



# FAX TRANSMITTAL FROM

**THE OFFICE OF THE GENERAL COUNSEL  
U.S. OFFICE OF PERSONNEL MANAGEMENT**

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**COMMENTS:**

Re: Hyginus U. Aguzie v. OPM  
Docket No: DC-0731-09-0261-B-1

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CLERK OF THE BOARD

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD

HYGINUS U. AGUZIE,  
Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,  
Agency.

DOCKET NUMBER  
DC-0731-09-0261-B-1

DATE: OCT - 6 2009

**MOTION TO REOPEN**

The Office of Personnel Management moves the Board to reopen its orders in *Aguzie v. Office of Personnel Management*, No. DC-0731-09-0261-I-1 (Sept. 3, 2009) and *Barnes v. Office of Personnel Management*, No. DC-0731-09-0260-I-1 (Sept. 3, 2009), two appeals of OPM actions removing appellants from their positions, debarring them from competition, and canceling their eligibilities under 5 C.F.R. Part 731. This action is warranted in the Board's discretion to speed adjudication of these non-fact dependent issues of law in order to allay uncertainty caused by the Board's analysis. Specifically, OPM requests that the Board modify its orders to revoke its remands, request the parties to brief the issues presented before the Board itself within 60 days of the Board's granting of OPM's request, and invite the Director of OPM to intervene in the case in his discretion.

In those orders the Board vacated the initial decisions in both cases and remanded the cases to the administrative judge to obtain briefing on two pure issues of law that were not raised below. They are 1) whether the appellants

were entitled to appeal their removal under 5 U.S.C. § 7513(d), and 2) if so, whether the other actions on appeal, that is, debarment and cancellation of eligibilities, remain within the Board's jurisdiction under 5 C.F.R. § 731.501.

The analysis preceding the Board's orders in both cases raises for the first time issues casting doubt on the authority of OPM, as well as the many agencies that take suitability actions under authority delegated by OPM, to take removal actions under 5 C.F.R. Part 731. Because these issues are not dependent in any way on specific factual determinations, including credibility determinations that are routinely made by the Board's administrative judges in the first instance, and because they raise legal issues of first impression, it is most appropriate for the Board itself to decide these issues in the first instance, subject to review by the Court of Appeals for the Federal Circuit. Remanding these decisions is an unnecessary step that will only delay resolution of these important legal issues. It is appropriate – indeed necessary – that these questions that the Board itself has interposed be decided expeditiously to prevent a long period of uncertainty during which OPM, agencies, and appellants and their representatives will not know how to proceed or react.

Indeed, it is not even clear that administrative judges may answer the first question posed in the affirmative without overruling Board precedent – something that is entirely beyond their authority. Administrative and judicial efficiency, as well as the uninterrupted efficient operation of the Government's vital suitability program require the Board to adjudicate these matters without superfluous intermediate steps.

Ordinarily, when a party to litigation requests the Board to reopen a case to modify an order, the Board will balance "the desirability of finality and the public interest in reaching what ultimately appears to be the right result." *Payne v. United States Postal Service*, 69 M.S.P.R. 503 (1996). Here considerations of both assuring finality and promoting the public interest argue in favor of the Board reopening these matters to (i) modify its order to revoke its remand; (ii) request the parties to brief the issues presented within 60 days of the Board's granting of OPM's request; and (iii) invite the Director of OPM to Intervene in the case in his discretion.

Respectfully submitted,

10/6/09

Date



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