

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD  
[REDACTED] REGIONAL OFFICE**

[REDACTED],  
Appellant,

DOCKET NUMBER  
[REDACTED]

v.

DEPARTMENT OF JUSTICE,  
Agency.

DATE: December 18, 2009

[REDACTED], pro se.

Patricia A. Miller, Washington, D.C., for the agency.

**BEFORE**

[REDACTED]  
Administrative Judge

**INITIAL DECISION**

**INTRODUCTION**

The appellant appealed the agency's decision not to appoint him to the position of Special Agent. Initial Appeal File (IAF), Tab 1. The appellant requested a hearing. *Id.* The agency has moved to dismiss the appeal for lack of jurisdiction. IAF, Tabs 3, 15, 21. For the reasons discussed below, the agency's motion is GRANTED and the appeal is DISMISSED for lack of Board jurisdiction without a hearing.<sup>1</sup>

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<sup>1</sup> The agency also moved to dismiss the appeal as untimely. IAF, Tabs 15, 21. A Board appeal must be filed no more than 30 days from the effective date of the action being appealed, or within 30 days of receipt of the agency decision, whichever is later. 5 C.F.R. § 1201.22(b). The agency contends that the appellant was untimely because he

## ANALYSIS AND FINDINGS

### Background

The undisputed record evidence reflects that on or about December 2, 2008 the appellant applied for the position of Special Agent with the Federal Bureau of Investigation (FBI) pursuant to vacancy announcement [REDACTED]. IAF, Tabs 8, 15. On May 6, 2009, the agency notified the appellant that he was being offered a conditional appointment as an FBI Special Agent. *Id.* The agency advised the appellant that his appointment was contingent upon the existence of a funded vacant position and successful completion of a background investigation, pre-employment polygraph examination, physical examination, urinalysis drug test and physical fitness test. *Id.* By letter dated July 1, 2009, the agency notified the appellant that it was rescinding its conditional appointment offer and was not selecting him for the position. IAF, Tab 1.

Through the Acknowledgment Order I informed the parties that the Board may not have jurisdiction over this appeal and ordered the parties to respond on this matter. IAF, Tab 2. Through this Order, the appellant was informed of his burden of showing the Board has jurisdiction over this appeal and ordered to file evidence and/or argument addressing jurisdiction. *Id.* The agency moved to dismiss the appeal arguing that the Board lacks jurisdiction over the matters raised in the appeal. IAF, Tab 3. On October 14, 2009, I issued an Order to Show Cause, informing the appellant that the Board may not have jurisdiction over the matters raised in the appeal, and explained in greater detail the appellant's burden of proof requirements. IAF, Tab 4. The latter order directed

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waited over 30 days after becoming aware he was not selected for the Special Agent position on or about July 1, 2009 to file his appeal. IAF, Tabs 15, 21. The appellant alleges that he had good cause for the late filing of his appeal as he was unaware of any Board appeal rights until September 16, 2009. IAF, Tab 8. Because I have found that the appeal is not within the Board's jurisdiction, however, I have not addressed the timeliness issue. *See Labinski v. U.S. Postal Service*, 88 M.S.P.R. 125, ¶ 5 (2001).

the appellant to non-frivolously allege facts and argument establishing Board jurisdiction. *Id.* The order also directed the agency to file additional documents relevant to the appeal. *Id.* Both parties timely responded to the order. IAF, Tabs 6, 7, 8, 11, 12, 13, 14, 15. Subsequent to the close of the record on jurisdiction, the appellant made a supplemental submission and the agency twice renewed its motion to dismiss. IAF, Tabs 21, 25, 26. Although untimely, the parties' submissions are accepted into the record.

In appealing the agency's failure to appoint him, the appellant alleges that (1) the agency erroneously made a negative suitability determination based on its incorrect conclusion that the appellant made inconsistent statements during the background investigation, (2) the agency determined to disqualify the appellant after comparing the appellant's perceived moral character with other applicants, (3) the stated basis for the agency's suitability determination is internally inconsistent, (4) the agency's apparent disqualification of the appellant for alleged drug use and criminal conduct was based on wrong information, (5) the appellant was pretextually disqualified when the agency held him to a standard of conduct that exceeded the law, the Office of Personnel Management's suitability guidelines, the agency's internal manual and the [REDACTED] Rules of Professional Conduct, (6) the agency has admitted the Board has jurisdiction, and (7) the agency committed various prohibited personnel practices. IAF, Tabs 1, 8, 13, 14, 16, 26.

#### Applicable Law and Findings

The Board's jurisdiction is limited to those matters over which it has been given jurisdiction by statute or regulation. *See* 5 U.S.C. § 7701(a); 5 C.F.R. § 1201.3(a); *Garcia v. Department of Homeland Security*, 437 F.3d 1322, 1327 (Fed. Cir. 2006) (en banc); *Saunders v. Merit Systems Protection Board*, 757 F.2d 1288, 1290 (Fed. Cir. 1985). The appellant has the burden of proving, by

preponderant evidence,<sup>2</sup> that the Board has jurisdiction over his appeal. 5 C.F.R. § 1201.56(a)(2)(i). The Board will grant a hearing on the issue of jurisdiction only if the appellant makes non-frivolous allegations<sup>3</sup> to support Board jurisdiction (*i.e.*, claims that, if proven, establish the Board's jurisdiction). *Coradeschi v. Department of Homeland Security*, 439 F.3d 1329, 1332 (Fed. Cir. 2006) (citations omitted).

It is well-settled that, with exceptions not relevant here, the Board does not have jurisdiction to consider an applicant's nonselection for a vacant position. *See Brown v. Office of Personnel Management*, 91 M.S.P.R. 314, ¶ 7 (2002). Nor does the Board possess any general authority to review agency selection actions. *See Prewitt v. Merit Systems Protection Board*, 133 F.3d 885, 886 (Fed. Cir. 1998).

For an appointment to take effect, an authorized appointing officer must take an action that reveals his awareness that he is making a promotion or appointment in the United States civil service, and the affected employee must take some action denoting acceptance. *Deida v. Department of the Navy*, 110 M.S.P.R. 408, ¶ 13 (2009); *Watts v. Office of Personnel Management*, 814 F.2d 1576, 1580 (Fed. Cir.), *cert. denied*, 484 U.S. 913 (1987). In addition, an appointment that has been effected may still be revoked prior to the employee's entrance on duty or performance in the higher grade. *See National Treasury Employees Union v. Reagan*, 663 F.2d 239, 253 (D.C. Cir. 1981).

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<sup>2</sup> A preponderance of the evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.56(c)(2).

<sup>3</sup> Non-frivolous allegations of Board jurisdiction are allegations of fact which, if proven, could establish a *prima facie* case that the Board has jurisdiction over the matter at issue. *See Ferdon v. U.S. Postal Service*, 60 M.S.P.R. 325, 329, (1994). The allegations should be supported by affidavits, declarations or other evidence if they are to be deemed non-frivolous. *Marcino v. U.S. Postal Service*, 344 F.3d 1199, 1204 (Fed. Cir. 2003).

To establish Board jurisdiction over the cancellation of a promotion or appointment, the appellant must show that: (1) the promotion or appointment actually occurred; that is, that it was approved by an authorized appointing official aware that he or she was making the promotion or appointment; (2) the appellant took some action denoting acceptance of the promotion or appointment; and (3) the promotion or appointment was not revoked before the appellant actually performed in the position. *Deida*, 110 MSPR at ¶¶ 14, 16. The Board has held that once an appellant has made a prima facie case of jurisdiction by showing that he was appointed to a position by an authorized official, that he took some action to denote acceptance of the promotion, and that he actually performed in the position, the burden of production shifts to the agency to show that the promotion or appointment was an error contrary to law or regulation. *Deida*, 110 MSPR at ¶ 16, *Lomax*, 78 M.S.P.R. 559-60.

I find that the appellant has failed to non-frivolously allege that his appointment actually occurred. While the agency did offer the appellant a conditional appointment, that appointment was contingent upon the existence of a funded Special Agent vacancy and on the appellant successfully completing his background investigation and meeting various other specified requirements. IAF, Tab 15. There is no evidence that an authorized appointing official aware that he or she was making an appointment actually approved the appellant's appointment. *Id.* Moreover, I find that even if the appointment had actually occurred, it is undisputed that the agency revoked the appointment on July 1, 2009 prior to the appellant actually performing in the position. IAF, Tab 1. The Board lacks jurisdiction over the appeal of the cancellation of an appointment where the appointment was revoked prior to the appellant actually performing in the position. *See Deida*, 110 M.S.P.R. at ¶ 11.

The appellant alleges that the agency made a negative suitability determination. IAF, Tab 1. The right to appeal negative suitability determinations relates only to positions in the competitive service, a position in

the excepted service where the incumbent can be noncompetitively converted to the competitive service, and a career appointment in the Senior Executive Service. *See* 5 C.F.R. §§ 731.101, 731.501(a). The Board has held that it does not have jurisdiction over suitability determinations of individuals in the excepted service. *See McBride v. U.S. Postal Service*, 78 M.S.P.R. 411, 414 (1998). All positions in the Federal Bureau of Investigation are excepted from the competitive service and the incumbents of such positions occupy positions in the excepted service. 28 U.S.C. § 536. I find that the appellant has failed to make a non-frivolous allegation over the agency's purported suitability determination as the Board does not have jurisdiction over suitability determinations over excepted service positions and all positions in the FBI are in the excepted service. Moreover, pursuant to the Office of Personnel Management's revised suitability regulations, effective June 16, 2008, 73 Fed. Reg. 20,149 (Apr. 15, 2008), the Board does not have jurisdiction over constructive suitability determinations. *See Upshaw v. Consumer Product Safety Commission*, 111 M.S.P.R. 236, ¶¶ 7, 8 (2009). Neither a denial of an appointment nor a non-selection for a specific action qualifies as a suitability action. *See Id.* at ¶ 8; 5 C.F.R. § 731.203(a),(b).

The appellant's assertion that the agency admitted the Board has jurisdiction over this appeal is unavailing. IAF, Tab 26. The parties cannot confer jurisdiction on the Board where it is otherwise lacking. *LaBoube v. Department of the Treasury*, 105 M.S.P.R. 337, ¶ 6 (2007).

With regard to the appellant's allegations of prohibited personnel practices because the appellant has not raised an otherwise appealable action, the Board has no jurisdiction to address these matters. *See Cruz v. Department of the Navy*, 934 F.2d 1240, 1245-46 (Fed. Cir. 1991); *Wren v. Department of the Army*, 2 M.S.P.R. 1, 2 (1980), *aff'd*, 681 F.2d 867, 871-73 (D.C. Cir. 1982).

For the above reasons, I find that the appellant has failed to make a non-frivolous allegation of Board jurisdiction over this appeal. Accordingly, the

agency's motion to dismiss the appeal is GRANTED, and the appeal is DISMISSED for lack of jurisdiction without a hearing. *See Coradeschi v. Department of Homeland Security*, 439 F.3d 1329, 1332 (Fed. Cir. 2006).

### DECISION

The appeal is DISMISSED.

FOR THE BOARD:

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Administrative Judge

### NOTICE TO APPELLANT

This initial decision will become final on **January 22, 2010**, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. You must establish the date on which you received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

### BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board  
Merit Systems Protection Board  
1615 M Street, NW.,  
Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (<https://e-appeal.mspb.gov>).

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you claim that you received this decision more than 5 days after its issuance, you have the burden to prove to the Board the date of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j).

### **JUDICIAL REVIEW**

If you are dissatisfied with the Board's final decision, you may file a petition with:



The United States Court of Appeals  
for the Federal Circuit  
717 Madison Place, NW.  
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

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](http://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.

**NOTICE TO AGENCY/INTERVENOR**

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.