



As the Board recognized in its Aguzie decision, the issue raised is not "academic." Aguzie v. Office of Pers. Mgmt., 112 M.S.P.R. 276, 278 (2009). In contrast to its authority regarding part 731 appeals, the Board's jurisdiction under Chapter 75 has long been recognized to include the power to mitigate penalties assessed against employees.

In the pending cases presenting this issue, OPM maintains that its regulations handcuff the Board and "dictate" that "OPM-directed" suitability removals may not be adjudicated by the Board under the adverse action procedures of Chapter 75. OPM Brief at 7. In advancing this position, OPM's view collides with the plain language of the relevant provisions of the Civil Service Reform Act (CSRA or the Act), Pub. L. No. 95-454, 92 Stat. 1111 (1978).

#### **ARGUMENT**

Prior to 1978, federal employment was governed by an "outdated patchwork of statutes and rules built up over almost a century." United States v. Fausto, 484 U.S. 439, 444 (1988). No systematic scheme for reviewing personnel actions existed. Congress reacted to this state of disarray by enacting the CSRA, which "comprehensively overhauled the civil service system" (Lindahl v. OPM, 470 U.S. 768, 773 (1985)). The Act "prescribes in great detail the protections and remedies applicable . . ." to pertinent employees. Fausto, 484 U.S. at 443. It is against

this backdrop that the question posed by the Board must be assessed.

1. The interpretation of a statute begins, of course, with its language. Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999). Section 7513(d) of Title V plainly stipulates that a tenured employee "against whom an action is taken under this section is entitled to appeal to" the Board. As part of its consideration, "in great detail," of the protections employees should have under the Act, Congress prescribed, with specificity, what "actions" could be contested and appealed to the Board under chapter 75. Congress took pains to list those actions--and included a "removal" on its list. 5 U.S.C. § 7512.

Congress further took the trouble to expressly exclude certain matters from its list of actions subject to challenge and appeal under Chapter 75. 5 U.S.C. § 7512. Tellingly, Congress chose, in crafting its "elaborate" and "comprehensive" (Lindahl, 470 U.S. at 773-774) CSRA scheme, not to except suitability removals initiated by OPM and effectuated by the employing agency from its list of covered actions. Where Congress carefully specified which matters it wished to except from the scope of actions appealable under Chapter 75, no "additional exception . . . should be implied." Carter v. Gibbs, 909 F.2d 1452, 1455 (Fed. Cir.) (en banc), cert. denied,

498 U.S. 811 (1990). This includes an exception for suitability removals.

Hence, on the face of the statute, there is no provision that would preclude a removal action, such as Aguzie's, from being appealed via Chapter 75. On the contrary, there is express statutory authorization for such an appeal. As the Federal Circuit has instructed, where the language of the CSRA is plain, it must be construed to "mean what it says." Mudge v. United States, 308 F.3d 1220, 1228 (Fed. Cir. 2002).

2. Faced with the plain language of the Act authorizing Aguzie to pursue his appeal to the Board under Chapter 75, OPM bears the heavy burden of establishing that Congress did not mean what the Act says. Garcia v. United States, 469 U.S. 70, 75 (1984) (underscoring that "only the most extraordinary showing of contrary intentions from [the legislative history] would justify a limitation on the 'plain meaning' of the statutory language"). OPM fails to show that the plain language at issue here should not be adhered to.

OPM acknowledges, as it must, that Congress chose, in section 7512, not to include removals for suitability reasons on its list of actions that may not be appealed under chapter 75. Notwithstanding that Congress clearly gave careful consideration to the matter of what to exclude from actions appealable under Chapter 75, OPM maintains that the list should not be viewed as

"exhaustive" (OPM reply at 10). Instead, OPM would have the Board infer that Congress would want it to re-write the Act and to add suitability removals to the list of those matters not appealable under Chapter 75. Such an argument is untenable. As shown, where Congress has carefully chosen the types of actions to exclude from those "actions covered" by Chapter 75, the Board must decline OPM's invitation to add to Congress' list a provision that Congress determined not to include.

3. OPM maintains that Congress "ratified" its view, as codified in part 731, that an individual is not entitled to invoke the adverse action procedures of Chapter 75 when he is removed for suitability reasons by OPM and the employing agency.

In its Aguzie reply brief (though, interestingly, not in its principal brief), OPM appears to argue that section 902(a) of the CSRA, entitled "Savings Provisions," constituted such a ratification. OPM asserts that section 902(a) "had the effect" of "reserving" the then-existing suitability program until such time as the President or OPM chose to amend it. OPM reply at 5. The actual language of section 902(a) is more revealing than OPM's paraphrasing of it and completely undermines OPM's position.

Section 902(a) states that "except as otherwise provided in this Act, all executive orders, rules and regulations affecting the Federal service shall continue in effect . . . until

modified, . . . superseded, or repealed" by the President, OPM, the MSPB, the Equal Employment Opportunity Commission, or the Federal Labor Relations Authority "with respect to matters within their respective jurisdictions." Id. (Emphasis added.) Curiously, OPM's discussion of this provision fails to mention its "except as otherwise provided in this Act" language. Properly read, what 902(a) demonstrates is that, while certain rules may well have been "reserved," no rules that conflicted with the CSRA could be deemed to survive under the Act. OPM's suitability action appeal rules, to the extent they were embodied in the pre-Act regulatory scheme, were plainly not intended by Congress to be "reserved" by section 902(a). As shown, those rules contravene the Board's explicitly prescribed Chapter 75 jurisdiction over appeals concerning removals of tenured employees.

OPM further purports to see congressional ratification of its position in 5 U.S.C. § 1103. That provision describes the functions of the OPM director and states that the director is, among other things, to enforce the civil service rules. See OPM brief at 18. Such a generic, non-specific provision hardly amounts to a "ratification" of OPM's assertion that the express appeal rights concerning removals conferred by 5 U.S.C. §§ 7512-7513 should give way to OPM's declaration that a suitability

appeal right is only a matter of OPM largesse and is conferred solely by part 731 of its regulations.

4. Unable to explain away the relevant statutory language, OPM advances various arguments to support its view that an OPM-directed suitability removal may not be adjudicated under the adverse action provisions of Chapter 75. Those arguments are unavailing.

a. OPM spends much time describing the "long history" of its authority to initiate suitability removal actions. Thus, OPM points to general statutory provisions authorizing it, among other things, to prescribe regulations for the admission of applicants into the civil service. See OPM brief at 9, 11, citing 5 U.S.C. §§ 3302, 1302 and 1103. Further, it notes that the pre-Act "Rule V" of Executive Order 10577 provided that the Civil Service Commission could, upon investigation, determine that an individual is "disqualified" for federal employment and thereby direct the individual be removed by his employing agency. OPM states that the "import" of this pre-Act Order was retained in Executive Order 12107, issued in December 1978. OPM brief at 10. The 1978 amended order similarly provides that OPM is to enforce the civil service laws and may, where warranted, instruct an employing agency to remove an employee if OPM determines the individual is disqualified from federal employment.

This history indeed exists. All it shows, however, is that OPM may retain some authority, consistent with law and under proper circumstances, to initiate suitability actions regarding individuals. What these provisions, including Rule V, do not reach is the critical question presented here--namely, whether the 1978 enactment of Chapter 75 bestowed upon tenured employees the right to appeal removals, including suitability removals initiated by OPM.

b. In resisting the notion that a tenured employee facing a suitability removal is entitled to appeal that action under Chapter 75, OPM attempts to rely on its own regulations for support. Those regulations, by their terms, explicitly recognize that a suitability action includes a "[r]emoval." 5 C.F.R. 731.101(b), 731.203(a)(2). Nonetheless, OPM's Part 731 regulations purport to distinguish between OPM-initiated suitability removals and those taken by employing agencies under Chapter 75. Thus, the regulations pronounce, among other things, that Chapter 75 adverse action procedures do not apply to OPM-initiated suitability actions under 731. They flatly declare that a suitability removal may not be regarded as an action taken under chapter 75. 5 CFR 731.203(f).

OPM asserts that its suitability regulations, and their characterization of suitability appeals as not implicating Chapter 75, should receive deference and govern the question



presented by the Board. No such deference is owed, however, where the regulations in question conflict with statutory language, as is the case here. As the Board has suggested in Aguzie, this effort to "carve out an exception" (112 M.S.P.R. at 4) to the Board's jurisdiction cannot be squared with the CSRA. The Act, as shown above, expressly provides that a removal of a tenured employee is, in fact, statutorily defined as an action taken under Chapter 75. Moreover, Congress chose not to include an OPM-initiated suitability removal on its list of exceptions to such actions.

c. Seeking to avoid the statutory appeal rights conferred by 5 U.S.C. §§ 7512-7513, OPM insists that an OPM-directed suitability removal of a tenured employee is not an adverse action because it is usually not initiated by the employing agency. This argument, too, is unavailing. Section 7513 authorizes an "agency" to take an appropriate action against an employee only "for such cause as will promote the efficiency of the service." OPM readily acknowledges that it does not carry out a suitability removal of an employee on its own. Though it minimizes the role of the employing agency as "ministerial" (OPM brief at 23), the fact is that OPM regards the agency as the actual removing entity--thus, further demonstrating that a suitability removal is, in reality, an adverse action. In any event, there is nothing that empowers OPM, by regulation or

otherwise, to override a tenured employee's statutory appeal rights regarding a removal, even where that removal is pursued for suitability reasons.

d. OPM relies on a number of Federal Circuit decisions, none of which is dispositive here. For example, OPM notes that the court in Folio v. Dep't of Homeland Sec., 402 F.3d 1350 (Fed. Cir. 2005), observed that part 731 concerns appeals of suitability determinations to the Board and describes the Board's jurisdiction under part 731. The court, however, had no occasion to address the question now presented by the Board: whether a removed tenured employee is entitled to invoke Chapter 75 of Title V notwithstanding that his removal was initiated under part 731.

In addition, OPM relies on Lackhouse v. Merit Sys. Prot. Bd., 773 F.2d 313 (Fed. Cir. 1985), for the unremarkable proposition that civil service rules that do not "facially conflict" (id. at 316) have an "independent vitality." OPM brief at 17. That principle is rendered beside the point here where, as we have shown, OPM's rules are at odds with the plain language of the Act.

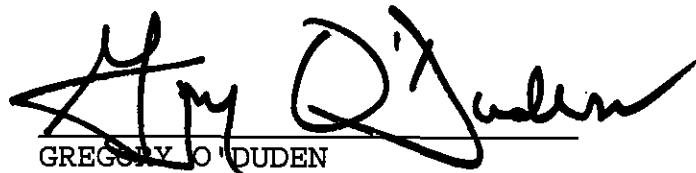
Finally, and contrary to OPM's assertions, the court's decision in Lovshin v. Dep't of the Navy, 767 F.2d 826 (Fed. Cir. 1985), provides no support for OPM's position in the instant case. Seeking to apply Lovshin "[b]y analogy," OPM

asserts that if Congress had meant to disturb OPM's part 731 suitability regulatory scheme, Congress would have stated that "suitability actions could no longer be used for removal actions." OPM brief at 19. It is not our view, however, that suitability actions can no longer be used to remove employees. They can. Our objection is to OPM's limitations on the Board's jurisdiction to consider, as an adverse action, an employee removal that is initiated by OPM on suitability grounds. As to this matter, we believe that Congress has clearly spoken. It did so when it granted tenured employees the right, in Chapter 75, to appeal removals to the Board without exception for those removals prompted by suitability reasons.

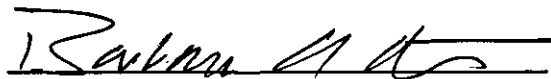
#### CONCLUSION

As demonstrated, the plain language of the relevant statutory provisions of the CSRA establishes that a tenured federal employee is entitled to appeal a suitability removal under Chapter 75. Insofar as they conflict with this conclusion, OPM's regulations require revision so that they are in accord with the commands of the Act.

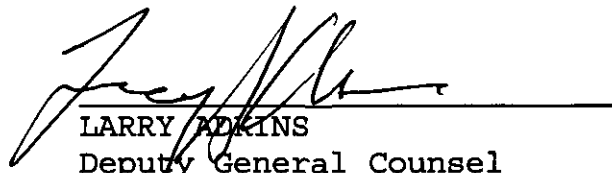
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