UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

PRISCILLA A. RICHARDSON, Appellant, v. DEPARTMENT OF DEFENSE, Agency.	)	DOCKET NUMBER DC-3443-97-0909-I-1 DATE: Mar 16, 1998

Ronnie C. Young, Richmond, Virginia, for the appellant.

Karen L. McClintick, Esquire, Richmond, Virginia, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall

OPINION AND ORDER

The appellant has filed a timely petition for review of the September 5, 1997 initial decision that dismissed her appeal for lack of jurisdiction. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.118, however, and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still DISMISSING the appellant's appeal for lack of jurisdiction.

BACKGROUND

The appellant is a GS-4 Supply Clerk. Initial Appeal File (IAF), Tab 4, Agency Exhibit (AE) 1a. In 1993, the agency incorrectly rated her application for a GS-5 Supply Systems Analyst position, resulting in her not being referred on the register to the selecting official for the position. *Id.*, AEs 2, 3. In 1994, to remedy the error, the agency gave her a one-time "special consideration" for the next GS-5 Supply Systems Analyst position to become available. *Id.*, AE 3. In 1995, because there had been no vacancies in that position and to satisfy her equal employment opportunity (EEO) complaint, the agency expanded her priority consideration to a GS-5 Inventory Management Specialist position. *Id.*, AEs 4-6. The appellant was then referred, but not selected, for an Inventory Management Specialist position. *Id.*, AEs 6-8. The agency informed her that it considered this referral as satisfying its EEO decision and her priority consideration rights. *Id.*, AEs 6, 12.

In her petition for appeal, the appellant asserted that her application was incorrectly rated, causing her to miss an opportunity for a promotion, and that the agency's citation to the incorrect provision in the Federal Personnel Manual for "special consideration" led her to believe that she would receive a temporary promotion to the GS-5 Inventory Management Specialist position. She also asserted that she was discriminated against on the basis of, among other things, race and sex. IAF, Tab 1; *see also* IAF, Tab 4, AE 11.

After giving the appellant an opportunity to address jurisdiction, the administrative judge dismissed her appeal without holding her requested hearing. He found that the Board lacks jurisdiction over a nonselection for promotion unless it is raised in an individual right of action appeal, which had not occurred in this case. He acknowledged the appellant’s assertion that she was not challenging her nonselection for promotion, but the agency’s errors in rating and evaluating her application for promotion. He found, however, that such claims

were not appealable to the Board. He further found that the appellant's discrimination allegations did not provide an independent basis for Board jurisdiction. Because of these findings, he did not address the timeliness of the appellant's appeal. Initial Decision at 1-2.

The agency has filed a timely response to the appellant's petition for review. Petition for Review (PFR) File, Tab 3.

ANALYSIS

As the administrative judge found, and with exceptions not applicable here, an allegation of nonselection for promotion is not per se appealable to the Board. *See, e.g., Crum v. Department of the Navy*, 75 M.S.P.R. 75, 78 (1997). The appellant has not disputed this finding in her petition for review, and we find no reason to disturb it.

The appellant asserts, however, that the Board has jurisdiction over her appeal under 5 C.F.R. § 300.104(a). She asserts that the agency used improper "employment practices," which violated "basic requirements," in evaluating her credentials for available positions. PFR at 2-5. Because the administrative judge did not completely address this assertion in the initial decision, we have reopened this appeal. However, because we find that the appellant has failed to make a nonfrivolous allegation of Board jurisdiction under 5 C.F.R. § 300.104(a), we find it unnecessary to remand this appeal for a jurisdictional hearing. *See, e.g., Hannon v. Office of Personnel Management*, 73 M.S.P.R. 613, 618 (1997).

Employment practices include the development and use of examinations, qualification standards, tests, and other measurement instruments. 5 C.F.R. § 300.101. "Basic requirements" provide that each employment practice shall be based on a job analysis, be rationally related to performance in the position, and not discriminate on nonmerit factors. 5 C.F.R. § 300.103. Candidates who believe that an employment practice applied to them by the Office of Personnel Management (OPM) violates a basic requirement in 5 C.F.R § 300.103 may

appeal to the Board. 5 C.F.R. § 300.104(a). An agency's misapplication of a valid OPM requirement under 5 C.F.R. Part 300 also constitutes an appealable employment practice. *See, e.g., Banks v. Department of Agriculture*, 59 M.S.P.R. 157, 160 (1993), *aff'd*, 26 F.3d 140 (Fed. Cir. 1994) (Table).

The appellant has not identified a basic requirement that was missing from the instrument the agency used to evaluate her application. Rather, she is simply contesting the agency's rating and handling of her individual application. Such a challenge is not within the Board's jurisdiction. *See, e.g., Hannon*, 73 M.S.P.R. at 616-17; *Dow v. Office of Personnel Management*, 68 M.S.P.R. 285, 288 (1995). Thus, the administrative judge did not err in finding that the agency's alleged errors in rating and evaluating her application did not provide a basis for Board jurisdiction.

The administrative judge correctly stated the general rule that the appellant's discrimination allegations could not confer jurisdiction on the Board where it does not otherwise exist. In the context of an employment practice appeal, however, this rule does not apply. As previously noted, the basic requirements specifically provide that employment practices may not discriminate on nonmerit factors. *See Hannon*, 73 M.S.P.R. at 617; 5 C.F.R. § 300.103.

However, the administrative judge's overbroad statement did not prejudice the appellant's substantive rights and thus does not provide a basis for reversing the initial decision. *Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984). The appellant asserted below only that an employment practice discriminated against her individually. The Board's jurisdiction is limited to claims that an employment practice is generally applied in a discriminatory fashion or is inherently biased against a certain group of individuals. *Hannon*, 73 M.S.P.R. at 617; *Dow*, 68 M.S.P.R. at 288-89. Thus, the administrative judge correctly dismissed the appellant's appeal for lack of jurisdiction. *Dow*, 68 M.S.P.R. at 288-90.

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO THE APPELLANT REGARDING FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). 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 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD: _____

Robert E. Taylor
Clerk of the Board

Washington, D.C.