

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

2009 MSPB 191

Docket No. DC-0731-09-0441-I-1

**Mohamad Kazan,
Appellant,
v.
Department of Justice,
Agency.**

September 29, 2009

Neil C. Bonney, Esquire, Virginia Beach, Virginia, for the appellant.

Harvey Smith, Washington, D.C., for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant filed a petition for review (PFR) of the initial decision (ID) that affirmed the agency's decision finding him unsuitable for employment as an Aviation Enforcement Officer and rescinding its tentative offer of employment. For the reasons set forth below, we DENY the petition, REOPEN the appeal on our own motion under [5 C.F.R. § 1201.118](#), VACATE the ID, and REMAND the appeal for further proceedings consistent with this Opinion and Order.

BACKGROUND

¶2 On May 25, 2007, the U.S. Marshals Service tentatively selected the appellant for the GS-1802-07 position of Aviation Enforcement Officer, a position which required an Office of Personnel Management (OPM) background

investigation. Initial Appeal File (IAF), Tab 11, Subtab 2l. On October 14, 2008, the agency proposed finding the appellant unsuitable for the position based upon certain conduct revealed by the background investigation, in particular, misconduct or negligence in his prior employment and criminal or dishonest conduct. IAF, Tab 11, Subtab 2e. The appellant was given the opportunity to respond, and he did so, generally disputing the alleged misconduct. IAF, Tab 11, Subtabs 2c, 2d. On March 17, 2009, the agency issued a decision letter stating that the appellant was “ineligible” for the position. IAF, Tab 11, Subtab 2a.

¶3 The appellant appealed the agency’s determination. IAF, Tab 1. He requested a hearing. *Id.* The administrative judge (AJ) held the appellant’s requested hearing, at which the appellant and several other witnesses testified. IAF, Tab 17, Hearing Tapes. In her ID, the AJ concluded that the Board had jurisdiction under [5 C.F.R. § 731.501\(a\)](#) and affirmed the agency’s suitability determination. IAF, Tab 18.

¶4 The appellant filed a PFR contending that the agency failed to prove the allegations of misconduct by preponderant evidence and that the AJ erred in failing to remand the case after she dismissed one of the charges. Petition for Review File (PFRF), Tab 1. The agency did not respond.

ANALYSIS

¶5 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 of proving the Board’s jurisdiction by a preponderance of the evidence. *Blount v. Department of the Treasury*, [109 M.S.P.R. 174](#), ¶ 5 (2008); [5 C.F.R. § 1201.56\(a\)\(2\)](#). Even if the parties fail to raise this issue on appeal or on PFR, 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.”).

We reopen this matter on our own motion because there is a question regarding the Board's jurisdiction over this appeal.

¶6 Generally, an unsuccessful candidate for a federal civil service position has no right to appeal his nonselection. *Tines v. Department of the Air Force*, [56 M.S.P.R. 90](#), 93 (1992). Nevertheless, pursuant to 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). Significantly, 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, a removal, a cancellation of reinstatement eligibility, and a debarment. [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](#), ¶ 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 at 5 C.F.R. § 731.202. 5 C.F.R. § 731.203(b); *Upshaw*, [111 M.S.P.R. 236](#), ¶ 8.

¶7 Here, the AJ found Board jurisdiction without analysis or consideration of the revised suitability regulations regarding the denial of appointments. IAF, Tab 18 at 1. But the agency's action appears to be a matter outside the Board's jurisdiction under OPM's new regulations. The agency's decision letter stated that the appellant was rated "ineligible" for employment, but that determination was specifically limited to the appellant's "May 23, 2007 application" for the specific position of "Aviation Enforcement Officer." IAF, Tab 11, Subtab 2a. In addition, the agency does not appear to have taken any broader action regarding the appellant's eligibility, such as canceling any other eligibilities on other existing competitive registers. *See, e.g., Riggsbee v. Office of Personnel Management*, [111 M.S.P.R. 129](#), ¶ 2 (2009) (referring to OPM's cancellation of

eligibilities “on existing competitive registers”); *Sazegari v. Office of Personnel Management*, [101 M.S.P.R. 254](#), ¶ 2 (2006) (distinguishing between OPM’s rating the appellant ineligible for the position of Immigration Inspector and its “cancel[ing] any eligibilities he may have obtained”). As such, the agency’s action appears to be a non-selection for a specific position, an action outside the Board’s jurisdiction. See [5 C.F.R. § 731.203](#)(b).

¶8 Nonetheless, an appellant must receive explicit information on what is required to establish an appealable jurisdictional issue. See *Burgess v. Merit Systems Protection Board*, [758 F.2d 641](#), 643-44 (Fed. Cir. 1985). In this case, the AJ never provided the appellant with such explicit information and an opportunity to show Board jurisdiction. As a result, the parties never had the opportunity to submit evidence and argument regarding jurisdiction, and the record is not adequately developed on this threshold issue. We therefore must 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.

ORDER

¶9 Accordingly, the ID is VACATED and the case is REMANDED to the Washington Regional Office for further proceedings consistent with this Opinion and Order.

FOR THE BOARD:

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