UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

HYGINUS U. AGUZIE
Appellant,

v. **Docket No. DC-0731-09-0261-R-1**

OFFICE OF PERSONNEL MANAGEMENT,
Agency.

AMICUS BRIEF BY THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

The American Federation of Government Employees submits this amicus curiae brief pursuant to the notice published by the United States Merit Systems Protection Board ("Board") in the Federal Register on May 25, 2010. 75 Fed. Reg. 29366 (May 25, 2010). The Board has asked amicus curiae to address the following legal issue: "When the Office of Personnel Management (OPM) directs an agency to separate a tenured employee for suitability reasons, must the Board consider a subsequent appeal under 5 CFR part 731 as contemplated therein, or should the Board instead consider the appeal under 5 U.S.C. Chapter 75, given that the scope of a Chapter 75 appeal is broader than a part 731 appeal and that OPM generally lacks authority to issue regulations limiting statutory rights?" *See* 75 Fed. Reg. 20007 (April 16, 2010).

AFGE thanks the Board for the opportunity to submit an amicus curiae brief on this issue. AFGE is the largest labor organization representing federal civilian employees. Both AFGE and its members therefore have a direct interest in the Board's

decision on this issue. Most, if not all, of the federal civilian employees that AFGE represents are subject to the OPM suitability regulations contained in 5 CFR, Part 731. Indeed, AFGE has been opposed to the application of Part 731 to tenured employees, i.e. those individuals who qualify as "employees" under 5 U.S.C. § 7511, since at least 2007. In 2007, AFGE submitted comments to changes that OPM proposed for its suitability regulations. At that time, AFGE argued that OPM should eliminate its regulations' coverage of employees who successfully completed their probationary periods because, "to the extent that OPM continues to attempt to restrictively modify the statutory protections granted to tenured federal employees and appointees, OPM acts *ultra vires*."

AFGE continues this argument today. Accordingly, and for the reasons discussed below, the Board should apply 5 U.S.C. Chapter 75 when considering the appeals of tenured federal civilian employees who have been removed from service at the direction of OPM for suitability reasons. None of the statutes that provide the authority for OPM's suitability regulations grant OPM the power to restrict or otherwise modify those rights that are expressly and specifically granted to tenured employees by Chapter 75 of Title V of the United States Code.

I. BACKGROUND

On December 7, 2009, OPM filed a brief in this matter and in the consolidated appeals of appellants Holley C. Barnes, Jenee Ella Hunt-O'Neal and James A. Scott ("OPM Brief"). Predictably, OPM defended Part 731. OPM argued: 1) that OPM's authority to regulate suitability actions is derived from distinct statutes and Executive Orders that pre-date Chapter 75; 2) that both OPM's and the Board's regulations

distinguish between OPM suitability removals and adverse actions taken by employing federal agencies; 3) that Congress ratified the use of separate procedures for suitability removals and adverse action in the Civil Service Reform Act of 1978 ("CSRA"); 4) that a removal directed by OPM under Civil Service Rule V cannot be an adverse action because it is not initiated by the employing agency; and 5) that the remedies of debarment and cancellation would not be available under Chapter 75.

Summarized, OPM's arguments may be boiled down to the assertion that the Board must apply Part 731 when considering the appeals of tenured federal civilian employees who have been removed from service at the direction of OPM after an adverse suitability determinations for three reasons. First, OPM asserts that the Board is bound to apply Part 731 because OPM has the statutory authority to promulgate suitability regulations. Second, OPM asserts that the Board is bound to apply part 731 because OPM has exercised its statutory authority by in fact promulgating suitability regulations. Third, the OPM asserts that the Board is bound to apply Part 731 because both the Board and the United States Court of Appeals for the Federal Circuit ("the Federal Circuit") have previously treated suitability removals taken under Part 731 separately from adverse action appeals under Chapter 75. *See* OPM Brief at 6-8. OPM relies primarily on five statutory provisions and Executive Order 12107 in support of these assertions. The five statutory provisions that OPM chiefly relies on are: 5 U.S.C. § 1103, 5 U.S.C. § 1104, 5 U.S.C. 1302, 5 U.S.C. § 3301, and 5 U.S.C. § 3302.

OPM then reasons that pursuant to the Federal Circuit's decision in *Lovshin v. Department of the Navy*, 767 F.2d 826 (Fed. Cir. 1985), because its regulations contained

in Part 731 are grounded in statute, the Board may not require suitability appeals to be adjudicated as adverse action appeals under Chapter 75.

II. ARGUMENT

OPM's arguments are misguided. To begin with, and as mentioned, OPM's assertion that its suitability regulations are firmly grounded in statutory authority fails because none of the statutory authorities that OPM relies on as the basis for Part 731 grant OPM the power to restrict or otherwise modify rights that are expressly and specifically granted to tenured employees by Chapter 75 and Chapter 77 of Title V of the United States Code. Next, OPM's assertion that the Board should not apply Chapter 75 to suitability removals because OPM's and the Board's regulations distinguish between Part 731 removals and adverse actions appeals and because Congress ratified this separate approach when it passed the CSRA also fails. The precise question raised by the Board has never been adjudicated, and neither *Chevron* deference nor *stare decisis* can save regulations that conflict with plain statutory language.

Finally, OPM's reliance on *Lovshin v. Dep't of the Navy*, 767 F.2d 826 (Fed. Cir. 1985), which AFGE will not discuss further, makes no sense. *Lovshin* dealt with an agency's ability to choose between two statutory choices when removing an employee for unacceptable performance, and presupposed that the both of choices available, Chapter 75 and Chapter 43, were valid. This is plainly not the case here. Therefore, *Lovshin* should not inform the Board's decision in this matter.

A. OPM Does Not Have Authority to Restrict or Alter Chapter 75 or the Board's Jurisdiction by Regulation

OPM's assertion that, "[t]he Board's *sua sponte* suggestion in this case that OPM's suitability regulations appear to carve out an exception to its statutory jurisdiction under Chapter 75 is, of course, contrary to these regulations," OPM Brief at 7, only underscores the precise problem with OPM's argument that its suitability regulations should triumph over Chapter 75. The core of OPM's argument is that the application of Chapter 75, and in particular the application of 5 U.S.C. § 7513, to this matter is inappropriate because it would be contrary to OPM's suitability regulations. This is a specious argument because it stands a central premise of administrative jurisprudence on its head. Specifically, it is an agency's regulations that must be consistent with statute and not the other way around. *See Chevron U.S.A., Inc., v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778 (1984) ("*Chevron*").

Thus, it is to the statutes relied on by OPM that the Board must look, and not to Part 731, in order to determine the extent of OPM's authority to govern suitability and to determine the validity of OPM's regulations. Placing the Board's analysis into the proper framework, the Board then should look to: 5 U.S.C. § 1103, 5 U.S.C. § 1104, 5 U.S.C. 1302, 5 U.S.C. § 3301, and 5 U.S.C. § 3302. Section 1103 details the functions of the Director of the Office of Personnel Management, including publishing notices of proposed rule-making in the Federal Register. 5 U.S.C. § 1103(b). Section 1104 allows, *inter alia,* for the delegation of personnel management functions from the President of the United States to the Director of OPM including authority for competitive examinations. 5 U.S.C. § 1104(a).

In pertinent part, section 1302 provides that, "[t]he Office of Personnel Management, subject to rules prescribed by the Prescribed by the President under this title for the administration of the competitive service, shall prescribe regulations for, control, supervise, and preserve the records of, examinations for the competitive service." 5 U.S.C. § 1302(a). Section 3301 allows the president to prescribe regulations for the admission of individuals into the civil service and to ascertain the fitness of applicants for employment. 5 U.S.C. § 3301. Section 3302 echoes section 3301 by allowing the President to prescribe rules governing the competitive service that provide for, as nearly as conditions of good administration warrant, necessary exceptions from the competitive service. 5 U.S.C. § 3302.

Taken together with Executive Order 12107, the authorities relied on by OPM craft argument that OPM has the general authority to issue and enforce suitability regulations. This is not, however, the issue raised by the Board. The central issue raised by the Board is the extent of OPM's admitted authority to issue suitability regulations. And, it is on this central issue raised by the Board that OPM stumbles because the authorities cited by OPM are silent. That is, giving the language of the provisions relied on by OPM their plain meaning they possess absolutely no indication that Congress intended to allow OPM to override by regulation the specific rights and obligations granted by Chapter 75.

For a more complete answer, the Board must then take as a starting point its own enabling statute. This enabling statute specifically grants the Board the power to, "hear, adjudicate, or provide for the hearing or adjudication, of all matters within the jurisdiction of the Board under this title, Chapter 43 of title 38, or any other law rule, or

regulation, and, subject to otherwise applicable provisions of law, take final action on any such matter." 5 U.S.C. § 1204(a)(1). While not a plenary grant of authority, section 1204(a)(1) quite clearly grants Board the broad authority to weigh the merits of those matters that are within its jurisdiction.

From its enabling statute the Board should therefore proceed to define which matters are "within the jurisdiction of the Board under this title." To answer this question, the Board must look to 5 U.S.C. § 7512. With exceptions not relevant here, section 7512 applies subchapter II of Chapter 75 to, "a removal." 5 U.S.C. § 7512(1). Next, the Board must journey to 5 U.S.C. § 7513, where it will find that, [u]nder regulations prescribed by the Office of Personnel Management, 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," and that an employee subject to such an action, "is entitled to appeal to the Merit Systems Protection board under section 7701 of this title." 5 U.S.C. § 7513(a) and (d).

The last piece of the puzzle resides in 5 U.S.C. § 7511. Section 7511 complements section 7513 by defining the term "employee" as, in pertinent part, an individual who has completed her probationary period. Thus, when all the pieces are put together Chapter 75 affirmatively grants the Board the power to adjudicate an employee's appeal of her removal from service in accordance with subchapter II of Chapter 75 unless that removal was taken pursuant to: 1) 5 U.S.C. § 7532 (pertaining to national security); 2) 5 U.S.C. § 3502 (pertaining to RIFs); 3) 5 U.S.C. § 4303 (pertaining to unacceptable performance removals); 4) 5 U.S.C. § 1215 (pertaining to special counsel actions); or 5)

5 U.S.C. § 7521 (pertaining to actions against administrative law judges). 5 U.S.C. § 7512(A)-(E).

This means that because Chapter 75 expressly speaks to "removals," as opposed to adverse actions, and because suitability removals do not fall within the exclusions specifically enumerated by 5 U.S.C. § 7512, when an agency removes a tenured employee from the rolls of the Federal Government for suitability reasons, that agency takes an action that on its face is covered by subchapter II of Chapter 75 of Title V of the United States Code. As a result, the effected employee is entitled to the protections mandated by Chapter 75, including Board review, and any limitations on those protections that are imposed by Part 731 are invalid. Put another way, OPM cannot point to any statutory authority that affirmatively allows it to restrict the Board as OPM purports to do in 5 C.F.R. § 731.50(b). That an agency may taken a removal action because it was directed to do so by OPM does not alter the fact that when an employee is removed for suitability reasons, it is the employing agency that ultimately effects the removal. Consequently, the Board should apply 5 U.S.C. Chapter 75 when considering the appeals of tenured federal civilian employees who have been removed from service at the direction of OPM for suitability reasons.

OPM's assertion that applying Chapter 75 will create a conflict with Civil Service Rule V should also be rejected. Not only is any potential conflict the a creature of OPM's own creation, OPM's assertion once again ignores the critical fact that it is OPM's regulations that must conform to statute and not the other way around.

B. Application of Part 731 to Tenured Federal Employees Cannot Be Sustained by *Chevron* Deference or *Stare Decisis*

Whether OPM argues for *Chevron* deference, as it claims to, or seeks to invoke the doctrine of *stare decisis*, which it also appears to do, to support the continued application of Part 731 to tenured federal civilian employees, OPM's argument lacks merit. *Chevron* deference is not appropriate when, as here, an OPM interpretation of its rule-making authority conflicts with express statutory language. *See, e.g., Butterbaugh v. Dep't of Justice*, 336 F.3d 1332, 1341 (2003); *Van Wersch v. Dep't of Health and Human Services*, 197 F.3d 1144, 1151 (1999). *Stare decisis* is policy doctrine and is not an absolute rule. Regardless of the need for consistency and certainty, *stare decisis* will yield when the rationale behind a previous interpretation or decision no longer withstands careful analysis. *See Arizona v. Gant*, 129 S.Ct. 1710, 1722 (2009), *quoting Lawrence v. Texas*, 539 U.S. 558, 577, 123 S.Ct. 2472 (2003).

Simply put, this means that the fact that OPM has been acting *ultra vires* for a long time and neither the Board nor the courts have previously challenged OPM on the application of its suitability regulations to tenured employees is not a valid argument in favor of allowing OPM to perpetuate its mistake. This is especially true when the precise issue raised by the Board has never been adjudicated. For example, OPM's reliance on *Folio v. Dep't of Homeland Security*, 402 F.3d 1350 (Fed. Cir. 2005) is misplaced. Folio was an entirely different case from what is presented here. Folio never worked a single day as a federal employee. Folio was an applicant for employment. The statutory requirements of Chapter 75 could not therefore have been triggered in that case because there was no way that Folio could have met the definition of employee contained in 5

U.S.C. § 7511. Not only was the argument not raised, it could not have been raised in that case.

Likewise, as explained above, any collision between Chapter 75 and OPM's suitability regulations is the result of OPM's regulations overreaching OPM's statutory authority. Therefore such a collision, even if likely, cannot present a sustainable reason for the Board to prop up the otherwise invalid portions of OPM's regulations. Indeed, OPM's argument that Congress silently, yet somehow affirmatively, ratified the use of separate procedures for suitability removals and adverse action because of its pre-existing knowledge of Civil Service Rule V is misdirected. Once again, the question is not whether congress gave OPM the power to regulate suitability. The relevant question is whether, by a general grant of rule-making authority to OPM, Congress intended to delegate to OPM the power to restrict the jurisdiction over removal appeals that is specifically granted to the Board by 5 U.S.C. 7513(d). There is no evidence that Congress intended to grant OPM such power. Consequently, the Board should apply 5 U.S.C. Chapter 75 when considering the appeals of tenured federal civilian employees who have been removed from service at the direction of OPM for suitability reasons.

III. CONCLUSION

Based on all of the foregoing, AFGE respectfully submits that the Board should apply 5 U.S.C. Chapter 75 when considering the appeals of tenured federal civilian employees who have been removed from service at the direction of OPM for suitability reasons.

Respectfully submitted,

Andres M. Grajales
Assistant General Counsel
Office of the General Counsel
AFGE, AFL-CIO
80 F. Street, NW
Washington, D.C. 20001
Tel.: 202-639-6426
Fax.: 202-639-6441
Email: Grajaa@afge.org

For AFGE

June 7, 2010
Date

CERTIFICATE OF SERVICE

***AGUZIE v. OPM*, DC-0731-09-0261-R-1**

I hereby certify and affirm that on this day, June 7, 2010, I caused the amicus curiae brief of the American Federation of Government Employees in the above-captioned case to be filed as follows:

MSPB
(U.S. First Class Certified Mail)

William D. Spencer
Clerk of the Board
Office of the Clerk of the Board
U.S. Merit Systems Protection Board
1615 M. Street N.W.
Washington, D.C. 20419
202-653-7130 (fax)

Andres M. Grajales
Assistant General Counsel

6/7/2010
Date