UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 199

Docket No. NY-0731-09-0060-I-1

Antonio J. Rodriguez,
Appellant,
v.
Department of Homeland Security,
Agency.

October 2, 2009

Albert Loew, Esquire, Merrick, New York, for the appellant.

Rafik Alidina, New York, New York, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has filed a petition for review (PFR) of an initial decision (ID) that dismissed his suitability appeal as moot. For the reasons set forth herein, we GRANT the PFR, VACATE the ID, and REMAND the appeal to the New York Field Office for further adjudication.

BACKGROUND

¶2 The appellant applied for and was tentatively offered a Customs and Border Protection Agriculture Specialist position in Newark, New Jersey, subject to a mandatory background investigation. Initial Appeal File (IAF), Tab 14 at 10-11. On July 28, 2008, the agency proposed to find the appellant unsuitable for the

position based upon financial issues that the agency discovered during the background investigation, and to withdraw its tentative offer of employment. *Id.* at 7-9. The agency subsequently issued a negative suitability determination and withdrew its tentative offer of employment based upon the appellant's financial issues and dishonest conduct. *Id.* at 10.

¶3 The appellant filed a Board appeal to challenge the agency's negative suitability action, and alleged harmful error. IAF, Tab 1 at 2-3, 5-6. He specifically asserted that the agency improperly relied upon a dishonest conduct issue in its negative suitability determination that was not previously raised in the proposal notice, thereby "depriving [him] of [his] ability to defend [him]self against this unexplained issue." *Id.* at 5-6. He requested a hearing and later designated a representative. *Id.* at 2, Tab 4 at 2.

¶4 While the appeal was pending, the agency sent the appellant a letter stating that on January 12, 2009, it overturned its negative suitability determination and officially offered the appellant the Agriculture Specialist position, which he accepted. IAF, Tab 14 at 11. The agency subsequently moved to dismiss the appeal as moot. IAF, Tab 9 at 2, Tab 12 at 2. The administrative judge (AJ) advised the appellant that the appeal appeared to be moot, and provided him with an opportunity to respond to the agency's motion to dismiss. IAF, Tab 13. The appellant responded in opposition to the agency's motion, alleging that his appeal was not moot because questions existed regarding his attorney's fees, and because the letter overturning the adverse suitability action referenced his alleged dishonest conduct, leaving the impression that the appellant "beat" the charge, and potentially causing a negative impact on his future employment and background checks. IAF, Tab 14 at 2-5.

¶5 Without holding the requested hearing, the AJ issued an ID dismissing the appeal as moot. ID at 1, 3. The appellant has filed a PFR of this decision. Petition for Review File (PFRF), Tab 1. The agency has responded in opposition. PFRF, Tab 3.

ANALYSIS

On review the appellant submits documents that are not new.

¶6 On review, the appellant submits copies of the proposal notice, the negative suitability determination, the rescission letter, and the ID, which are already a part of the record, and therefore are not new. PFRF, Tab 1 at 11-20, 23; *see* ID; IAF, Tab 14 at 7-11; *Meier v. Department of the Interior*, 3 M.S.P.R. 247, 256 (1980). He also submits his September 24, 2008 response to the agency's proposal notice, which is not new because it was available prior to the close of the record below. PFRF, Tab 1 at 21-22; *see Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980); 5 C.F.R. § 1201.115(d)(1). Thus, for the foregoing reasons, the Board need not consider these documents.

A question exists regarding the Board's jurisdiction over this suitability appeal.

¶7 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 to prove Board jurisdiction over his appeal by preponderant evidence. 5 C.F.R. § 1201.56(a)(2)(i).

¶8 Generally, an unsuccessful candidate for a federal civil service position has no right to appeal his non-selection. *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.*

¶9 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, ¶¶ 7-8. In addition, OPM's new regulations specify that a non-selection for a specific position is not a "suitability action" even if it is based on the criteria for making suitability determinations set forth in 5 C.F.R. § 731.202.[4] 5 C.F.R. § 731.203(b).

¶10 The ID in this appeal found Board jurisdiction without addressing the revisions in OPM's suitability regulations relating to denial of appointment and nonselection. *See* ID at 1. On its face, the agency's decision appears to be a matter now outside the Board's jurisdiction under OPM's new regulations. IAF, Tab 14 at 10. Although the parties did not raise this issue on appeal or on review,

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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 (or equivalent) to be reinstated to a competitive service position. *See* 5 C.F.R. § 315.401.

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

[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.

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 on our own motion to address this issue.

¶11 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 *Burgess* notice, and the appellant did not receive explicit information and an opportunity to show Board jurisdiction. Without *Burgess* notice, the parties did not submit responses with evidence and argument on the jurisdictional issue, and consequently, the record is not fully developed on this 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.

The AJ erred in dismissing the appeal as moot.

¶12 Even though an action may be within the Board's jurisdiction, subsequent events may render an appeal moot and foreclose the Board's review. *Harris v. Department of Transportation*, 96 M.S.P.R. 487, ¶ 8 (2004). Mootness can arise at any stage of litigation, and an appeal will be dismissed as moot when, by virtue of an intervening event, the Board cannot grant any effectual relief in favor of the appellant, as when the appellant, by whatever means, obtained all of the relief he could have obtained had he prevailed before the Board and thereby lost any legally cognizable interest in the outcome of the appeal. *Id*. The agency's unilateral modification of its personnel action after an appeal has been filed cannot divest the Board of jurisdiction, unless the appellant consents to such divestiture or the agency completely rescinds the action being appealed. *Id*. For an appeal to be deemed moot, the agency's rescission must be complete, i.e., the

appellant must be returned to the status quo ante and not left in a worse position as a result of the cancellation than he would have been in if the matter had been adjudicated and he had prevailed. *Harris*, 96 M.S.P.R. 487, ¶ 8.

¶13 On review, the appellant alleges as follows:

> The [Board] should rule that the [AJ] has jurisdiction over the correction of errors by the Agency even when the unsuitability decision is reversed in a situation such as the present case where the Agency's placement of the improper designation of DISHONEST CONDUCT deprives the Appellant of a complete reversal of the unsuitability decision.

PFRF, Tab 1 at 8; *see* IAF, Tab 14 at 2. He is claiming, as he did below, that because his record, in the guise of the rescission letter, still references dishonest conduct, he has not been returned to the status quo ante. PFRF, Tab 1 at 6-7; IAF, Tab 14 at 3-5.

¶14 Although the AJ correctly determined that the matter of attorney's fees did not preclude dismissal of the appeal as moot, *see Currier v. U.S. Postal Service*, 72 M.S.P.R. 191, 198 (1996), she erred in finding that the appellant had already obtained all of the relief that he could have obtained if he had prevailed in his suitability appeal before the Board. *See* ID at 2. When the Board orders cancellation of an action, it requires that the agency remove all references to that action from the employee's personnel record. To render an appeal moot by canceling an appealable action, an agency must do no less. *Marren v. Department of Justice*, 55 M.S.P.R. 1, 2-3 (1992); *Gonzales v. U.S. Postal Service*, 44 M.S.P.R. 517, 519-20 (1990) (citing *Dancer v. U.S. Postal Service*, 36 M.S.P.R. 235, 238, *rev'd in part on other grounds*, 38 M.S.P.R. 224 (1988)); *Kellus v. U.S. Postal Service*, 35 M.S.P.R. 335, 339 (1987), *implicitly overruled on other grounds by Andress v. U.S. Postal Service*, 56 M.S.P.R. 501 (1993), *overruling recognized by Hawkins v. U.S. Postal Service*, 56 M.S.P.R. 633 (1993)).

¶15 Here, the agency included a copy of the rescission letter, which is apparently in the appellant's "background file" along with the initial unsuitability letter, to indicate that it overturned its negative suitability determination. IAF, Tab 12 at 4, Tab 15 at 3-4. However, the rescission letter expressly refers to the overturned negative suitability determination, including its bases of dishonest conduct and financial issues. IAF, Tab 12 at 4. Had the AJ adjudicated this appeal in favor of the appellant and ordered the agency to cancel the action, the Board would have ordered the agency to expunge the appellant's personnel record of all references to the negative suitability determination. *See Marren*, 55 M.S.P.R. at 2-3; *Gonzales*, 44 M.S.P.R. at 519-20; *Dancer*, 36 M.S.P.R. at 238; *Kellus*, 35 M.S.P.R. at 339. Thus, if the rescission letter or any other reference to the negative suitability determination remains in the appellant's personnel record, the agency has failed to completely rescind the negative suitability action against the appellant. *See Harris*, 96 M.S.P.R. 487, ¶ 8. Remand is therefore appropriate. *See Guy v. Department of Energy*, 37 M.S.P.R. 230, 233 (1988); *Kellus*, 35 M.S.P.R. at 339-40.

ORDER

¶16 We REMAND the appeal for further proceedings in accordance with this Opinion and Order. If the AJ finds that the Board has jurisdiction over this appeal, she must determine whether the agency has failed to completely expunge the appellant's personnel record of all references to the negative suitability

determination. If the AJ finds that the agency has failed to do so, the AJ shall adjudicate the suitability appeal. *See Guy*, 37 M.S.P.R. at 233.

FOR THE BOARD:

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