

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

2012 MSPB 25

Docket No. CH-0731-09-0578-R-1

**James A. Scott,
Appellant,**

v.

**Office of Personnel Management,
Agency.**

March 5, 2012

Jeffrey Letts, Esquire, Trenton, New Jersey, for the appellant.

Darlene M. Carr, Esquire, and Robert J. Girouard, Esquire, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The Director of the Office of Personnel Management (OPM) has petitioned the Board to reconsider its May 9, 2011 Opinion and Order in *Scott v. Office of Personnel Management*, [116 M.S.P.R. 356](#) (2011) (*Scott I*), which reversed the appellant's suitability-based removal. For the reasons set forth below, we DENY the Director's petition and AFFIRM our previous decision in this case AS MODIFIED by this Opinion and Order.

BACKGROUND

¶2 In 2006, the appellant received a conditional excepted service appointment to a Human Resources Specialist position with the Defense Finance Accounting Service (DFAS). His continued employment was subject to successful completion of a background security investigation and favorable adjudication, but DFAS did not conduct or request a suitability investigation. Instead, consistent with agency policy, DFAS granted reciprocity to a prior security clearance determination by the U.S. Army. The appellant was converted to a career appointment in the competitive service in January 2008. *Scott I*, [116 M.S.P.R. 356](#), ¶ 2.

¶3 In April 2009, OPM informed the appellant that, pursuant to 5 C.F.R. part 731, it had found him unsuitable for any covered position in the federal service based on a charge of deception or fraud in connection with his wife's February 2008 application for employment with DFAS. OPM further informed the appellant that it had directed DFAS to remove him, cancelled any reinstatement eligibility obtained from his appointment or any other eligibilities he may have had for covered positions, and debarred him from competition for, or appointment to, any covered position for a period of 3 years. DFAS removed the appellant on April 13, 2009. *Id.*, ¶¶ 3-4.

¶4 The appellant filed a Board appeal challenging his OPM-directed removal. He argued, inter alia, that OPM had not been delegated the authority to base a suitability action solely on post-appointment conduct. The administrative judge rejected the appellant's arguments and affirmed the removal, and the appellant filed a petition for review. While the petition for review was pending, the Board granted OPM's motion to reopen the appeals of *Aguzie v. Office of Personnel Management*, MSPB Docket No. DC-0731-09-0261-R-1, and *Barnes v. Office of Personnel Management*, MSPB Docket No. DA-0731-09-0260-R-1, consolidated those appeals for briefing on the question of whether, when OPM directs the removal of a tenured employee under [5 U.S.C. § 7511\(a\)\(1\)](#) for suitability reasons

pursuant to 5 C.F.R. part 731, the removal action is subject to the requirements of 5 U.S.C. chapter 75, subchapter II, including the statutory grant of appeal rights at [5 U.S.C. § 7513\(d\)](#). The Board added the instant appeal to the consolidation. *Scott I*, [116 M.S.P.R. 356](#), ¶¶ 5-6. After receiving briefs and holding oral argument, the Board severed the instant appeal and issued a decision in *Aguzie* in which it found that an OPM-directed suitability removal of a tenured employee is appealable under [5 U.S.C. § 7513\(d\)](#), and subject to the “efficiency of the service” standard of [5 U.S.C. § 7513\(a\)](#). *Aguzie v. Office of Personnel Management*, [116 M.S.P.R. 64](#), ¶¶ 25-31 (2011).

¶5 In an Opinion and Order issued on May 9, 2011, the Board reversed the appellant’s OPM-directed removal on suitability grounds. *Scott I*, [116 M.S.P.R. 356](#), ¶¶ 8-17. In accordance with its recent decision in *Aguzie*, the Board held that the appellant’s removal on suitability grounds was within its appellate jurisdiction under 5 U.S.C. chapter 75, subchapter II. *Scott I*, [116 M.S.P.R. 356](#), ¶ 8. The Board determined that it did not need to decide whether the action met the efficiency of the service standard because it found that OPM lacked authority under 5 C.F.R. part 731 to make suitability determinations or to take or direct suitability actions against an individual based solely on conduct occurring after his admission into the competitive service. *Id.*, ¶ 9. Although it reversed the appellant’s removal, the Board remanded the appeal to the regional office for further adjudication of the appellant’s discrimination claim. *Id.*, ¶ 17.

¶6 After remand, the appellant informed the administrative judge that he wanted to withdraw his discrimination claim. Remand Appeal File (RAF), Tab 2. Therefore, on May 24, 2011, the administrative judge issued an initial decision dismissing the appellant’s discrimination claim as withdrawn. RAF, Tab 3.

¶7 On June 9, 2011, the Director of OPM notified the Clerk of the Board that he was exercising his statutory authority under [5 U.S.C. § 7703\(d\)](#) to request reconsideration of the Board’s Opinion and Order reversing the appellant’s removal. Reconsideration File (RF), Tab 1. The Director requested the

administrative records in the appeal and 20 days from receipt of the record to submit a brief in support of its reconsideration request. *Id.* After successfully requesting an extension of time, RF, Tabs 3, 4, the Director filed a brief in support of his reconsideration request on August 1, 2011, RF, Tab 5. The appellant filed a brief in opposition to the Director's petition on August 25, 2011. RF, Tab 6.

ANALYSIS

The Director's petition is properly before the Board.

¶8 As a preliminary matter, we note that the Director's statutory authority to request reconsideration is limited to "any final order or decision of the Board." [5 U.S.C. § 7703\(d\)](#). The Director argued in his June 9, 2011 notice to the Clerk of the Board that *Scott I* was a final decision because it reversed the appellant's removal, despite the fact that *Scott I* also remanded the appeal for adjudication of the appellant's discrimination claims. RF, Tab 1. However, we need not decide that question in light of the intervening withdrawal of the appellant's discrimination claim after remand. It is undisputed that the Board has now issued a final decision in this appeal.¹

The Director has not shown that the Board erred in interpreting a civil service law, rule, or regulation.

¶9 The Director of OPM may file a petition for reconsideration of a final decision of the Board if the Director determines: 1) that the Board erred in

¹ If *Scott I* was not itself a final decision of the Board subject to a reconsideration request, then the Director's request was premature at the time it was filed on June 9, 2011, because the initial decision dismissing the discrimination claim did not become final until June 28, 2011. See RAF, Tab 3 at 2. However, even if we were to so hold, we find that the request became ripe once the finality date of the most recent initial decision passed. The request is therefore properly before the Board and need not be dismissed. See *French v. U.S. Postal Service*, [80 M.S.P.R. 171](#), ¶ 7 (1998) (when an appeal is premature when filed but subsequently becomes ripe, the Board will not dismiss it).

interpreting a civil service law, rule, or regulation affecting personnel management; and 2) that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. [5 U.S.C. § 7703\(d\)](#); 5 C.F.R. § 1201.119(a). The Board will consider *de novo* the arguments raised by OPM on petition for reconsideration, even in cases where OPM was a party to the proceedings before the Board. *Griffin v. Office of Personnel Management*, [83 M.S.P.R. 67](#), 72 (1999).

¶10 The Director argues that the Board erred in finding that the President has not delegated to OPM the authority to make suitability determinations based on post-appointment conduct. RF, Tab 5 at 7. Specifically, the Director argues that the President delegated such authority to the Civil Service Commission, *id.* at 7-12, and that the codification of [5 U.S.C. §§ 3301](#) and 7301 did not modify or repeal the delegation of such authority, *id.* at 13-15. However, we affirm our determination in *Scott I* that the President never delegated, to either the Civil Service Commission or OPM, the authority to make suitability determinations based on post-appointment conduct.

¶11 In arguing that the President delegated to OPM the authority to make suitability determinations based on post-appointment conduct, the Director primarily relies on Executive Order 10,577. However, the Board found in *Scott I* that there is nothing in Executive Order 10,577 “authorizing OPM to base a suitability determination or action solely on conduct occurring after the appointment process is complete.” *Scott I*, [116 M.S.P.R. 356](#), ¶ 12. The Board recognized that Executive Order 10,577, *codified at* [5 C.F.R. § 5.2](#), granted the Director the authority to conduct suitability investigations after appointment, but found that the subject of such an investigation “is the act of appointment itself,” and that “[c]onduct occurring after the appointment process is complete, such as the conduct at issue in this case, would not lie within the scope of such an investigation. . . .” *Scott I*, [116 M.S.P.R. 356](#), ¶ 13. Nothing in the Director’s

request convinces us that the Board's prior interpretation of Executive Order 10,577 was incorrect.

¶12 The Director also relies on [5 C.F.R. § 5.3\(a\)](#), which provides, in relevant part,

The Director is authorized to ensure enforcement of the civil service laws, rules, and regulations, and all applicable Executive orders, by:
(1) Instructing an agency to separate or take other action against an employee serving an appointment subject to investigation when the Director finds that the employee is disqualified for Federal employment. . . .

Id.; see RF, Tab 5 at 11. The Director notes the use of the present tense (i.e., “is disqualified for Federal employment”), as well as the “more elaborate text” of Executive Order 10,577 that incorporates both pre-appointment and post-appointment conduct, and argues that [5 C.F.R. § 5.3\(a\)\(1\)](#) provides authority for OPM to take or direct suitability-based removals based on post-appointment conduct. RF, Tab 5 at 11-12. However, we do not read the enforcement authority provided at [5 C.F.R. § 5.3\(a\)\(1\)](#) so broadly. By its own terms, [5 C.F.R. § 5.3\(a\)\(1\)](#) applies only when the Director makes a finding of disqualification with respect to “an employee serving an appointment subject to investigation.” Under [5 C.F.R. § 5.2\(a\)](#), appointments may be made subject to investigation “to enable the Director to determine, after appointment, that the requirements of law or the civil service rules and regulations have been met.” *Id.* Reading the two regulatory provisions together, we find that the Director's authority to direct removals or other actions under [5 C.F.R. § 5.3\(a\)\(1\)](#) is limited to those findings of disqualification that result from the investigations authorized under [5 C.F.R. § 5.2\(a\)](#). As noted above, the Board found in *Scott I* that “[c]onduct occurring after the appointment process is complete, such as the conduct at issue in this case, would not lie within the scope of [an investigation authorized under [5 C.F.R. § 5.2\(a\)](#)]. . . .” *Scott I*, [116 M.S.P.R. 356](#), ¶ 13.

Accordingly, we find that [5 C.F.R. § 5.3\(a\)\(1\)](#) does not authorize OPM to direct suitability-based removals based on post-appointment conduct.

¶13 We are also not convinced that the Board should recognize a special exception to allow OPM to take or direct suitability-based removals in cases of “deception or fraud in examination or appointment” under [5 C.F.R. § 731.202\(b\)](#), as the Director argues in his request for reconsideration. *See* RF, Tab 5 at 18-19. The Director has not established why the rationale set forth in *Scott I* should cease to apply simply because of the particular grounds for OPM’s negative suitability determination in a particular case.

¶14 The Director takes issue with the Board’s statement in *Scott I* that an OPM suitability investigation cannot extend to post-appointment conduct. RF, Tab 5 at 8 n.2. Specifically, the Director argues that the Board’s statement to that effect is dictum because a suitability investigation is not itself appealable to the Board. *Id.* The Director is correct that the Board lacks jurisdiction over a suitability investigation that does not result in a removal or other action over which the Board has been granted jurisdiction. *See Maddox v. Merit Systems Protection Board*, [759 F.2d 9](#), 10 (Fed. Cir. 1985) (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). We therefore modify *Scott I* to the extent it could be interpreted as an attempt by the Board to bar OPM from conducting suitability investigations or making suitability determinations when those actions are taken independent of any action within the Board’s jurisdiction.

¶15 Finally, the Director argues that Executive Order 13,488, issued in January 2009, confirms that OPM’s authority to conduct suitability investigations and make suitability determinations applies to post-appointment conduct, *id.* at 15-17, and that even if Executive Order 13,488 is read narrowly to only authorize consideration of post-appointment conduct in adjudicating a “reinvestigation,” the action at issue in this case was based on a reinvestigation of the appellant, *id.* at 17-18.

¶16 Executive Order 13,488 provides in relevant part that “[i]ndividuals in positions of public trust shall be subject to reinvestigation under standards (including but not limited to the frequency of such reinvestigation) as determined by the Director of [OPM], to ensure their suitability for continued employment.” *Id.*, § 5. The Director argues that the requirement for reinvestigation and determination of a public trust employee’s suitability for continued employment “necessarily requires consideration of the employee’s conduct after he or she is appointed.” RF, Tab 5 at 16.

¶17 We find that Executive Order 13,488 does not affect our prior determination that the President has not delegated to OPM the authority to direct the removal of a tenured employee on suitability grounds based on post-appointment conduct. We note that the Executive Order itself does not grant OPM the authority to direct the removal of a public trust employee based on a suitability reinvestigation; it merely authorizes investigations. OPM could therefore fully comply with Executive Order 13,488 without taking or directing a suitability action based on post-appointment conduct. As the Board noted in *Scott I*, post-appointment conduct discovered during a suitability investigation can form the basis of an adverse action taken by the employing agency. *See Scott I*, [116 M.S.P.R. 356](#), ¶ 16. Accordingly, we find no inconsistency between the provision in Executive Order 13,488 requiring suitability reinvestigations and the Board’s holding in *Scott I* that OPM lacks the delegated authority to direct suitability-based removals based on post-appointment conduct.²

² We also agree with the appellant that even if Executive Order 13,488 specifically authorized OPM to direct the removal of a public trust employee based on post-appointment conduct discovered during a suitability reinvestigation, it would not change the outcome in this appeal because the Director has not shown that the appellant in this case was designated as a public trust employee. It also appears that the Executive Order is inapplicable to the appellant because it only applies to “individuals newly appointed to excepted service positions or hired as contractor employees beginning 90 days from the effective date [January 16, 2009] of this order.” *Id.*, § 8. The appellant does not fall into either category.

ORDER

¶18 Accordingly, and upon reconsideration, the Board's decision in *Scott I* is AFFIRMED AS MODIFIED by this Opinion and Order. The Director may seek judicial review of the Board's final decision in the U.S. Court of Appeals for the Federal Circuit. [5 U.S.C. § 7703\(d\)](#).

NOTICE TO THE APPELLANT REGARDING
YOUR RIGHT TO REQUEST
ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at [5 C.F.R. §§ 1201.201, 1201.202, and 1201.203](#). If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

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.