

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JAMES A. SCOTT,
Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,
Agency.

* DOCKET NUMBER
* CH-0731-09-0578-I-1
*
* APPELLANT'S
* RESPONSE TO
* AGENCY BRIEF
*

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INTRODUCTION

The Appellant, Mr. James A . Scott, appealed his removal based on suitability reasons to the Merit Systems Protection Board (Board or MSPB) on April 24, 2009. An Initial Decision (ID) upholding the Appellant's removal was issued on August 21, 2009. The Appellant submitted a Petition for Review (PFR) on September 21, 2009.

On October 15, 2009, the Board consolidated this case with Aguzie v. OPM, et al., DC-0731-09-0261-R-1 (2009). On October 28, 2009, the Appellant filed his opposition to the consolidation. The Appellant requested the Board accept his PFR and issue a decision on the merits of the PFR. The Board did not respond to the Appellant's request.

The Appellant reiterates his opposition to the consolidation and asks for a decision on the merits of his PFR. However, as a result of the consolidation, the Appellant will also submit his response to the issues raised by the Board, and arguments of the Office of Personnel Management (OPM) in its brief of December 7, 2009, regarding the legal issues identified in Aguzie.

Appellant's Opposition to Consolidation and Request for a Decision on His PFR

Appellant opposes the consolidation of his case with those of Aguzie, et al., because OPM was wrong as a matter of law in his case. When an action such as this is fatally defective from its inception, there is no need to reach the issue of whether the Appellant should have had adverse action appeal rights.

The Board has the authority to declare OPM was wrong as a matter of law to base a suitability action against the Appellant entirely on post employment conduct. This should be done immediately and the removal of the Appellant should be overturned.

In contrast, Appellants Aguzie and Barnes had the merits of their cases evaluated by the Board. It is appropriate in their cases to decide whether they should have adverse action appeal rights.

In a typical adverse action the Board is required to review the employing agency's decision solely on the grounds invoked by the agency. Gottlieb, Veterans Administration, 39 M.S.P.R. 606, 609 (1989). This case is not directly on point with Gottlieb because OPM brought this case as a suitability action. However, the underlying premise, an agency's case should be evaluated on the grounds invoked by the agency, is applicable to this case. In this case, OPM initiated a suitability removal on purely post employment conduct. It is that decision that should be initially evaluated by the Board.

In the event OPM was wrong as a matter of law to base a suitability action entirely on post employment conduct, the action should be reversed and the Appellant should be returned to work. If post employment conduct has become a suitability issue, then, and only then, should the issue be decided whether the Appellant should have been afforded 5 U.S.C. 7513 appeal rights.

If the Board grants the Appellant's request and issues a decision on his PFR, the legal issues in Aguzie will still be addressed by the other parties. The cases will be decided contemporaneously.

It would be a travesty to give OPM's fatally defective suitability action against the Appellant a second chance because OPM failed to give the Appellant his proper appeal rights. In effect, the Board will be rewarding OPM's illegal behavior.

Accordingly, the Appellant will argue post employment can not form the sole basis of a suitability action. Then the Appellant will address the issues raised in Aguzie, et al. At the risk of being overly simplistic, the Appellant does not believe the issue is as complicated as OPM makes it out to be in its brief. Appellant will conclude all employees have the appeal rights identified in 5 U.S.C. 7513. The Appellants' removals should be rescinded in their entirety based on a violation of their due process rights.

ARGUMENT

1. As a matter of law, post employment conduct may not form the sole basis for a negative suitability determination.

A suitability determination is an assessment of an applicant's character and conduct. A suitability investigation, by its very nature, investigates an applicant's activities prior to employment with the government. Events that occur after an employee begins working for the government do not deal with the character or conduct of an applicant and are not suitability issues.

OPM's legal authority to make suitability determinations is derived from the authority granted to the President in 5 U.S.C. 3301. Specifically,

5 U.S.C. 3301. The President may --

(1) prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of of the service.

(2) ascertain the fitness of *applicants* as to age, health, character, knowledge and ability for the employment sought; and [emphasis added]

In that legislation Congress granted the President the authority to investigate and assess an applicant's character. Based on the assessment of an applicant's background a decision may be made not to hire an applicant, or if the individual was hired during the investigative process, they may be removed for pre-employment reasons.

This legislation is directed solely at an applicant's fitness for employment sought. This section of the statute deals only with applicants. The fitness of an applicant is based on events that occurred before the applicant becomes a federal employee. There is nothing in 5 U.S.C. 3301 that deals with a current employee's conduct.

An assessment of a current employee's on duty, or off duty, conduct is not a suitability matter. Post employment conduct cases are adverse actions and are controlled by the provisions contained in 5 U.S.C. 7513.

Executive agencies are free to take adverse actions against their employees as long as the actions promote the efficiency of the service. OPM has no legal authority to interfere with another agency's management of its own employees for post employment conduct.

In this case, the Appellant had worked at Defense Finance and Accounting Service (DFAS) as a federal employee since January 23, 2006. ID at 2. The incident upon which OPM based its negative suitability determination did not occur until February 22, 2008. ID at 3. The Appellant was not an applicant on February 22, 2008. He was a productive employee working at DFAS and had been for two years.

Suitability determinations, based on the provisions of 5 U.S.C. 3301, do not apply to the actions of current federal employees. These provisions apply only to applicants for federal employment. The ID violates the plain language of 5 USC 3301(2).

The President delegated the authority to perform investigations, and make suitability determinations, in Executive Order 10577. Revisions to that Executive Order grant the Director of OPM the responsibility for

Sec. 5.2.(a). Investigating the qualifications and suitability of *applicants* for positions in the competitive service. [emphasis added]

The President delegated authority to OPM to investigate the suitability of an applicant, an individual in the process of attempting to obtain federal employment. There is no grant of authority from the President to OPM to get involved in cases concerning employees at other federal agencies for post employment conduct.

An individual is an applicant prior to working for the government. Consequently, the conduct subject to OPM review must have occurred while, or before, the individual was applying for job with the government.

Conduct that occurs after an employee has started working is not within OPM's purview. There is no delegation of authority in the statute or Executive Order for OPM to take suitability actions against federal employees for post employment conduct.

The plain language of Section 5.2.a. of Executive Order 10577 deals with applicants for federal employment. The word "employee" is not mentioned in Section 5.2.a.

OPM's regulations for implementing the delegated authority to investigate, and determine, an applicant's suitability are contained in 5 C.F.R. 731. In these regulations

OPM acknowledges a suitability determination is based on an assessment of an applicant. In pertinent part,

5 C.F.R. 731.101

(a)... Section 3301 of title 5, United States Code, directs consideration of “age, health, character, knowledge and ability for the *employment sought*”... This part concerns only determinations of “suitability,” that is, those determinations based on a person’s character or conduct that *may have an impact* on the integrity or efficiency of the service... [emphasis added]

On February 22, 2008, the Appellant was not seeking employment. He had been working for the government for two years.

OPM’s use of the terms “employment sought” and “may have an impact” confirm a suitability determination is an attempt to judge an applicant’s fitness as a federal employee. These terms are prospective in nature.

When assessing post employment conduct of federal employees, a decision to remove an employee must “promote the efficiency of the service.” 5 U.S.C. 7513(a). Agencies, and not OPM, have the responsibility and authority to deal with the post employment conduct of their employees.

A slight change of the facts in this case illustrates the flaws in the OPM position, adopted in the ID, in this matter. The Appellant worked at DFAS for three years. His work was very good. ID at 16. Assume for a moment the Appellant had started working at DFAS in 1979. Under OPM’s theory of the case, if the Appellant had worked at DFAS for thirty years, instead of three, OPM could still direct he be removed for attempting to help his wife in 2008, twenty nine years after the start of his federal employment. Removing an exemplary, thirty year employee for suitability reasons would be absurd.

OPM's theory of the case, that post employment conduct may subject an employee to a negative suitability determination, has other implications. Under this theory, if an employee violated the provisions of 5 C.F.R. 731(b)(2),(5) or (6) OPM would be free to direct another federal agency to fire the employee for suitability reasons if the employee engaged in criminal conduct, abused alcohol or drugs.

The Board has also held suitability actions deals with applicants. In Ferguson v. Office of Personnel Management, 100 MSPR 347, 350 (2005), the Board held a "suitability inquiry is directed toward whether the "character or conduct" of a *candidate* is such that employing him may have an impact on the integrity or efficiency of the service." [emphasis added] Throughout the course of this case, neither the undersigned, OPM or the AJ could find any Board case in which post employment conduct formed the sole basis for a negative suitability determination. There is no support for OPM's expanded, and flawed, theory of the suitability process.

The ID relied on very generalized statutory references supporting the conclusion that OPM may rely on post employment conduct to in a suitability case. ID at 5. The provisions of 5 U.S.C. 7301 consist of fourteen words that allow the President to make regulations concerning federal employees. That point is not in dispute. The provisions of 5 U.S.C. 1103(a)(5) deal with OPM's authority to enforce laws. The Appellant is asking OPM and the Board to adhere to, and enforce, the provisions of 5 U.S.C. 3301(2).

The ID's reliance on Section 5.3.(a)(1) of Executive Order 10577 is also misplaced. ID at 6. That provision follows Section 5.2.a. which specifically refers to applicants. Section 5.3.(a)(1) is most logically directed to situations where the investigation of an

applicant is still being conducted and the individual is hired and becomes employed by the government. However, the investigation is of pre-employment conduct.

OPM's regulations in 5 CFR 731.105(d), which state investigations should be commenced within two weeks on an individual's entry into federal service, also support the Appellant's position in this matter. If the investigation commences within two weeks of an employee's starting date, then it only stands to reason the investigation is of pre-employment conduct.

The ID's holding that post employment conduct may form the basis for a negative suitability determination is based on an erroneous interpretation of 5 U.S.C. 3301, Executive Order 10577, 5 C.F.R. 731 and Board case law. The plain language of the statute, regulations and Ferguson deal with assessing the conduct or character of an applicant. On February 22, 2008, the Appellant was not an applicant. He had been an employee for over two years and was a very good employee for DFAS.

Appellant's response to OPM's Aguzie Brief

ARGUMENT

1. OPM misconstrues the nature of, and relationship between, the United States Code (Statute) the Code of Federal Regulations (Code).

There is a critical difference between the Statute, which is the law of the United States of America, and the Code, whose provisions are the implementing regulations of the Statute. Simply put, the Statute takes precedence over the Code.

OPM did not suggest there is a conflict between 5 U.S.C. 3301 and 5 U.S.C. 7511-7514. If there were, it would be necessary for the judicial system to resolve that conflict.

Rather, OPM notes a conflict between 5 C.F.R. 731 and 5 U.S.C. 7513 and asks the provisions of the Code take precedence over the Statute. OPM cites no authority for an interpretation of an implementing regulation being given precedence over law.

Congress did not pass, and President Carter did not sign, nor did any President sign, 5 C.F.R. 731 into law. Congress did pass, and President Carter did sign, 5 U.S.C. 7513 into law.

OPM's mandate is to enforce the law. OPM is not free to enforce some laws and not others. OPM's implementing regulations must comply with the entire United States Code, including 5 U.S.C. 7513.

An employee's rights under 5 U.S.C. 7513 take precedence over OPM's regulations in 5 C.F.R. 731. Honoring an employee's adverse action appeal rights in a suitability situation will cause confusion and require OPM to revise its carefully constructed regulations. This may be inconvenient. However, administrative inconvenience is not a reason to ignore the Statute.

2. Employees have adverse action appeal rights.

The definition of an employee is spelled out in detail in 5 U.S.C. 7511(a)(1)(A). There are certain exceptions listed in 5 U.S.C. 7511(b). However, there are no exceptions listed in 5 U.S.C. 7511(b) for an employee facing a suitability action or applicable to this case. Consequently, Appellants Aguzie, Barnes and Scott were employees under the provisions of 5 U.S.C. 7511(a)(1)(A).

As employees, the Appellants are entitled to all of the rights listed in 5 U.S.C. 7513. All federal agencies, including OPM, must honor these rights. Employees have the right under 5 U.S.C. 7513(d) to appeal their removal to the Board. An adverse action against an employee must promote the efficiency of the service. 5 U.S.C. 7513(a). In reviewing an adverse action, the Board has the authority to mitigate the penalty. Douglas v. Veterans Administration, 5 M.S..PR. 280 (1981).

3. The proper remedy is to rescind the removals of Appellants Aguzie, Barnes and Scott as they have been denied due process of law.

The Appellants are employees and have the adverse action rights and protections listed in 5 U.S.C. 7513. Both the Board and OPM acknowledge in an adverse action the employing Agency is the Respondent and may only take an action that promotes the efficiency of the service. 5 U.S.C. 7513(a).

In consideration of the fact the employing agency is the Respondent, it becomes critical to identify who should be the deciding official and how much discretion the rests with the deciding official. The determination of the proper disciplinary action to be taken to promote the efficiency of the service is a matter particularly and necessarily within the discretion of the agency. Lachance v. Devall, 178 F. 2d 1246, 1251 (Fed. Cir. 1999), citing Parker v. United States Postal Service, 819 F.2d 1113, 1116 (Fed. Cir. 1987).

As a result of the employing agency being the Respondent, and the requirement the employing agency maintaining the discretion to determine what promotes the efficiency of the service in an adverse action, it only stands to reason the deciding official must also be from the employing agency.

In reviewing the actions of the employing Agency, the Board has the authority to mitigate any penalty in an adverse action case. Douglas v. Veterans Administration, 5 M.S.P.R. 280 (1981). OPM is not directly arguing for an overruling of Douglas. However, it appears OPM argues for a scenario where the Board has the discretion to mitigate an action the Respondent agency does not possess. That would be absurd.

The provisions of 5 U.S.C. 7513(b)(2) guarantee employees minimum due process as they are granted the right to respond to a proposed adverse action. This response is made to a deciding official of their employing agency. That deciding official must have the discretion to take, or not take an action, or mitigate any proposed penalty. Otherwise, the process is a complete sham.

The essential requirements of due process... are notice and an opportunity to respond. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 546 (1985). The Appellants have been denied a meaningful opportunity to respond.

An essential principle of due process is that a deprivation of life, liberty or property “be preceded by notice and opportunity for a hearing appropriate to the nature of the case.”... This principle requires “some kind of hearing” prior to the discharge or an employee who has a constitutionally protected property interest in his employment... Id. at 542.

As Loudermill makes perfectly clear, the opportunity to respond must be made before the employee is removed. Consequently, minimum due process requires the employee have the opportunity to respond to a proposed action to a deciding official who has the authority to decline to take an action, or reduce its severity, before the action is taken against the employee.

If the employing agency's deciding official has not had the opportunity to evaluate and consider the Appellant's response to the proposed removal notice, then the Appellant has not had a meaningful opportunity to respond under 5 U.S.C. 7513(b)(2).

Denying an employee the opportunity to respond under 5 U.S.C. 7513(b)(2) is clearly a denial of due process. Denying an employee a meaningful opportunity to respond under 5 U.S.C. 7513(b)(2) is also a denial of due process.

Currently, under the Board's remand instructions in Aguzie, if the Appellant is an employee, and has adverse action appeal rights, the Appellant will be allowed to file an appeal 30 days after the Administrative Judge has so stated. Aguzie slip op. at 5. This approach seems contrary to Loudermill. The Appellant can not be removed until a deciding official at the employing agency has considered his response.

If the Appellants in this consolidated appeal are employees, and have 5 U.S.C. 7513 protection, the appropriate remedy is to rescind the removals. The deciding officials should be from the Appellant's employing agencies. An Appellant's right to respond under 5 U.S.C. 7513(b)(2) is meaningless unless that deciding official has the authority to truly consider an employee's response and mitigate the penalty or take no action at all. An employee's response must come, and be considered, before they are removed. An employee's right to respond under 5 U.S.C. 7513(b)(2) is of constitutional magnitude and must be respected.

The second issue raised in Aguzie concerns whether the other actions on appeal remain within the Board's jurisdiction under 5 C.F.R. 731.501. Appellant takes the position in an adverse action the Board has authority under Douglas to mitigate any penalty, including cancellation of eligibilities and debarment.

CONCLUSION

Removing the Appellant for suitability reasons, based on an event that happened two years after he began his federal employment, is an abuse of the suitability process. Suitability determinations can not be based solely on post employment conduct.

In enacting 5 U.S.C. 3301(2), Congress granted the President the authority to make suitability determinations based on the conduct or character of *applicants* for federal employment. [emphasis added] Suitability determinations are evaluations of the prior conduct of applicants for federal employment. The statute deals with applicants and only applicants. The word "employee" is not mentioned in that statute.

Events that occur after an applicant becomes a federal employee are not suitability issues. The authority granted in 5 U.S.C. 3301(2) does not grant OPM the authority to get involved in the post employment conduct of employees at other federal agencies.

The Appellant was a well liked and productive employee for DFAS. ID at 16. His supervisor at DFAS did not want to lose the Appellant. Removing a productive employee does not promote the efficiency of the service. By illegally directing DFAS to remove a good employee, OPM has detracted from the efficiency of the service.

The Appellant requests the ID be reversed and he be reinstated with back pay and benefits, have the negative suitability determination rescinded, his debarment lifted, all eligibilities restored and be paid attorney fees.

Furthermore, the Appellants in Aguzie, et al., are employees under 5 U.S.C. 7511 and as such are entitled to the adverse actions procedures and protections contained in 5 U.S.C. 7513. As long as Douglas retains in viability, the Board certainly has the authority to mitigate penalties in an adverse action case against an employee.

If the federal employment system is to have any integrity, the Responding agency of an employee must also have the authority to mitigate the proposed penalty of one of its employees.

Due process requires a deciding official of a Respondent agency review an employees response to a proposed adverse action prior to effecting the adverse action. Accordingly, the removal of the Appellants must be rescinded until a deciding official of their employing agency reviews their response and makes an informed decision on whether the proposed action promotes the efficiency of the service. Finally, the Board retains jurisdiction to mitigate any penalty in an adverse action.

DATED this 5th day of January 2010.

Respectfully submitted,



Jeffrey G. Letts
Appellant's Representative

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