UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 198

Docket No. SF-0731-09-0329-I-1

Gustavo B. Alvarez,

Appellant,

v.

Department of Homeland Security,

Agency.

October 2, 2009

Gustavo B. Alvarez, Calexico, California, pro se.

Janet Murray, San Diego, California, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant filed a petition for review of an initial decision that affirmed the agency's decision finding him unsuitable for employment as a Customs and Border Protection Officer and rescinding its conditional offer of employment in that position. For the reasons set forth below, we DENY the petition, REOPEN the appeal on our own motion under 5 C.F.R. § 1201.118, VACATE the initial decision and REMAND the appeal for further proceedings consistent with this Opinion and Order.

BACKGROUND

¶2 On March 6, 2008, the agency tentatively selected the appellant for the GS-1895-07 position of Customs and Border Protection Officer (CBPO) subject to several pre-employment requirements, including a background investigation regarding suitability. Appeal File (AF), Tab 3, Subtab 4j. The position was filled under the Federal Career Intern Program (FCIP), under which the selectee receives an excepted service appointment but may be converted to the competitive service after 2 years. *Id.*, Subtabs 4h, 4k; *see also* 5 C.F.R. § 213.3202(o)(6)(i).

¶3 On September 2, 2008, the agency informed the appellant that it proposed to find him unsuitable for the CBPO position and to withdraw its tentative offer of employment because of information developed during the background investigation. AF, Tab 3, Subtab 4c. After receiving a response from the appellant, the agency issued a decision on February 11, 2009, rescinding its tentative offer of employment. *Id.*, Subtab 4a. The agency stated that its Office of Internal Affairs had found the appellant unsuitable for the CBPO position because of alcohol abuse, associations – foreign, and criminal conduct. *Id.*

¶4 The appellant filed a Board appeal and did not request a hearing. AF, Tab 1. The administrative judge (AJ) issued an initial decision (ID) finding Board jurisdiction under 5 C.F.R. § 731.101(a) and affirming the agency's suitability determination. *Id.*, Tab 8. The appellant has filed a petition for review (PFR). Petition for Review File (RF), Tab 1. The agency has responded in opposition to the PFR. *Id.*, Tab 3.

ANALYSIS

¶5 The Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule or regulation. *Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985). The appellant has the burden of proof on the issue of jurisdiction. 5 C.F.R. § 1201.56(a)(2)(i).

¶6 Generally, an unsuccessful candidate for a federal civil service position has no right to appeal his nonselection. *Tines v. Department of the Air Force*, 56 M.S.P.R. 90, 93 (1992). Nevertheless, pursuant to Office of Personnel Management (OPM) regulations at 5 C.F.R. Part 731, the Board has jurisdiction over certain matters involving suitability for federal employment. *See Upshaw v. Consumer Product Safety Commission*, 111 M.S.P.R. 236, ¶ 7 (2009). A suitability determination is directed toward whether the character or conduct of an individual is such that his employment would adversely affect the integrity or efficiency of the service. *Id.*

¶7 OPM issued revised suitability regulations which became effective June 16, 2008. 73 Fed. Reg. 20,149 (Apr. 15, 2008) (codified at 5 C.F.R. Part 731). Under the new 5 C.F.R. § 731.501(a), only a "suitability action" may be appealed to the Board. A "suitability action" is defined as a cancellation of eligibility,[1] a removal, a cancellation of reinstatement eligibility,[2] and a debarment.[3] 5 C.F.R. § 731.203(a). In its revised regulations, OPM removed a denial of appointment from the list of actions appealable to the Board under the former § 731.203(a). *See Upshaw*, 111 M.S.P.R. 236, ¶ 8. In addition, OPM's new regulations specify that a non-selection for a specific position is not a "suitability action" even if it is

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[1] Cancellation of eligibility may be for a specific position or for any positions for which the individual is on competitive registers or has pending applications. *See, e.g., Riggsbee v. Office of Personnel Management*, 111 M.S.P.R. 129, ¶ 2 (2009); *Ferguson v. Office of Personnel Management*, 100 M.S.P.R. 347, ¶ 2 (2005).

[2] Reinstatement eligibility is the right of an individual previously employed under a career or career-conditional appointment to be reinstated to a competitive service position. *See* 5 C.F.R. § 315.401.

[3] Debarment is defined as denial of examination for or appointment to a position for a period of up to 3 years, based on a finding of unsuitability. *See* 5 C.F.R. §§ 731.204-.205.

based on the criteria for making suitability determinations set forth at 5 C.F.R. § 731.202.[4] 5 C.F.R. § 731.203(b).

¶8 The ID in this appeal found Board jurisdiction without addressing the revisions in OPM's suitability regulations relating to denial of appointment and nonselection.[5] On its face, the agency's decision appears to be a matter now outside the Board's jurisdiction under OPM's new regulations. Although the parties did not raise this issue on appeal or on PFR, the Board must ensure that it has jurisdiction over the matter on appeal. *See Metzenbaum v. General Services Administration*, 96 M.S.P.R. 104, ¶ 15 (2004) ("[T]he Board must satisfy itself that it has authority to adjudicate the matter before it and may raise the issue of its own jurisdiction sua sponte at any time."); *Waldrop v. U.S. Postal Service*, 72 M.S.P.R. 12, 15 (1996). We therefore reopen the appeal on our own motion to address this issue.

¶9 Prior to dismissal of an appeal for lack of jurisdiction, an appellant must receive explicit information on what is required to establish an appealable jurisdictional issue. *Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643-44 (Fed. Cir. 1985). In this case, the AJ did not issue a *Burgess* notice, and thus, the appellant did not receive explicit information and an opportunity to show Board jurisdiction. Without a *Burgess* notice, the parties did not submit

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[4] Under both the former and the revised regulations at 5 C.F.R. § 731.202, these factors include: misconduct or negligence in employment; criminal or dishonest conduct; material, intentional false statement, or deception or fraud in examination or appointment; refusal to furnish testimony as required by 5 C.F.R. § 5.4; alcohol abuse under certain circumstances; illegal use of narcotics, drugs or other controlled substances without evidence of substantial rehabilitation; knowing and willful engagement in acts or activities designed to overthrow the U.S. Government by force; and any statutory or regulatory bar which prevents the lawful employment of the person involved in the position in question.

[5] The AJ, however, correctly found that, under the revisions, Board appeal rights are now available for positions in the excepted service where the incumbent can be noncompetitively converted to the competitive service, such as the FCIP position in this appeal. ID at 1 n.1 (citing 5 C.F.R. § 731.101(b)).

responses with evidence and argument, and so the record is not fully developed on the threshold issue. We therefore remand the appeal for further adjudication. On remand, the AJ should provide notice to the parties of the jurisdictional standard and determine whether this is a matter within the Board's jurisdiction.

ORDER

¶10 Accordingly, the initial decision is VACATED, and the case is REMANDED to the Western Regional Office for further proceedings consistent with this Opinion and Order.

FOR THE BOARD:

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