

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

2009 MSPB 178

Docket No. DC-0731-09-0260-I-1

**Holley C. Barnes,
Appellant,
v.
Office of Personnel Management,
Agency.**

September 3, 2009

Holley C. Barnes, Washington, D.C., pro se.

Darlene M. Carr, Washington, D.C., for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision sustaining her removal and other actions taken pursuant to a suitability decision by the Office of Personnel Management (OPM). We find that the petition does not meet the criteria for review set forth at [5 C.F.R. § 1201.115](#), and we therefore DENY it. For the reasons set forth below, however, we REOPEN this case on our own motion under 5 C.F.R. § 1201.118, VACATE the initial decision, and REMAND the appeal for further proceedings.

BACKGROUND

¶2 On November 12, 2006, the Department of Homeland Security, Citizenship and Immigration Services (CIS), hired the appellant as a GS-13 Adjudication Officer, on a career-conditional appointment subject to a 1-year probationary period. *See* Initial Appeal File (IAF), Tab 4, Subtab 2cc. By letter dated December 1, 2008, OPM informed the appellant that it had found her unsuitable for her position and had taken 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 ending December 1, 2011. IAF, Tab 4, Subtab 2b at 1; *see id.* at 12 (OPM's letter directing CIS to remove the appellant). The record does not include an SF-50 recording the appellant's removal, but neither party disputes that CIS complied with OPM's instruction.

¶3 The appellant appealed OPM's action, but she did not request a hearing. IAF, Tab 1 at 2. The administrative judge found that the Board had jurisdiction over the appeal under [5 U.S.C. § 7701](#) and [5 C.F.R. § 731.501](#). IAF, Tab 5 at 1. On the written record, the administrative judge sustained the charge and OPM's suitability actions. *Id.*, Tab 9, Initial Decision. In her petition for review, the appellant argues that the charge against her should not have been sustained, and that she is suitable for her former position. Petition for Review File, Tab 1 at 4, 8. OPM has responded in opposition to the petition for review. *Id.*, Tab 3.

ANALYSIS

¶4 The appellant's allegations and arguments do not show error in the initial decision. As in *Aguzie v. Office of Personnel Management*, 2009 MSPB 177, however, we REOPEN this case to address the question, not raised below or on petition for review, of whether the appellant is entitled to appeal her removal to

the Board as an adverse action under 5 U.S.C. chapter 75, subchapter II. Like the appellant in *Aguzie*, the instant appellant, at the time of her removal, occupied a competitive service position and had completed her 1-year probationary period. *See* IAF, Tab 4, Subtab 2cc. She therefore satisfies the definition of an “employee” at [5 U.S.C. § 7511\(a\)\(1\)\(A\)](#) and, as a consequence, may have a statutory right to appeal her removal as an adverse action under chapter 75, subchapter II, notwithstanding OPM’s characterization of the removal as an action under 5 C.F.R. part 731. *See Aguzie*, 2009 MSPB 177, ¶¶ 4 n.2, 6.

¶5 As *Aguzie* sets forth, our jurisdiction over adverse actions under 5 U.S.C. chapter 75, subchapter II, includes the authority to mitigate penalties. *Id.* ¶ 5; *see Douglas v. Veterans Administration*, [5 M.S.P.R. 280](#), 296 (1981). Further, the respondent in an adverse action appeal under 5 U.S.C. chapter 75, subchapter II, would be the appellant’s employing agency, which actually effected the removal action, rather than OPM. *See Aguzie*, 2009 MSPB 177, ¶ 5. In addition, as we indicated in *Aguzie*, 2009 MSPB 177, ¶ 6, while OPM’s current suitability regulations may purport to exclude removals effected pursuant to an OPM suitability decision from the Board’s jurisdiction under 5 U.S.C. chapter 75, subchapter II, the effectiveness of such an attempted exclusion is in doubt.

ORDER

¶6 The initial decision is VACATED. On remand, the parties shall be provided an opportunity to brief the question of whether the appellant is entitled to appeal her removal under [5 U.S.C. § 7513\(d\)](#), and, if so, whether the other actions on appeal, i.e., debarment and cancellation of eligibilities, remain within the Board’s jurisdiction under [5 C.F.R. § 731.501](#). Should the administrative judge find that the appellant has appeal rights under [5 U.S.C. § 7513\(d\)](#), the appellant shall be granted 30 days from the date of the remand decision in which to file a timely appeal of her removal, with CIS as the respondent agency. Should the administrative judge find that one or more of the suitability actions on appeal

is within the Board's jurisdiction under [5 C.F.R. § 731.501](#), the parties shall also be provided an opportunity to brief the question of how and whether OPM's June 16, 2008 revision of its suitability regulations may affect the scope of the Board's review of those actions. *See Aguzie*, 2009 MSPB 177, ¶¶ 4 n.2, 6.

FOR THE BOARD:

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