

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2012 MSPB 34

Docket No. DC-3443-11-0529-I-1

**Marguerite Pridgen,
Appellant,**

v.

**Office of Management and Budget,
Agency.**

March 16, 2012

Marguerite Pridgen, Washington, D.C., pro se.

Steve Aitken, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman

OPINION AND ORDER

¶1 The appellant seeks review of an initial decision dismissing her appeal for lack of Board jurisdiction. For the reasons discussed below, we AFFIRM the initial decision AS MODIFIED by this Opinion and Order, still dismissing the appeal for lack of jurisdiction.

BACKGROUND

¶2 The appellant filed the instant appeal alleging that the Office of Management and Budget (OMB) added an experience requirement to the mandatory qualifications in its vacancy announcement for the position of Chief, Accountability, Performance, and Reporting Branch, in order to disqualify all but

the current detailed incumbent from consideration for the position. Initial Appeal File (IAF), Tab 1 at 6. The appellant also indicated on her appeal form that she was alleging that OMB engaged in prohibited personnel practices by giving unauthorized preferential treatment to an employee or applicant, and by discriminating on the basis of personal conduct unrelated to performance. *Id.* at 8.

¶3 The administrative judge issued an order in which she informed the appellant that the Board may not have jurisdiction over her appeal. IAF, Tab 3. The administrative judge identified two distinct jurisdictional issues. First, she noted that the “Board may not have jurisdiction over appeals from personnel actions taken by [OMB] because that agency is authorized to appoint and fix the pay of its employees ‘under regulations prescribed by the President.’” *Id.* (citing [31 U.S.C. § 521](#)).¹ Second, the administrative judge noted that, even if the Board had jurisdiction over appeals from actions taken by OMB, the Board would nonetheless lack jurisdiction over this appeal because it appeared to challenge a nonselection action and because prohibited personnel practice claims do not provide an independent source of jurisdiction. IAF, Tab 3 at 1-2. The order directed the appellant to file evidence and argument establishing that the appeal was within the Board’s jurisdiction. *Id.* at 2.

¶4 After both the appellant and the agency responded to the jurisdictional order, the administrative judge dismissed the appeal for lack of jurisdiction. IAF, Tabs 4, 6, 7, Initial Decision (ID) at 2. Specifically, the administrative judge determined that the appellant had failed to identify any law, rule or regulation under which an employee could appeal a nonselection action and that prohibited personnel practice claims do not provide an independent source of Board jurisdiction. ID at 2. In dismissing the appeal, the administrative judge did not address the scope of the Board’s jurisdiction over actions taken by OMB.

¹ OMB is an office in the Executive Office of the President. [3 U.S.C. § 501](#).

¶5 The appellant has filed a petition for review in which she disputes the administrative judge’s jurisdictional finding. Petition for Review (PFR) File, Tab 1. The agency has filed a brief response in which it opposes her petition. *Id.*, Tab 3.

ANALYSIS

¶6 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). As the administrative judge correctly observed, a nonselection for an appointment is generally not appealable to the Board. *Id.* at 2; *Miller v. Department of Homeland Security*, [111 M.S.P.R. 325](#), ¶ 10 (2009), *aff’d*, 361 F. App’x 134 (Fed. Cir. 2010).

¶7 The appellant contends on review that the Board has jurisdiction over her appeal as a mixed case including personnel practices prohibited by [5 U.S.C. § 2302\(b\)](#), and she alleges for the first time that OMB tailored the vacancy announcement at issue in a manner that discriminated against her on the basis of age, race and sex. PFR File, Tab 1 at 4. The Board does not have jurisdiction over discrimination claims absent an otherwise appealable action. *See* [5 U.S.C. § 7702\(a\)\(1\)](#); *Garcia v. Department of Homeland Security*, [437 F.3d 1322](#), 1342-43 (Fed. Cir. 2006) (en banc). Furthermore, prohibited personnel practices under [5 U.S.C. § 2302\(b\)](#) are not an independent source of Board jurisdiction. *Wren v. Department of the Army*, [2 M.S.P.R. 1](#), 2 (1980), *aff’d*, [681 F.2d 867](#), 871-73 (D.C. Cir. 1982).

¶8 The appellant also asserts that the Board has jurisdiction under the Presidential and Executive Office Accountability Act, [3 U.S.C. § 401](#), et seq., because she is an employee of the Executive Office of the President. PFR File, Tab 1 at 4; IAF, Tab 4 at 4.² We disagree. The Act authorizes appeals to the

² For its part, OMB responded below, without further explanation, that “[i]t is the case that OMB’s employees are covered by the regulations issued by the Office of Personnel

Board by “covered employees” of the Executive Office of the President (including OMB) who allege violations of certain workplace laws, including the Family and Medical Leave Act and the Fair Labor Standards Act. *See generally* [3 U.S.C. §§ 401-402, 431\(d\)\(2\), 454](#). Even assuming that the appellant is a covered employee within the meaning of the Act, nothing in its provisions grants the Board jurisdiction over appeals of nonselections. Furthermore, Section 454(b) of the Act, which governs discrimination cases, provides that when an employee claims discrimination, the Board is the initial appropriate forum for redress only when the action at issue is one “which an employee of an executive agency may appeal to the Board.” As discussed above, because a nonselection is not an action which an employee of an executive agency may appeal to the Board, the Board lacks jurisdiction to adjudicate this appeal under Section 454(b)(2) of the Act as a mixed case.

¶9 Accordingly, the Board lacks jurisdiction over the instant appeal.³

ORDER

¶10 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

Management [] that generally apply to Federal employees.” IAF, Tab 6 at 4. OMB does not address the issue on review.

³ The appellant requests that the Board stay the personnel action at issue in the instant appeal and refer the matter to the Office of Special Counsel (OSC). PFR File, Tab 1 at 4. We DENY the appellant’s request. Because the Board lacks jurisdiction over the instant appeal, it also lacks jurisdiction to grant the appellant’s request for a stay. The appellant, however, may seek redress from OSC pursuant to the procedures set forth at 5 C.F.R. part 1800.

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's

"Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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