



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for March 20, 2020

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COURT DECISIONS

PRECEDENTIAL:

Petitioner: Helen Z. Ricci

Respondent: Merit Systems Protection Board

Tribunal: U.S. Court of Appeals for the Federal Circuit

Case Number: [2019-1626](#)

MSPB Docket Number: DC-0731-18-0837-I-1

Issuance Date: March 19, 2020

JURISDICTION

- MISCELLANEOUS

MISCELLANEOUS AGENCY ACTIONS

- SUITABILITY

The Department of Homeland Security tentatively selected the petitioner for a Criminal Investigator position subject to her successful completion of a background investigation. The agency later rescinded its tentative offer of employment based on derogatory information obtained during the background investigation.

The petitioner filed a Board appeal alleging that the agency has subjected her to a negative suitability determination. The administrative judge dismissed the

appeal for lack of jurisdiction. The administrative judge found that, although the agency based its decision on suitability criteria, the action it took based on those factors was nonselection for a specific vacant position rather than any broader action such as debarment of the petitioner from future agency employment. The initial decision became the final decision of the Board when neither party filed a petition for review. The petitioner filed a timely appeal with the U.S. Court of Appeals for the Federal Circuit.

Holding: The Court held that the Board lacks jurisdiction over a nonselection for a specific position and that a claim of a “de facto” or “constructive” debarment will not bring a nonselection within the Board’s jurisdiction.

- 1) The Board’s jurisdiction is limited to matters appealable under law, rule, or regulation. The failure to select an individual for a specific vacant position generally is not an appealable action.
- 2) The Board does have jurisdiction over suitability actions pursuant to Office of Personnel Management (OPM) regulation at 5 C.F.R. part 731. However, those regulations explicitly provide that the nonselection for a specific position is not an appealable suitability action even when an agency bases such nonselection on the same considerations that support suitability determinations.
- 3) The court rejected the petitioner’s argument that her nonselection was in effect a debarment, which is an appealable suitability action. The court found that the nonselection here differed from a debarment because it did not apply to any position other than the specific one for which the petitioner had been tentatively selected. The court further determined that OPM made clear in its revised suitability regulations that the Board no longer had any authority to take jurisdiction over “de facto” or “constructive” debarments.
- 4) Finally, the court rejected the petitioner’s argument that the Board’s interpretation of “debarment” as excluding de facto debarment constituted a substantive rule that was not made in accordance with the Administrative Procedures Act (APA). The court found that this matter, like most Board adjudications, was specifically excluded from APA coverage.

NONPRECEDENTIAL:

Plasola v. Merit Systems Protection Board, [No. 2019-2453](#) (Fed. Cir. March 17, 2020) (MSPB Docket No. SF-0841-19-0308-I-1): The court affirmed the administrative judge’s initial decision dismissing the appeal for lack of jurisdiction because OPM had not rendered a final decision concerning the

recalculation of the petitioner's Federal Employees' Retirement System retirement annuity to provide a monthly benefit to his former spouse. The court rejected the petitioner's argument that OPM had refused or improperly failed to issue a final decision.

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