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The Office of Personnel Management (Agency) hereby respectfully submits its Supplemental Reply to the Response of Appellant Holley C. Barnes in the consolidated appeal of Aguzie, et al. v. OPM, Nos. DC-0731-09-0261-R-1; DC-0731-09-0260-R-1, AT-0731-09-0240-I-1, and CH-0731-09-0578-I-1.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

Hyginus U. Aguzie, Holley C. Barnes, Jenee Ella Hunt-O'Neal, and James A. Scott,	Docket Nos.
Appellants,	DC-0731-09-0261-R-1 DC-0731-09-0260-R-1 AT-0731-09-0240-I-1 CH-0731-09-0578-I-1
v.	
Office of Personnel Management,	
Agency.	SEP 22 2010

OFFICE OF PERSONNEL MANAGEMENT'S SUPPLEMENTAL REPLY TO THE RESPONSE OF APPELLANT HOLLEY C. BARNES

On August 9, 2010, the Merit Systems Protection Board (Board) issued orders to *pro bono* counsel for two of the Appellants in this consolidated appeal, Holley C. Barnes and Jenee Ella Hunt-O'Neal, giving them the opportunity to file response briefs, with an opportunity for the Office of Personnel Management (OPM; Agency) to file supplemental replies. Appellants Barnes and Hunt-O'Neal filed their response briefs on August 31, 2010. OPM hereby replies to Appellant Barnes' response brief.[1]

ARGUMENT

The Appellant was removed from her job on the basis of OPM's determination that she was not suitable for federal employment under the criteria set forth at 5 C.F.R. Part 731. As we have described in our prior briefs, Part 731 was promulgated consistent with OPM's rule making authority that pre-dates the Civil Service Reform Act (CSRA). As we have also shown, when Congress enacted the

[1] OPM replies to Appellant Hunt-O'Neal's response in a separate brief.

CSRA, it expressly ratified and preserved the existing civil service rules, which include the rules governing suitability.

Under OPM's rules governing suitability actions, employees possess a right of review before the MSPB that is very similar to the right of MSPB review that is provided to employees who have been removed pursuant to Chapter 75. The primary difference between the rights afforded is that the Board may not "mitigate" a removal that is directed by OPM based on its determination that an individual is not suitable for federal employment as it can a removal action initiated by an agency under Chapter 75. In deciding whether to uphold an unfavorable suitability determination the Board may, however, look at factors that are similar to those it considers when deciding whether a penalty should be mitigated under Chapter 75. In the suitability context, the Board may review these additional considerations in deciding whether OPM has proved the merits of the suitability determination.

This distinction stems from the fundamentally different character of an OPM initiated suitability action against an employee as compared to a Chapter 75 adverse action taking by an employing agency. The former by definition involves a determination that an individual is disqualified generally from continuing to hold a federal job because of particular types of misconduct that are considered to go to the heart of the civil service examination process (material, intentional false statements, deception or fraud in examination or appointment; refusal to furnish testimony as required by Civil Service Rule 5.4; or a statutory or regulatory bar which prevents the person's lawful employment). The concept of "mitigation," which allows the Board to review whether a penalty decision is within the bounds of reasonableness and adjust it accordingly, is simply inapposite; if an individual is not suitable (that is, disqualified from) federal employment, removal must be part of the outcome, simply as a matter of logic.

The distinctions between unfavorable suitability determinations and Chapter 75 adverse actions are made explicit by OPM's regulations (which are entitled to substantial deference) and by the MSPB's own regulations. The distinctions have been applied in a long line of heretofore unquestioned Board and Federal Circuit precedent. The Appellant has failed to provide the Board with a persuasive justification for rejecting OPM's interpretation of the statute or departing from this well established practice and precedent.

A. The Appellant's "Plain Language" Argument is Without Merit.

The Appellant argues at some length that she fits under the definition of "employee" set forth in 5 U.S.C. Chapter 75. (Barnes Res. Br. 5-6, Aug. 31, 2010, citing 5 U.S.C. § 7512(a)(1)(A).) She points out that 5 U.S.C. Chapter 75 expressly "applies to removals" and argues that a suitability removal directed by OPM must be an adverse action subject to Chapter 75, since it "is not among the listed statutory exceptions." (*Id.* 7-8, citing 5 U.S.C. § 7512.). Claiming that the "plain language" of Chapter 75 covers an OPM ordered suitability removal, she (and her *amici*) argue that OPM's regulations are not entitled to deference. *Id.* 4; *see also* NTEU *Amicus* Br. 3-5, June 3, 2010; AFGE *Amicus* Br. 5-8, June 7, 2010.

The Appellant's "plain language" argument is overly simplistic and ignores the overall statutory structure, its historical context, and the critical distinctions between the interests served by agency initiated adverse actions and OPM initiated suitability actions. Thus, OPM acknowledges that the Appellant meets the definition of "employee" under Chapter 75, and that she has been removed from her job. But what the Appellant glosses over is that Chapter 75 prescribes procedures for "an agency" to take an action against one of its own employees "for such cause as will promote the efficiency of the service" subject to OPM's regulations. 5 U.S.C. § 7513(a). Further, the procedural rights afforded by

section 7513, including the right of appeal to the MSPB contained at section 7513(d) are expressly made applicable only to "an employee *against whom an action is taken under this section*." (Emphasis supplied.) The action taken against the Appellant was not "taken under" Chapter 75 because it was not taken by her employer at its own initiative for such cause as will promote the efficiency of the service; it was directed by OPM and taken pursuant to 5 CFR Part 731, Subpart C, based on the specific standards set forth under that regulatory scheme.

Thus, the structure and text of Section 7513 make it obvious that it was intended to establish employees' procedural rights in the context of actions initiated by their employing agencies, not OPM directed actions. Section 7513(b) provides employees with a right to a written notice of reasons for the proposed action from "the agency" (not from OPM), to a reasonable time to answer this employing agency statement of reasons orally and in writing, and to a written decision by the employing agency concerning the proposed removal..

It is inconceivable that Congress intended to subject suitability determinations made by OPM to this process, which was clearly designed to allow an employee to secure reconsideration of a decision made by his or her employing agency. The underlying reviewable decision in a suitability determination is made by OPM, not an employing agency. The employing agency exercises no management discretion in removing the employee and therefore cannot reverse the unfavorable suitability determination as a consequence of an employee's written or oral response. In fact, the employing agency's interests may not be aligned with those of OPM. That is why Civil Service Rule V gives the employing agency as well as the employee the right to "appeal[] the Director's finding that a separation or other action is necessary," *see* 5 C.F.R. § 5.3(a)(1), a right that OPM has provided in its implementing regulation. *See* 5 C.F.R. § 731.303(b) (Agency's right to answer OPM's charges). Further, an employer may be sanctioned if it fails to remove the employee as ordered. Civil Service Rule V, 5 C.F.R.

§ 5.4(c). The fact that Chapter 75 lists a "removal" as a covered action does not, therefore, compel the conclusion appellant seeks. Cf. *Horner v. Andrzjewski*, 811 F.2d 571, 575 (Fed. Cir. 1987) (holding that although Chapter 75 expressly applies to furloughs, an emergency furlough is not an action taken under Chapter 75 because the agency has no choice not to order the furlough; "[i]f an . . . [otherwise covered] action is taken because an agency has no choice, . . . it can reasonably be said that the agency did not 'take an action' covered by chapter 75"). The fact that Chapter 75 lists a "removal" as a covered action does not, therefore, compel the conclusion the Appellant seeks.

Further, the Appellant's "plain language" argument is implausible because substituting the employing agency for OPM in defending a suitability determination undermines the role that OPM plays in protecting the integrity of the examination process and of the civil service generally when it makes suitability determinations. An OPM determination that an employee is not suitable for federal employment involves a broader set of interests than those an individual employing agency possesses. OPM's determination can result in a government-wide debarment of an individual from federal employment, a remedy that an individual agency lacks the authority or the expertise to order. In making suitability determinations, OPM is acting its role as guardian of the examination process and of the merit based civil service; it is OPM that must prosecute such cases before the MSPB, to protect those broader interests. As noted in OPM's briefs in this consolidated appeal, both Congress and the President have conferred this responsibility on OPM.

Finally, the Appellant's reliance on the exceptions clause contained at 5 U.S.C. § 7512 is unavailing. The exceptions clause lists five types of actions that are subject to other statutory procedures. Its purpose was to reconcile these other codified provisions of the Act with Chapter 75. (*See* Discussion in Agency Reply Br. at 10-11 & n.7.) Given this purpose (as well as the savings

provisions of the CSRA), nothing can be read into its failure to explicitly exclude directed removals under pre-existing civil service rules from the coverage of Chapter 75.

In short, there is no merit to the Appellant's "plain language" argument (or that of the *amici*). Instead, as OPM argued in its opening and reply briefs, the language and history of the CSRA confirm that the process Congress set up in the CSRA for adjudicating adverse actions that agencies take against their own employees was not intended to supplant the procedures set forth in Executive order and in OPM's regulations for securing review of suitability determinations made by OPM To the contrary, as is also explained in detail in our previous briefs, Congress expressly stated that it intended to preserve existing civil service rules, including those governing OPM initiated suitability determinations "except as otherwise provided in the Act." CSRA, § 904, 5 U.S.C. §1101 note. The Act does not provide an alternative procedure for the review of suitability determinations. OPM's regulations are entitled to deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). The Board, accordingly, should decline the Appellant's invitation to depart from decades of settled law and practice, and to invalidate both its own and OPM's regulations governing suitability determinations.

B. OPM's Authority to Promulgate the Suitability Regulations Is Firmly Grounded in Statute.

In addition to its "plain language" argument, the Appellant argues more generally that OPM's suitability regulations, in authorizing actions against tenured employees, exceed the authority delegated to OPM under 5 U.S.C. § 3301 to regulate "admission . . . into the civil service" and to "ascertain the fitness of applicants." (Barnes Res. Br. 9-12.)

First, 5 U.S.C. § 3301 is not the sole statutory authority for OPM's suitability regulations. As stated in the authority citation for 5 C.F.R. Part 731, the regulations are also authorized by a delegation

under 5 U.S.C. § 7301, authorizing the President to "prescribe regulations for the conduct of employees in the executive branch," and 5 U.S.C. § 1302, authorizing OPM, subject to the Civil Service Rules, to "prescribe regulations for, control, [and] supervise . . . examinations for the competitive service." (Agency Opening Br. 9 & n. 3, 11-12.) Consistent with these provisions, OPM has the authority to take a suitability action after the first year of employment, although OPM's jurisdiction to do so is circumscribed, and is limited to three circumstances that go to the heart of the Civil Service examining system. (Agency Reply Br. 3 n. 3.)

The Appellant argues that OPM likewise cannot rely on Executive Order 10577, as amended, as the source of its authority to regulate suitability actions against employees, including directed removals under rule V of E.O. 10577, in the face of later-enacted conflicting provisions of the CSRA. (Barnes Res. Br. 13.) The Appellant's argument is unavailing because the CSRA itself reserved the President's existing authorities and delegations of authority under Executive order "[e]xcept as otherwise *expressly* provided in" the CSRA [emphasis supplied]. CSRA, § 904, 5 U.S.C. § 1101 note; *see also* CSRA § 902(a), 5 U.S.C. § 1101 note, discussed *infra*. The CSRA is not a later-enacted statute in conflict with E.O. 10577, since the CSRA itself ratified E.O. 10577 and the delegations made thereunder, and effected no express amendment or revocation of any of its provisions.[2]

[2] Moreover, as OPM argued in greater detail in its previous briefs, even if Congress had not plainly signaled, in CSRA §§ 902(a) and 904, its intent to reserve distinct suitability actions and procedures, Congress' intent to do so must be presumed. *Lackhouse v. Merit Sys. Prot. Bd.*, 773 F.2d 313, 316 & n. 6, 317 (Fed. Cir. 1985); *Lovshin v. Dep't of the Navy*, 767 F.2d 826, 840, 842 (Fed. Cir. 1985).

C. The "Unified Penalty" Principle is Inapplicable to Suitability Actions.

The Appellant finally argues that if the Board has jurisdiction over a suitability removal as an adverse action under 5 U.S.C. Chapter 75, the Board also has adverse action jurisdiction over other suitability actions taken against the employee, such as debarment or cancellation of eligibilities, under the "unified penalty" principle. (Barnes Res. Br. 14-15, citing *Brewer v. Am. Battle Monuments Comm'n*, 779 F.2d 663, 664-5 (Fed. Cir. 1985); *Campbell v. Dep't of Veterans Affairs*, 93 M.S.P.R. 70, 73 (2002).)

The "unified penalty" principle allows the Board to determine whether a removal or other adverse action taken under Chapter 75 has had conditions placed upon it, such as an accompanying reassignment, that make the adverse action "excessive or unreasonable" in the circumstances, and therefore subject to mitigation. *See Brewer*, 779 F.2d at 665. Even if the Board could review a directed removal under adverse action procedures, the Board could not review a debarment or a cancellation of eligibilities as part of a "unified penalty." Debarment and cancellation of eligibilities are actions made expressly distinct from the directed removal by regulation, and they serve to prospectively regulate the conduct of and admission into examinations, not to place conditions on a directed removal. (*See* Agency Opening Br. 26; 5 U.S.C. § 1302(a); Civil Service Rule II, 5 C.F.R. § 2.1(a); 5 C.F.R. §§ 731.203(a)(1), (a)(3), (a)(4).)

CONCLUSION

For the foregoing reasons, and the reasons stated in the Agency's prior submissions in this appeal, the Appellant was entitled to appeal her removal only under 5 C.F.R. Part 731, not under 5 U.S.C.

§ 7513(d). Because the Board has already found that the Appellant's petition fails to meet the Board's criteria for review, 112 M.S.P.R. 273, 274 (2009), and because the Board must resolve the additional questions presented in OPM's favor, the Board should issue a final order informing the Appellant of her right to judicial review.

Respectfully submitted,

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