UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

95 M.S.P.R. 355

LARRY M. DOW,
Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,
Agency.

DOCKET NUMBERS
NY-0731-00-0374-X-1

DATE: December 23, 2003

Larry M. Dow, Williamsville, New York, pro se.

Eric S. Gold, Esquire, Washington, D.C., for the agency.

BEFORE

Neil A.G. McPhie, Acting Chairman
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 The agency has filed a brief supporting its disagreement with the administrative judge's recommendation that the Board find the agency in noncompliance with the Board's final order issued in *Dow v. Office of Personnel Management*, MSPB Docket No. NY-0731-00-0374-I-1, slip op. (Initial Decision, June 21, 2001), *petition for review denied*, 91 M.S.P.R. 665 (2002) (Table). For the reasons set forth below, we find that the agency is IN COMPLIANCE with the Board's final order and DISMISS the appellant's petition for enforcement AS MOOT.

BACKGROUND

¶2 On March 1, 2000, Mark Heck, Chief of the Boyers Personnel Service Center (BPSC), U.S. Office of Personnel Management (OPM), submitted a request to OPM's Washington Service Center (WSC) to advertise, rate, and issue a certificate of eligibles for 6 vacancies for the position of Investigator, GS-1810-07, with the agency's Investigations Service, Federal Investigations Processing Center (FIPC). Initial Appeal File (IAF), Tab 13, Subtab 4i. In response to this request, WSC issued a vacancy announcement, and the appellant applied for the position. *Id.*, Subtab 4j. On March 28, 2000, WSC certified 38 applicants as eligible for the position. The certificate listed the appellant as the second-highest rated applicant with a rating of 104.0. *Id.*, Subtab 4i. The certificate also indicated that the appellant was a 10 point preference-eligible candidate with a service-connected disability of 30% or more. *Id.* The agency telephonically interviewed the appellant on June 22, 2000. *Id.*, Subtab 4h.

¶3 By letter dated July 6, 2000, Thomas DelPozzo, FIPC Program Manager, notified the appellant that, based on statements he made during the interview and the results of previous investigations conducted by OPM, the FIPC did not feel that the appellant was "suitable for employment and are requesting to pass over your preference eligibility." *Id.*, Subtab 4g. The letter further indicated that the specific reasons for the pass-over were shown in the enclosure and notified the appellant that, as a veteran with a service-connected disability of 30 percent or more, he had the right to respond to the agency within 15 days in accordance with 5 U.S.C. § 3318(b)(2). *Id.* In support of its request to pass over the appellant, FIPC filed a Standard Form (SF) 62 in which it indicated that it proposed to pass over the appellant to select a nonpreference eligible for reasons of suitability. As the specific reasons in support of this request, FIPC listed several factual allegations. *Id.*, Subtab 4f. FIPC listed each allegation under one of the following labels: misconduct or negligence in prior employment; criminal or dishonest conduct; and intentional false statement or deception or fraud in

examination or appointment. *Id*. The appellant filed a written response to FIPC's pass-over request. *Id*., Subtab 4e.

¶4 By letter dated August 24, 2000, Kirke Harper, Director of OPM's Office of Human Resources and EEO, notified the appellant that because FIPC's request involved a question of suitability, the appellant's case was referred to Harper's office for a decision. *Id*., Subtab 4c. Harper indicated that his office had granted FIPC's request to pass over the appellant's name on the certificate and that it suspended the appellant's eligibility for competitive Federal employment into the position. *Id*. The letter further stated:

> In addition, we are forwarding your application to OPM's Suitability Adjudications Branch in Boyers for investigation so that a final suitability determination can be made in your case. If you are found eligible, your name will be restored to the register of eligibles. However, if a potential disqualification exists, you will be notified in writing and given the opportunity to respond before a final decision is made.

Id. The appellant requested that Harper reconsider the decision. *Id*., Subtab 4b. Harper declined the appellant's request but indicated that his decision was limited to approval of FIPC's request to remove the appellant from consideration only on the particular certificate of eligibles WSC issued to FIPC. *Id*., Subtab 4a.

¶5 The appellant filed an appeal with the Board's New York Field Office in which he challenged the agency's decision to approve the pass-over request and the "suitability determination." IAF, Tab 1. The agency filed a motion to dismiss the appellant's appeal for lack of jurisdiction, arguing that the Board lacked jurisdiction over the appellant's suitability claim because the agency had merely granted FIPC's request to pass over the appellant without making a final suitability determination. IAF, Tab 11. The administrative judge denied the agency's motion. IAF, Tab 12. The appeal proceeded to a hearing, and the administrative judge issued an initial decision in which he found that the agency had, in fact, made an appealable negative suitability determination. IAF, Tab 41, Initial Decision (ID) at 3-4.

¶6 With regard to the merits of the appellant's suitability claim, the administrative judge found that the agency proved one of the bases for the negative suitability determination, namely, that the appellant engaged in misconduct or was negligent in prior employment. ID at 6. However, the administrative judge found that the agency failed to prove the other bases for the determination, i.e., that the appellant had engaged in criminal or dishonest conduct and that the appellant had made false statements in examination or appointment. ID at 7-9. Despite his finding that the agency sustained one of the reasons for finding the appellant unsuitable, the administrative judge determined that the agency failed to establish that its action would promote the efficiency of the service, and he reversed the action and ordered the agency to cancel the appellant's negative suitability rating and to restore the appellant to "all appropriate eligibility lists for employment."[1] ID at 11.

¶7 Although the agency filed a motion requesting an extension of time in which to file a petition challenging the initial decision, it never filed a petition for review. Petition for Review File (PFRF), Tab 1. The appellant, however, filed a petition for review, but, on March 6, 2002, the Board denied the petition and notified the appellant that he may file any petition for enforcement of the final order with the New York Field Office. *Dow v. Office of Personnel Management*, 91 M.S.P.R. 665 (2002) (Table). The appellant filed a petition for enforcement on March 29, 2002, claiming that the agency failed to comply with the final order by failing to restore him to the certificate of eligibles for the OPM

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[1] Effective January 29, 2001, OPM revised its regulations governing suitability determinations. 65 Fed. Reg. 82243 (2000). The revised regulations provide that the Board shall affirm an unsuitability determination if it finds that one or more of the charges supporting the determination are supported by a preponderance of the evidence, but, if the Board sustains fewer than all of the charges, the regulations require the Board to remand the case to OPM or the agency to determine whether the action taken is still appropriate based on the sustained charges. 5 C.F.R. § 731.501(a) (2002). However, these regulations were not in effect when OPM approved FIPC's request to pass over the appellant in this case.

Investigator position and by obstructing him from competing for other positions by notifying the Immigration and Naturalization Service (INS) of its negative suitability determination and pass-over decision. Compliance File (CF), Tab 1. In its response to the appellant's petition, the agency argued that it was in full compliance with the Board's final order because the appellant was considered suitable for employment and the agency had not removed his name from any list of eligibles as a result of its negative suitability determination. CF, Tab 6. With respect to the certificate of eligibles for the OPM Investigator position, the agency argued that the appellant was not entitled to have his name restored to this certificate because his name was removed from this list as a result of OPM sustaining FIPC's pass-over request and not as a result of a negative suitability determination. *Id.* The agency also argued that it could not restore the appellant's name to this certificate because the certificate was closed and the Board has no authority to order the agency to reopen a previously-closed certificate. *Id.*

¶8 On July 26, 2002, the administrative judge issued a recommendation in which he granted the appellant's petition for enforcement and recommended that the Board find the agency in noncompliance with the final order. CF, Tab 9, Compliance Recommendation (CR) at 3. The administrative judge rejected the agency's arguments that the appellant was not entitled to have his name restored to the certificate, that it was not required to expunge the documents which were found to constitute an unsuitability rating, and that it could transmit this information to other agencies which may consider the appellant for employment. CR at 2-3. The agency, in accordance with 5 C.F.R. § 1201.183, has filed a brief supporting its nonconcurrence with the administrative judge's recommendation, arguing that the Board has no authority to order the agency to reverse its decision to sustain FIPC's pass-over request. Compliance Referral File (CRF), Tab 1. The appellant filed no response.

ANALYSIS

Under the law of the case doctrine, OPM is precluded from relitigating the appellant's appealable suitability determination as an unappealable nonselection (pass over).

¶9 This is an action for enforcement of a final Board order, not an appeal. OPM argues that it is in full compliance with the Board's order to cancel its negative suitability determination and restore the appellant's name to all appropriate eligibility lists for employment. CRF, Tab 1. OPM also argues, however, that it need not restore the appellant's name to the certificate of eligibles issued March 28, 2000 for the investigator position because the appellant's name was not removed from consideration based on a suitability determination, but rather, his name was removed because OPM sustained a pass-over request, an action over which the Board lacks jurisdiction. This argument is essentially the same argument raised by OPM and decided by the Board in its prior final decision, i.e., the June 21, 2001 initial decision. In that decision, the administrative judge found that, in substance, OPM made an appealable suitability determination. *See Dow v. Office of Personnel Management*, MSPB Docket No. NY-0731-00-0374-I-1, slip op. (Initial Decision, June 21, 2001).

¶10 We find that the law of the case doctrine precludes us from reconsidering OPM's arguments concerning the suitability determination issue. The law of the case doctrine was developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit; it thus regulates judicial affairs before final judgment, not preclusion by final judgment. *Griffin v. Office of Personnel Management*, 75 M.S.P.R. 263, 269 (1997); *Peartree v. U.S. Postal Service*, 66 M.S.P.R. 332, 339 (1995). Under the law of the case doctrine, a tribunal will not reconsider issues that have already been decided in an appeal. *Camastro v. Department of Justice*, 86 M.S.P.R. 267, 271 (2000); *O'Connell v. Department of the Navy*, 73 M.S.P.R. 235, 240 (1997). There are, however, three exceptions to the doctrine: 1) the availability of new

and substantially different evidence; 2) a contrary decision by controlling authority that is applicable to the question at issue; and 3) a showing that the prior decision in the same appeal was clearly erroneous and would work a manifest injustice. *Camastro*, 86 M.S.P.R. at 270. The third exception, the one OPM appears to be invoking here, requires "exceptional circumstances," that is, a strong showing of "clear error" that convinces the adjudicating tribunal that the prior decision was in error. *White v. Department of the Air Force*, 71 M.S.P.R. 607, 615 (1996). OPM has failed to show clear error here. Indeed, OPM has cited no authority and offered no evidence to show that the administrative judge's decision was incorrect. In fact, OPM failed to challenge the administrative judge's finding by filing a petition for review of the initial decision. *See* ¶ 7, *supra*. Furthermore, we note that the administrative judge's determination that OPM's approval of the FIPC's pass-over request was a constructive suitability determination because OPM granted the request on the basis of reasons normally relied on to support a suitability determination under 5 C.F.R. § 731.202 is consistent with prior Board decisions. *See*, *e.g.*, *Edwards v. Department of Justice*, 87 M.S.P.R. 518, ¶ 14 (2001).

¶11 We also note that the OPM regulations provide that an appointing officer may not pass over a preference eligible to select a non-preference eligible unless an objection to the preference eligible is sustained by OPM. 5 C.F.R. § 332.406(b); *see also* 5 U.S.C. § 3318(b)(1). However, the OPM regulations indicate that the objection must be to the eligible's "certification," and that OPM will sustain the objection "for any of the reasons stated in § 339.101 [(medical qualification determinations)] or § 731.201 [(suitability)] of this chapter or for other reasons considered by OPM *to be disqualifying for the particular position*." Thus, the OPM regulations suggest that an OPM decision sustaining an agency objection to a preference eligible's certification not only allows the employing agency to pass over the preference eligible to select a non-preference eligible, but it also disqualifies the preference eligible from consideration for the particular

position. In this case, the OPM letter notifying the appellant of the approval of FIPC's pass-over request informed the appellant that OPM's decision "suspended your eligibility for competitive Federal employment into this position." IAF, Tab 13, Subtab 4c. The record also indicates that the reasons FIPC cited to support its objection to the appellant's certification, including misconduct or negligence in prior employment, criminal or dishonest conduct, and intentional false statement or deception in fraud in examination or appointment, *see* ¶ 3, *supra*, are reasons that may be considered a basis for finding an individual unsuitable, *see* 5 C.F.R. § 731.202(b)(1), (2), (3). Thus, the record indicates that, in approving FIPC's pass-over request, OPM "de-certified" the appellant as eligible for the investigator position on the basis of suitability. Therefore, OPM has failed to establish "clear error" which would convince the Board that its prior decision was erroneous. Accordingly, we decline to reconsider OPM's argument that the Board lacks jurisdiction to consider OPM's decision to sustain FIPC's objection to the appellant's certification on the basis that OPM's decision constituted only a pass-over determination rather than a constructive suitability determination.

<u>The agency's failure to restore the appellant's name to the certificate of eligibles issued on March 28, 2000 was in compliance with the Board's final order.</u>

¶12 When the Board reverses a negative suitability determination, and there has not been an appointment to a position, the proper remedy is to order the agency to both cancel the unsuitability rating and return the affected applicant to all appropriate eligibility lists for employment. *Jordan v. Department of Justice*, 91 M.S.P.R. 635, ¶ 7 (2002) (citing *Lewis v. General Services Administration*, 54 M.S.P.R. 120, 123 (1992)). This is the relief the administrative judge ordered in the initial decision which became the Board's final decision when the Board denied the appellant's petition for review. *See* 5 C.F.R. § 1201.113(b) (the initial decision becomes final if the Board denies all petitions for review).

¶13 However, because an agency exercises discretion in appointment to a position, when the Board orders relief concerning an agency action that resulted in an applicant being denied consideration for a position, the Board generally orders only prospective relief. *See*, *e.g.*, *Petrecz v. Office of Personnel Management*, 33 M.S.P.R. 21, 23 (1987) (where the Board reversed OPM's negative suitability determination, the appropriate remedy was to give the appellant priority consideration for future vacancies for a period of 30 months); *Schaefer v. Department of Justice*, 28 M.S.P.R. 566, 568-69 (1985) (upon reversing the agency's negative suitability determination, it is not an appropriate remedy to order the agency to place the appellant in the position he would have obtained but for the unsuitability rating); *cf. Vesser v. Office of Personnel Management*, 65 M.S.P.R. 282, 285 (1994) (where an applicant has been denied consideration for a position due to the application of an invalid employment practice, the Board's authority is limited to ordering OPM to afford the appellant appropriate relief by placing him in the position where he may again be considered for appointment to a vacant position); *Baxter v. Office of Personnel Management*, 44 M.S.P.R. 125, 133 (1990) (the remedy commensurate with the denial of proper consideration for a position is some form of priority for future vacancies). In other words, the Board does not generally order the agency to provide the relief to which the appellant in this case claims entitlement under the final Board order, that is, to reopen the certificate, reconstruct the hiring process, and retroactively appoint the appellant to the position with back pay.[2] *See*, *e.g.*,

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[2] Although there have been several cases in which the Board has ordered an agency to reconstruct a selection process or to retroactively appoint an appellant, these cases have generally involved either the enforcement of settlement agreements, in which the agencies agreed to provide the appellants with some form of priority consideration, or a finding that the agency committed a prohibited personnel practice in denying the applicant meaningful consideration for a position. *See Jackson v. Department of the Army*, 69 M.S.P.R. 268, 273-74 (1996) (settlement agreement); *Myers v. Department of Agriculture*, 31 M.S.P.R. 312, 318 (1986) (settlement agreement in which the agency agreed to give the appellant "strong consideration" for a position); *Bartel v. Federal*

Lewis v. General Services Administration, 54 M.S.P.R. 120, 123 (1992) (because appointment to a position is at the discretion of the employing agency, the Board found that it erred in requiring the agency to retroactively place or appoint the appellant to a position after the Board reversed the agency's negative suitability determination; the Board is without authority to order back pay and benefits to an appellant who was never appointed to a position). In this case, OPM presented evidence to establish that the BPSC finished with the certificate and returned it and the original applications of the candidates not selected for appointment to the WSC on July 26, 2000.[3] CF, Tab 6, Attachment 3. The appellant has not alleged that this certificate was re-issued or was otherwise used by OPM after it was returned to the WSC. Thus, while we have determined that the OPM's decision to sustain FIPC's objection to the appellant's certification for the investigator position constituted an appealable constructive suitability determination, we find no basis on which to order the agency to reopen this certificate and restore the appellant's name to it. Therefore, we find that the agency's refusal to restore the appellant's name to the March 28, 2000 certificate of eligibles did not constitute a failure to comply with the Board's final order in this case.

Aviation Administration, 24 M.S.P.R. 560, 562 (1984) (the Board ordered the agency to reconstruct the selection process after finding that the agency denied the appellant meaningful consideration for a position in reprisal for his previous exercise of protected appeal rights). In the instant case, the Board did not find that OPM denied the appellant consideration as the result of a prohibited personnel practice, and the appellant's petition for enforcement was not based on OPM's alleged violation of a settlement agreement.

[3] Although Mark Heck, the BPSC official who signed the statement indicating that the certificate was being returned, dated his signature "7/26/00," OPM's representative indicated that Heck actually signed the statement on June 26, 2000. CF, Tab 6 at 3 n.4. However, the statements of a party's representative in a pleading do not constitute evidence. *Hendricks v. Department of the Navy*, 69 M.S.P.R. 163, 168 (1995). Nevertheless, for the purposes of this compliance matter, we find that it is immaterial whether Heck signed the statement on June 26 or July 26, 2000.

In order to comply with the Board's final order, OPM was not required to expunge documents which supported its constructive suitability determination from its investigation files.

¶14 In his petition for enforcement, the appellant alleged that OPM failed to comply with the Board's final order because it provided information to the INS regarding OPM's negative suitability determination/pass-over, specifically, pages 84-133 of the OPM investigation file. CF, Tab 1. In its response to the appellant's petition, OPM argued that, even if it released this information to the INS, it would not constitute non-compliance with the Board's order. CF, Tab 6. It also submitted an affidavit in which Kathy Baker, Lead Freedom of Information/Privacy Act Specialist for FIPC, averred that OPM did not transmit this information to the INS because FIPC's records indicated that the appellant's final suitability investigation was never completed. *Id.*, Attachment 2. In the Compliance Recommendation, the administrative judge rejected OPM's position that it was not required to expunge the documents which were found to constitute an unsuitability rating from its files and that it could transmit this information to other agencies which may consider the appellant for employment. CR at 2-3.

¶15 Contrary to the administrative judge's recommendation, we find that OPM was not required to expunge the information which supported its constructive suitability determination from its investigation files or to withhold such information from other agencies considering the appellant for employment. The Board's underlying decision in this case merely concluded that the agency failed to sustain its reasons for finding the appellant unsuitable for the particular investigator position for which he was certified as eligible on the March 28, 2000 certificate. Yet, as the Board noted in *Edwards*, 87 M.S.P.R. 518, ¶ 11, the OPM regulations allow for position-specific negative suitability determinations based on a finding that an individual's conduct or character may interfere with efficient service in the particular position for which the appellant applied or is employed. Thus, the fact that the Board overturned OPM's negative suitability determination

with respect to a particular position does not necessarily rule out the possibility that the same facts might support a negative suitability determination with respect to another position. Therefore, in a case such as this, where the Board overturns a position-specific negative suitability determination, a Board order requiring OPM to cancel the negative suitability determination might preclude OPM from relying on the same facts to find the appellant unsuitable for future vacancies in the same position, *see Kroeger v. U.S. Postal Service*, 865 F.2d 235, 239 (Fed. Cir. 1988) (collateral estoppel, or issue preclusion, is appropriate when (1) an issue is identical to that involved in the prior action, (2) the issue was actually litigated in the prior action, (3) the determination on the issue in the prior action was necessary to the resulting judgment, and (4) the party precluded was fully represented in the prior action), but it does not preclude OPM from maintaining and transmitting information regarding its investigation of the appellant to agencies that may be considering the appellant for other positions. The appellant has not alleged that the INS position for which he applied was the same position for which OPM found him unsuitable, and the documentation the appellant submitted with his petition for enforcement indicates that the INS position was classified in a different occupational series than the OPM investigator position for which OPM found the appellant unsuitable. CF, Tab 1, Investigation file at 23. Accordingly, the Board finds that the final order in this case did not preclude the agency from providing information to the INS regarding its prior investigation of the appellant.

¶16 Because we find that the final Board order in this case did not require OPM to restore the appellant to the March 28, 2000 certificate of eligibles and did not preclude OPM from providing information to the INS regarding its prior investigation of the appellant, we find that the agency has established that it is IN COMPLIANCE with the Board's final order which required OPM to cancel the unsuitability rating and return the appellant to all appropriate eligibility lists for

employment. Therefore, we DISMISS the appellant's petition for enforcement AS MOOT.

ORDER

¶17 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)).

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 web site, http://www.mspb.gov.

FOR THE BOARD: ______________________________

Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.