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Phone (202) 606-1700 Fax (202) 606-0082**FAX TRANSMITTAL****TO:** Honorable William D. Spencer, Clerk of the Board**Office:** Merit Systems Protection Board**Phone:** (202) 653-7200**Fax:** (202) 653-7130**FROM:** Robert J. Girouard**Office:** Office of the General Counsel

U.S. Office of Personnel Management

Phone: (202) 606-1700**Fax:** (202) 606-0082**DATE:** September 22, 2010**PAGES:** 7 (including cover)

The Office of Personnel Management (Agency) hereby respectfully submits its Supplemental Reply to the Response of Appellant Jenee Ella Hunt-O'Neal in the consolidated appeal of Aguzic, et al. v. OPM, Nos. DC-0731-09-0261-R-1, DC-0731-09-0260-R-1, AT-0731-09-0240-1-1, and CH-0731-09-0578-1-1.

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CLERK OF THE BOARD

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

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

OFFICE OF PERSONNEL MANAGEMENT'S SUPPLEMENTAL REPLY
TO THE RESPONSE OF APPELLANT JENEE ELLA HUNT-O'NEAL

Introduction

On December 30, 2008, The Office of Personnel Management (OPM; Agency) found Jence Ella Hunt-O'Neal (the Appellant) unsuitable for Federal employment based on two charges, (1) misconduct or negligence in employment and (2) material, intentional false statement or deception or fraud in examination or appointment, and directed the Internal Revenue Service (IRS) to remove her. *Hunt O'Neal v. Office of Pers. Mgmt.*, No. AT-0731-09-0240-I-1 (M.S.P.B. Init. Dec. filed Sept. 11, 2009). The Appellant appealed to the Merit Systems Protection Board (Board). Following a hearing, the presiding administrative judge sustained both charges, found that OPM's determination of unsuitability was supported by a preponderance of the evidence, and affirmed OPM's suitability action. *Id.*

The Appellant filed a petition for review on September 23, 2009. On October 19, 2009, OPM moved for an extension of time to respond to the petition, asserting that the appeal presented the same issues raised in the *Aguzie* and *Barnes* appeals. In an October 22, 2009 order, the Board consolidated the appeal with *Aguzie, et al. v. OPM*.

In its opening brief in the consolidated appeal, OPM asserted that "the order consolidating the *Hunt-O'Neal* appeal to the other three appeals may have been improvidently granted," since "Appellant *Hunt-O'Neal* apparently would not, based on her service history, meet the definition of an 'employee' in 5 U.S.C. § 7511(a)(1)(A)." (Agency Opening Br. 2 n. 1, Dec. 7, 2009, citing the Agency File, tabs 2a, 2n (Notification of Personnel Action forms showing that the appellant was appointed January 7, 2008 subject to a one-year probationary period, and removed less than one year later, on January 5, 2009)).

On August 9, 2010, the Board issued orders to *pro bono* counsel for the Appellant, giving her the opportunity to file a response, and giving OPM the opportunity to file a supplemental reply. The Appellant filed her response brief on August 31, 2010. OPM hereby replies to the Appellant's response brief.¹

Argument

At the time of her directed removal, the Appellant, unlike the other appellants in this consolidated appeal, could not meet the definition of an "employee" in 5 U.S.C. § 7511(a)(1). The Appellant admits that the IRS appointed her on January 7, 2008; that OPM ordered her removed on December 30, 2008 based on an unfavorable suitability determination; and that the IRS removed her less

¹ The Appellant's argument concerning the merits of the other consolidated appellants' claims (*Hunt-O'Neal* Res. Br. 4-13, Aug. 31, 2010) are not relevant to the questions presented in her own appeal, and accordingly, are not addressed in this reply. OPM replies in a separate brief to the August 31, 2010 response brief of Holley C. Barnes.

than one year after her appointment, on January 5, 2009. (Hunt-O'Neal Res. Br. 2-3.) Further, the Appellant cites her January 7, 2008 SF 50 form. (*Id.*:2.)² This form documents that she had no military or civilian Federal service prior to January 7, 2008, and that she was appointed "subject to completion of [a] one year initial probationary period beginning 01/7/08." (Agency File, tab 2n at 1.)

It is well settled that "a probationary employee with less than 1 year of current continuous service . . . has no statutory right to appeal [her] separation." *Rivera v. Dep't of the Navy*, 114 M.S.P.R. 52, 53 (2010). An employing agency may refer a case involving an appointee's falsification to OPM for a suitability action under 5 C.F.R. part 731, or may instead take a probationary action under 5 C.F.R. part 315 after giving notice to OPM. *Gamble v. Dep't of the Army*, 111 M.S.P.R. 529, 534 (2009). When OPM orders an appointee's removal as the result of an unfavorable suitability determination under 5 C.F.R. part 731, the appointee's right to appeal to the Board is found in Part 731, and the procedures in Part 315 are inapplicable. *Ward v. Dep't of the Navy*, 44 M.S.P.R. 493, 497-99 (1990); *see also* *McChesney v. Dep't of Justice*, 55 M.S.P.R. 512, 515-16 (1992), *aff'd sub nom. McChesney v. Merit Sys. Prot. Bd.*, 5 F.3d 1503 (Fed. Cir. 1993) (table); *Munson v. Dep't of Justice*, 55 M.S.P.R. 246, 251-52 (1992). Because OPM ordered the Appellant's removal based on a suitability determination under 5 C.F.R. Part 731, the Appellant was entitled to appeal her removal only under Part 731 procedures, and she could not invoke the procedures in Part 315.

² Notwithstanding the Appellant's admission that she worked for the IRS for less than one year, and her favorable citation of record evidence showing that she does not otherwise meet the Chapter 75 definition of an "employee," she asserts that the Board cannot at this stage dispose of her appeal, but must remand it "for a finding of fact as to her employment status at the time of her removal." (Hunt-O'Neal Res. Br. 12.) If the Appellant believes that she is an "employee" entitled to adverse action appeal rights under 5 U.S.C. Chapter 75, she has the burden of proving the elements of the Board's jurisdiction by preponderant evidence. 5 C.F.R. § 1201.56(a)(2)(i). The Appellant, through counsel, has failed to make a jurisdictional showing, and has instead proffered argument showing that the Board lacks jurisdiction over her appeal. The Board should not accept her invitation to remand the jurisdictional question.

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 procedures. The Appellant's September 23, 2009 Petition for Review should be denied for failure to meet the Board's criteria for review.

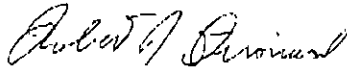
Respectfully submitted,



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Enclosure: certificate of service