerations favored a broad reading of the rule at issue: “Notwithstanding the absence of express statutory language, this Court has readily construed statutes that authorize deprivations of liberty or property to require that the Government give affected individuals *both* notice *and* a meaningful opportunity to be heard.” *Id.* at 137-38 (emphasis in original). Here, due process concerns would, if anything, favor a broader interpretation of Board appeal rights.

¶19 Furthermore, there is evidence that Congress did consider suitability removals when defining the scope of 5 U.S.C. chapter 75 subchapter II. In the Senate Report accompanying the CSRA, the Senate’s Committee of Government Affairs noted that in 1976, a total of 17,157 employees were dismissed from federal service. S. Rep. No. 95-969 at 9 (1978). The committee went on to specify the numbers of employees dismissed on various different grounds, including, *inter alia*, 418 employees “separated for suitability reasons.” *Id.* The report later states: “The actions covered in [chapter 75] subchapter II may be appealed by the employee to the board. These provisions govern *any* such action where the basis of the action is conduct *or any other cause* besides unacceptable performance.” *Id.* at 46 (emphasis added). In light of the report’s prior reference to suitability as a cause for dismissal, it would be reasonable to conclude that Congress did contemplate that suitability removals of tenured employees would be covered under 5 U.S.C. chapter 75 subchapter II. Moreover, to expand the subchapter to include the suitability removal of a tenured employee, thereby granting the employee a statutory right of appeal, would be consistent with the expressly stated intent of Congress that “Federal employees should receive appropriate protection through increasing the authority and powers of the Merit Systems Protection Board in processing hearing and appeals affecting Federal employees.” CSRA, § 3(3), [5 U.S.C. § 1101](#) note.

¶20 In the absence of compelling evidence of contrary Congressional intent, we discern no reason to abandon a plain language reading of [5 U.S.C. § 7512](#). Indeed, even if such evidence existed, we would have no choice but to abide by the unambiguous language of the statute. *See Van Wersch*, 197 F.3d at 1151. To the extent OPM’s regulations at [5 C.F.R. §§ 731.203\(f\)](#) and 752.401(b)(10) are inconsistent with our statutory obligation to hear appeals under [5 U.S.C. § 7513\(d\)](#), we decline to follow them. *Cf. DoPadre v. Office of Personnel Management*, [69 M.S.P.R. 346](#), 351-52 (1996) (invalidating regulation intended to limit Board’s authority to review OPM’s application of regulations governing court orders affecting retirement benefits).

¶21 OPM has also argued that the Board’s regulation at [5 C.F.R. § 1201.3\(a\)](#), which lists the actions appealable before the Board, distinguishes between a removal “for such cause as will promote the efficiency of the service,” pursuant to 5 U.S.C. chapter 75 subchapter II and 5 C.F.R. part 752, from “the disqualification of an employee or applicant because of a suitability determination,” pursuant to 5 C.F.R. part 731. *See* [5 C.F.R. § 1201.3\(a\)\(2\), \(7\)](#). However, OPM has not shown that the appealable actions listed at [5 C.F.R. § 1201.3\(a\)](#) must be read as mutually exclusive. Indeed, they are not. In *Lovshin v. Department of the Navy*, [767 F.2d 826](#) (Fed. Cir. 1985) (en banc), our reviewing court held that an agency may take a mixed removal action, relying on chapter 43 for “unacceptable performance” with an alternative or additional charge under chapter 75 “for such cause as will promote the efficiency of the service.” *Id.* at 843. In such a case, the court explained, “the appropriate standard of review by MSPB should be applied according to the basis for each specific charge.” *Id.* Consequently, we would adjudicate the removal as both an adverse action under 5 C.F.R. § 1201.3(a)(1) and a performance-based action under § 1201.3(a)(2). Similarly, our regulations do not preclude us from construing the appellants’ removals as appealable actions under both 5 C.F.R. § 1201.3(a)(2) and (7).

The appellants are employees for purposes of 5 U.S.C. chapter 75 subchapter II.

¶22 The final requirement for coverage under [5 U.S.C. § 7513\(a\)](#) is that the individual against whom the action is taken be an “employee.” For purposes of 5 U.S.C. chapter 75 subchapter II, the term “employee” is defined at [5 U.S.C. § 7511\(a\)\(1\)](#), and includes an individual in the competitive service who is not serving a probationary or trial period under an initial appointment, or who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less. *See McCormick v. Department of the Air Force*, [307 F.3d 1339](#), 1343-44 (Fed. Cir. 2002). It is undisputed that both Mr. Aguzie and Ms. Barnes satisfy that definition.

¶23 This is not to say, however, that their status as tenured employees renders them immune from suitability actions. The appellants contend that by taking suitability actions against tenured employees, OPM has exceeded its statutory authority, in particular, [5 U.S.C. § 3301](#), which provides that the President may:

- (1) prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of the service; [and]
- (2) ascertain the fitness of applicants as to age, health, character, knowledge, and ability for the employment sought[.]

As the appellants rightly point out, these provisions are concerned with the admissions process and the fitness of applicants, and do not directly concern tenured employees. However, we find nothing in the language of the statute that would preclude OPM from making an after-the-fact determination that a tenured employee serving an appointment subject to investigation was improperly admitted or was unfit at the time he applied. Furthermore, Rule V provides that the Director of OPM may determine “after appointment” whether the civil service rules and regulations were met with respect to that appointment. [5 C.F.R.](#)

[§ 5.2\(a\)](#). Neither [5 U.S.C. § 3301](#) nor Rule V set a deadline for making such a determination or for taking corrective action based on that determination.⁷

¶24 Consistent with these underlying authorities, the regulations at 5 C.F.R. part 731 allow for an appointment to remain subject to investigation after the probationary period is complete. [5 C.F.R. § 731.104\(b\)\(1\)](#). OPM has also reserved the authority to make suitability determinations and take or direct suitability actions against an “employee,” defined for purposes of 5 C.F.R. part 731 as an individual who has completed the first year of a subject-to-investigation appointment. See [5 C.F.R. §§ 731.101\(b\)](#), [731.105\(d\)](#). Thus, individuals who qualify as tenured employees under [5 U.S.C. § 7511\(a\)\(1\)\(A\)](#), whether by virtue of having completed a probationary period or having met the 1 year current continuous service criterion, are not on that account exempt from OPM-initiated suitability actions. Our holding is rather that the appellants’ removals, though authorized by 5 C.F.R. part 731, are also subject to the requirements of 5 U.S.C. chapter 75 subchapter II.

The OPM-directed removal of a tenured employee is “taken under” [5 U.S.C. § 7513](#) and therefore appealable under [5 U.S.C. § 7513\(d\)](#).

¶25 For the reasons discussed above, we find that the directed removal of a tenured employee falls under [5 U.S.C. § 7513\(a\)](#), and may therefore be taken only for such cause as will promote the efficiency of the service.⁸ This would appear

⁷ Prior to the CSRA, the regulations at 5 C.F.R. part 731 provided that appointments would remain subject to investigation for no longer than 1 year after the effective date of the appointment, except in cases involving intentional false statement or deception or fraud in examination or appointment. [5 C.F.R. § 731.301\(b\)](#) (1978). Although OPM’s current regulations do not set a time limit for investigation, they contemplate that an investigation will not continue indefinitely, but must in each case conclude in a suitability determination, i.e., a decision that the individual is suitable or not suitable for employment in covered positions in the federal government or in a specific agency. See 5 C.F.R. § 731.104(b)(1), (3).

⁸ We note in passing that all suitability actions are subject to an “efficiency of the service” standard, though not necessarily the same “efficiency of the service” standard prescribed by [5 U.S.C. § 7513\(a\)](#). See [5 U.S.C. § 3301\(1\)](#) (providing that the President

to resolve the question of whether the appellants have a right of appeal under [5 U.S.C. § 7513\(d\)](#), which provides that an employee “against whom an action is taken under this section” may appeal to the Board. OPM contends, however, that the appellants’ removals were not “taken under” [5 U.S.C. § 7513](#) because it invoked 5 C.F.R. part 731 as the authority for directing the actions. Hence, OPM argues, the appellants are not entitled to appeal their removals under 5 U.S.C. § 7513(d).

¶26 This argument is without merit. It is a well-established principle of Board law that the Board is not obliged to accept the assertion of a party as to the nature of a personnel action, but may make its own independent determination regarding the matter. *Cruz-Packer v. Department of Homeland Security*, [102 M.S.P.R. 64](#),

may “prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of the service”). This fact is obscured somewhat by the regulation at [5 C.F.R. § 731.201](#), which states that the standard for a suitability action is that it “protect the integrity or promote the efficiency” of the service. The use of the word “or” would seem to permit suitability actions that protect the integrity of the service but do not promote the efficiency of the service. *See Van Wersch*, 197 F.3d at 1151 (“the word ‘or’ unambiguously signifies alternatives”). OPM has stated, however, that it included the word “integrity” to clarify that integrity and honest conduct are *part* of the efficiency of the service standard as used in the suitability context:

The current efficiency of the service language might inadvertently lead some to believe that efficiency and effectiveness are limited to their dictionary definitions, namely, the capacity to produce desired results with a minimum expenditure of energy, time or money, or the ability to produce results. In fact, the efficiency of the service standard as used by OPM in a suitability context always has been a broader concept that involves, among other things, the integrity of the competitive examination system Adding the word integrity makes it even clearer that integrity and honest conduct always have been an important part of the existing efficiency of the service standard.

65 Fed. Reg. 82,239, 82,241 (Dec. 28, 2000); *see Doerr v. Office of Personnel Management*, [104 M.S.P.R. 196](#), ¶ 10 (2006). Hence, as OPM employs the terms, actions that protect the integrity of the service are a subset of those actions that promote the efficiency of the service. It is unclear why OPM believed it would be helpful to express a part-whole relationship with a disjunction.

¶ 5 (2006); *Russell v. Department of the Navy*, [6 M.S.P.R. 698](#), 704 (1981). Thus, it is the nature of a personnel action, not the agency's characterization of the action, that determines the Board's jurisdiction. *Cruz-Packer*, [102 M.S.P.R. 64](#), ¶ 5; *Czarkowski v. Department of the Navy*, [87 M.S.P.R. 107](#), ¶ 20 (2000).

¶27 We recognize that an exception to this principle exists in the case of performance-based actions. In *Lovshin*, our reviewing court held that an agency may, at its discretion, rely on either chapter 75 or chapter 43 to take a performance-based action, thereby requiring the Board to adjudicate the appeal under the chosen standard. 767 F.2d at 843. According to OPM, *Lovshin* stands for the general proposition that, where there exists a choice of adjudicatory procedures, it is up to the agency initiating the action to decide which one to follow. See OPM Reply Brief at 9; see also Department of Veterans Affairs Brief at 3; Department of the Treasury Brief at 5. Hence, OPM argues, the Board cannot require that an action taken under the authority of 5 C.F.R. part 731 be adjudicated under the standards applicable to [5 U.S.C. § 7513](#).

¶28 As we explained in *Aguzie*, however, the holding of *Lovshin* is predicated on the fact that chapter 43 and chapter 75 procedures are, by statute, mutually exclusive with respect to particular charges. *Aguzie*, [112 M.S.P.R. 276](#), ¶ 4 n.2; see [5 U.S.C. § 7512\(D\)](#); *Lovshin*, 767 F.2d at 843. Because of that express statutory exclusion, an agency may prohibit the Board from applying chapter 75 standards by invoking chapter 43 as the sole authority for its performance based action. *Aguzie*, [112 M.S.P.R. 276](#), ¶ 4 n.2. Here, there is no statutory provision that would preclude a removal action ostensibly taken under 5 C.F.R. part 731 from being adjudicated under chapter 75 standards. *Id.* Indeed, as discussed above, [5 U.S.C. § 7512](#) must be read to include suitability removals within its scope. OPM objects to this analysis, arguing that the Board “fails to take cognizance of the statutory and regulatory bases that exist for OPM-directed suitability removals, which do, in fact, explicitly preclude the use of chapter 75 standards for such suitability removals.” OPM Brief at 21. In making that

argument, however, OPM conflates the statutes underlying its suitability authority with the regulations at 5 C.F.R. part 731. It is only the latter that purport to exclude suitability removals from coverage under 5 U.S.C. chapter 75 subchapter II.

¶29 This case further differs from *Lovshin* in that a tenured employee removed for performance reasons is guaranteed a statutory right of appeal, whether it be under [5 U.S.C. § 7513\(d\)](#) or [5 U.S.C. § 4303\(e\)](#). By contrast, were we to find that the OPM-directed removal of a tenured employee is not “taken under” [5 U.S.C. § 7513](#), merely on the grounds that OPM did not cite that authority, the affected employee would be left with no appeal rights apart from those OPM deigns to provide. *See Folio*, 402 F.3d at 1353 (finding that, with respect to a suitability action appealable only under [5 C.F.R. § 731.501](#), “Congress granted OPM the authority to determine the scope of the Board’s authority”). To permit such a result would undermine the stated intent of Congress to provide “appropriate protection” to tenured federal employees by increasing the powers of the Board. *See* [5 U.S.C. § 1101](#) note; *Wassenaar v. Office of Personnel Management*, [21 F.3d 1090](#), 1092 (Fed. Cir. 1994) (a statute should be construed to avoid an absurd result when it can be given a reasonable application consistent with its words and legislative purpose).

¶30 Consistent with its stated intent to provide appropriate protection to federal employees, Congress has placed limits on the authority of OPM in matters over which the Board has primary responsibility. Among the functions vested in the Director of OPM by Congress are the following:

[E]xecuting, administering, and enforcing –

(A) the civil service rules and regulations of the President and the Office and the laws governing the civil service; and

(B) the other activities of the Office including retirement and classification activities;

except with respect to functions for which the Merit Systems Protection Board or the Special Counsel is primarily responsible[. . .]

[5 U.S.C. § 1103](#)(a)(5) (emphasis added). Thus, although Congress clearly established that OPM is the primary authority in most matters involving the civil service, it also reserved certain matters for the Board or the Special Counsel, and it denied OPM authority over those matters. Congress explicitly gave the Board authority to adjudicate appeals involving the removal of employees under chapter 75. [5 U.S.C. §§ 7512](#)(1), 7513(d). We therefore find that although OPM has authority to prescribe regulations establishing how agencies may take an action under chapter 75, [5 U.S.C. § 7513](#)(a), OPM lacks authority to prescribe regulations that remove such actions from the Board’s jurisdiction or otherwise inhibit the Board’s full adjudication of appeals arising from such actions.

¶31 Based on the foregoing, we conclude that, because the removal actions on appeal were taken by an agency, covered under [5 U.S.C. § 7512](#), and taken against employees as defined by [5 U.S.C. § 7511](#), they are subject to the efficiency of the service requirement of 5 U.S.C. § 7513(a) and appealable under 5 U.S.C. § 7513(d).

Scope of the Board’s review

¶32 It is well-established that the Board’s jurisdiction under [5 U.S.C. § 7513](#)(d) includes review of an agency’s penalty determination. *See generally Douglas v. Veterans Administration*, [5 M.S.P.R. 280](#) (1981). In order to find that a removal based on a sustained charge of misconduct satisfies the “efficiency of the service” criterion of [5 U.S.C. § 7513](#)(a), the Board must make two distinct determinations: first, whether there is an nexus between the appellant’s conduct and the efficiency of the service, and second, whether the penalty is appropriate. *Douglas*, 5 M.S.P.R. at 302-03. That is, the Board must consider not only whether *any* disciplinary action is warranted, but whether the *particular* penalty in a given case takes reasonable account of the factors relevant to the promotion of service

efficiency. *Id.* at 303. Accordingly, notwithstanding any contrary provision at [5 C.F.R. § 731.501](#), we may sustain the appellants' removals only if we find both components of the efficiency of the service standard have been established by a preponderance of the evidence. [5 U.S.C. §§ 7513](#), 7701(c)(1)(B); *see Devine*, 724 F.2d at 1564 (while obtaining an appointment through misrepresentation may properly form the basis for removal, it would be a "quantum leap of logic" to conclude that review of the penalty is thereby barred).

¶33 In the typical case, the Board will defer to an agency's penalty determination and modify a penalty only when it finds the agency failed to weigh the relevant factors or that it clearly exceeded the bounds of reasonableness in determining the penalty. *Stuhmacher v. U.S. Postal Service*, [89 M.S.P.R. 272](#), ¶ 20 (2001); *Douglas*, 5 M.S.P.R. at 306. The principle of deference derives from the "unassailable proposition" that penalty determinations are judgment calls within the discretion of the employing agency. *Lachance v. Devall*, [178 F.3d 1246](#), 1251 (Fed. Cir. 1999); *see Beard v. General Services Administration*, [801 F.2d 1318](#), 1322 (Fed. Cir. 1986) ("the employing (and not the reviewing) agency is in the best position to judge the impact of employee misconduct upon the operations of the agency . . ."). This rationale does not apply, however, when OPM, rather than the employing agency, makes the penalty determination. The factors pertinent to determining the appropriateness of the penalty under the efficiency of the service standard of [5 U.S.C. § 7513\(a\)](#) are not limited to the factors OPM may consider under [5 C.F.R. § 731.203\(c\)](#), but may also include matters which the employing agency is in a better position to evaluate. Such factors may include, for example, the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence. *See Douglas*, 5 M.S.P.R. at 305-06. Accordingly, we find that in an appeal of an OPM-directed suitability removal, the Board must conduct an independent review of the penalty in light of the relevant *Douglas* factors, which may include facts not in OPM's possession. In this regard, we stress that the

ultimate burden is upon the deciding agency, in this case OPM, to persuade the Board of the appropriateness of the penalty imposed. *Id.* at 307.

¶34 We further find that our statutory jurisdiction extends to review of the other suitability actions on appeal, i.e., debarment and cancellation of eligibilities. While those actions would not by themselves be covered under [5 U.S.C. § 7512](#), in conjunction with the removal actions they lie within our jurisdiction as components of a unitary penalty arising from the same underlying misconduct. See *Brewer v. American Battle Monuments Commission*, [779 F.2d 663](#) (Fed. Cir. 1985) (finding that the Board had jurisdiction to consider a reassignment imposed in connection with a demotion as part of a unified penalty arising out of the same set of circumstances); *White v. Government Printing Office*, [108 M.S.P.R. 355](#) (2008) (asserting jurisdiction over a unitary penalty including both a reduction in grade and a 14-day suspension); see also *Campbell v. Department of Veterans Affairs*, [93 M.S.P.R. 70](#), ¶ 8 (2002) (remanding for a determination of whether a 14-day suspension was reviewable, in conjunction with a reduction in pay, as part of a unitary penalty). OPM has argued that the “unitary penalty” principle should not apply in these cases because debarment and cancellation of eligibilities are not intended to compound the severity of a removal action, but rather serve to prospectively regulate the conduct of examinations and admission into the federal service. However, the court in *Brewer* did not address whether the penalties imposed by the agency served the same end, but rather relied on the fact that the penalties arose “out of the same set of circumstances of which Mr. Brewer was found culpable.” *Brewer*, 779 F.2d at 664. Here, with respect to both Mr. Aguzie and Ms. Barnes, OPM relied on the same incidents of misconduct as the basis for all of its suitability actions. We therefore find no basis for distinguishing these appeals from *Brewer*.

¶35 We also note that a determination that the Board can review the suitability removal of a tenured employee, but not the debarment or cancellation of eligibilities that are part of the same OPM decision, could lead to an absurd

result. If the Board were to reverse a removal but find that it lacked the authority to reverse the debarment or cancellation of eligibilities, it would be ordering the return to federal employment of an employee whom OPM still deems ineligible to hold a federal position. We therefore conclude that the Board's review of the removal of an employee for suitability reasons must also include review of any debarment or cancellation of eligibilities that arise out of the same circumstances.

ORDER

¶36 Having determined that the suitability actions on appeal are reviewable under [5 U.S.C. § 7513\(d\)](#), we REMAND both appeals for further adjudication. With respect to both Mr. Aguzie and Ms. Barnes, the administrative judge shall determine on remand whether the suitability actions on appeal satisfy the efficiency of the service standard of [5 U.S.C. § 7513\(a\)](#). In addition, the administrative judge shall determine whether the appellants were provided the procedures described at [5 U.S.C. § 7513\(b\)](#) and, if not, whether the error was likely to have caused OPM to reach a different conclusion from the one it would have reached in the absence or cure of the error.⁹ See [5 U.S.C. § 7701\(c\)\(2\)\(A\)](#); *Stephen v. Department of the Air Force*, [47 M.S.P.R. 672](#), 681, 685 (1991). Should the administrative judge reverse or mitigate one or both of the removal actions, the employing agency or agencies shall be responsible for providing back pay and benefits, as appropriate. See *Brackins v. Office of Personnel Management*, [60 M.S.P.R. 260](#), 263 (1993).

¶37 We also find that further adjudication is necessary to resolve Mr. Aguzie's claim of race and national origin discrimination. In finding the discrimination claim unproven, the administrative judge relied on Mr. Aguzie's failure to identify a comparator employee outside his protected group. However, the Board

⁹ Title [5 U.S.C. § 7513\(b\)](#) does not require that the procedures listed under that paragraph be provided by the employing agency.

has recently clarified that comparator evidence is not essential to a prima facie case of disparate treatment discrimination. *Davis v. Department of the Interior*, [114 M.S.P.R. 527](#), ¶¶ 6-8 (2010). While evidence of discrimination may include proof that similarly situated employees outside the protected class were treated differently, an appellant may also prevail on a discrimination claim by introducing evidence: (1) that the agency lied about its reason for taking the action; (2) of inconsistency in the agency's explanation; (3) of failure to follow established procedures; (4) of general treatment of minority employees or those who engage in protected activity; or (5) of incriminating statements by the agency. *See id.*, ¶ 8. Accordingly, the administrative judge shall provide Mr. Aguzie the opportunity to present such evidence and then reconsider his discrimination claim in light of *Davis*.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.