Appendix A

NOTE: This order is nonprecedential.

United States Court of Appeals for the FederalCircuit

HENRY E. GOSSAGE,

Petitioner

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent

2018-1970

Petition for review of the Merit Systems Protection Board in No. SE-0731-01-0261-I-5.

ON PETITION FOR REHEARING EN BANC

Before PROST, *Chief Judge*, NEWMAN, LOURIE, DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, and STOLL, *Circuit Judges*[*].

PER CURIAM.

O R D E R

Petitioner Henry E. Gossage filed a petition for re- hearing en banc. The petition was first referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof, IT IS ORDERED THAT: The petition for rehearing en banc is denied.

The mandate of the court will issue on February 8, 2019.

FOR THE COURT

February 1, 2019 /s/ Peter R. Marksteiner

Date Peter R. Marksteiner

Clerk of Court

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* Circuit Judge Hughes did not participate

Appendix C

NOTE: This order is nonprecedential.

United States Court ofAppeals

for the FederalCircuit

HENRY E. GOSSAGE,

Petitioner

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent

2018-1970

Petition for review of the Merit Systems Protection Board in No. SE-0731-01-0261-I-5.

Before REYNA, TARANTO, and STOLL, *Circuit Judges.*

PER CURIAM.

O R D E R

After receiving the parties' responses to this court's show cause order, the court dismisses Henry E. Gossage's petition for review for lack of jurisdiction.

I.

In July 2008, an administrative judge of the Merit Systems Protection Board affirmed the determination of the Office of Personnel Management ("OPM") that Mr. Gossage was not suitable for employment. The full Board affirmed that decision on March 24, 2009. Mr. Gossage petitioned this court to review that final Board decision, but the petition was ultimately dismissed in October 2009 for failure to prosecute after he failed to file a brief.

In February 2012, Mr. Gossage sought the Board's reconsideration, alleging that he obtained evidence in 2011 that revealed OPM had defrauded the Board during the course of his first appeal. Mr. Gossage filed a second request for reconsideration in May 2012, which repeated these allegations. On August 3, 2012, the Board's Office of the Clerk ("Clerk") sent Mr. Gossage a form letter explaining that he had no right to seek reconsideration of the Board's March 24, 2009 final decision. Mr. Gossage did not seek review of that letter in this court.

On March 12, 2018, Mr. Gossage filed at the Board a document styled as a new appeal but merely reasserting the allegations from his prior requests for reconsideration. * On April 27, 2018, the Clerk again sent Mr. Gossage a letter identical in substance to the previous letter, explaining he had no right to seek reconsideration of the Board's March 24, 2009 final decision. Mr. Gossage then petitioned this court for review of the letter.

* It appears that on August 6, 2012 and February 7, 2013, Mr. Gossage filed a third

and fourth request for reconsideration making the same allegations, which were again met with a letter from the Clerk of the Board. Mr. Gossage also did not seek review of that letter.

II.

This court's jurisdiction to review decisions by the Board is limited. Pursuant to 28 U.S.C. §1295(a)(9), we may only hear "an appeal from a final order or final decision" of the Board. We conclude that the Clerk's letter denying Mr. Gossage's request to reconsider his appeal was not a final order or decision of the Board. In *Haines v. Merit Systems Protection Board*, 44 F.3d 998, 1000 (Fed. Cir. 1995), this court held that a form letter from the Clerk denying a repetitive motion to reopen was not a "final order or final decision" of the Board because it was not akin to an initial decision, a denial of a petition for review by the Board, or a Board decision disposing of an entire action. Rather, the Clerk's form letter was "merely an administrative response" to the petitioner's third request to reopen the appeal, and the Clerk "was performing only a ministerial function" within his delegated authority. *Id; see also McCarthy v. Merit Sys. Prot. Bd.*, 809 F.3d 1365, 1370 (Fed. Cir. 2016).

As in *Haines*, the Clerk's April 2018 letter was simply an administrative response to a repetitive motion for reconsideration. We therefore dismiss.

Accordingly,

IT IS ORDERED THAT:

The stay of the briefing schedule is lifted.

The petition for review is dismissed.

All pending motions are denied.

Each side shall bear its own costs.

FOR THE COURT

/s/ Peter R. Marksteiner

Peter R. Marksteiner

Clerk of Court

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Appendix O

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

97 M.S.P.R. 366

HENRY E. GOSSAGE,

Appellant,

v.

OFFICE OF PERSONNEL

MANAGEMENT,

Agency.

DOCKET NUMBER

SE-0731-01-0261-I-2

DATE: September 27, 2004

Paul D. Doumit, Esquire, Olympia, Washington, for the appellant.

Kimya I. Jones, Esquire, Washington, D.C., for the agency.

BEFORE

Neil A. G. McPhie, Acting Chairman

Susanne T. Marshall, Member

Acting Chairman McPhie and Member Marshall both issue separate opinions.

ORDER

This case is before the Board by petition for review of the initial decision which dismissed the refiled petition for appeal as moot. The two Board members cannot agree on the disposition of the petition for review. Therefore, the initial decision now becomes the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1200.3(b) (5 C.F.R. § 1200.3(b)). This decision shall not be considered as precedent by the Board in any other case. 5 C.F.R. § 1200.3(d).

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:

Washington, D.C.

Bentley M. Roberts, Jr.

Clerk of the Board

SEPARATE OPINION OF NEIL A. G. MCPHIE

in

Henry E. Gossage v. Office of Personnel Management

MSPB Docket No. SE-0731-01-0261-I-2

¶1 I write separately to express my views that: (1) The agency's actions did not render moot the appellant's appeal of his suitability determination; and (2) the Board may have jurisdiction over an alleged constructive suitability determination, and that matter is not barred by collateral estoppel.

¶2 The facts of this case, which are not in dispute, are as follows: The appellant pleaded guilty in 1992 to charges of rape and incest. After serving approximately three years in prison, he was released on parole. Initial Appeal File (IAF), Tab 10, Subtab 2o. He applied for various positions with the Federal government. *Id.*, Subtab 2u. The Office of Personnel Management (OPM) found him unsuitable on the basis of an investigation showing his conviction and falsification of employment documents and false statements in connection with his application for an Industrial Hygienist position with the Occupational Safety & Health Administration (OSHA). OPM debarred him from Federal employment until July 21, 2000. *Id.*, Subtab 2o. The appellant filed an appeal with the Board of that decision. The administrative judge (AJ) affirmed OPM's decision, and the Board denied his petition for review. *Gossage v. Office of Personnel Management*, MSPB Docket No. SE-0731-98-0139-I-1 (Initial Decision, June 30, 1998), *review denied*, 81 M.S.P.R. 651 (1998) (Table), *review dismissed*, 215 F.3d 1340 (Fed. Cir. 1999) (Table); IAF, Tab 10, Subtab 2o.

¶3 When the period of debarment expired, the appellant, who is preference eligible, again applied for an Industrial Hygienist position with OSHA. His name was at the top of a certificate of eligibles, along with two other candidates, both of whom withdrew their applications. OSHA requested authority from OPM to pass over his application. IAF, Tab 10, Subtab 2o. OSHA also notified the appellant that it intended to object to him on the basis of suitability for the position, specifically his incarceration between 1992 and 1995. *Id.* On November 30, 2000, OPM issued a written decision granting OSHA's request to pass over the appellant. OPM informed him that it would conduct an investigation as to his suitability. *Id.*, Subtab 2l. After notifying the appellant that it proposed to find him unsuitable and affording him an opportunity to respond, OPM issued a determination on May 16, 2001, rating the appellant ineligible for the Industrial Hygienist position with OSHA, canceling any eligibilities he had obtained from this application or other pending applications, and debarring him until May 16, 2003. The determination was based on his criminal conviction and resulting penalties and the falsification and false statement made in connection with his applications in 1996 and 1997. *Id.*, Subtabs 2a, 2b, 2d.

¶4 The appellant filed an appeal of OPM's May 16, 2001 decision finding him unsuitable for Federal employment and debarring him for two years. IAF, Tabs 1, 2. OPM filed a motion to dismiss the appeal as moot based on its withdrawal of the May 16, 2001 negative suitability and debarment determination. Refiled IAF, Tab 6. The appellant objected to the dismissal of his appeal. *Id.*, Tabs 7, 9. Without

affording the appellant the hearing he requested, the AJ issued an initial decision dismissing the appeal. He found that the appeal had been rendered moot by OPM's withdrawal of its negative suitability determination and debarment and by the collateral estoppel effect of the Board's earlier decision regarding the same charge of criminal conduct. Refiled IAF, Tab 12. The appellant's appeal of the May 16, 2001, suitability determination is not moot.

¶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). Ordinarily, the Board lacks jurisdiction over an appeal of a nonselection for a vacant position. *Metzenbaum v. General Services Administration*, 83 M.S.P.R. 243, ¶ 4 (1999). The Board has jurisdiction over appeals of negative suitability determinations, however, under 5 C.F.R. §§ 731.1-3(d) and 731.501.

¶6 The Board's jurisdiction attaches at the time an appeal is filed and is generally unaffected by the parties' subsequent action. The agency's unilateral modification of an appealable action after an appeal has been filed cannot divest the Board of jurisdiction, unless the appellant consents to such divestiture, or the agency completely rescinds the action being appealed. Thus, the Board may dismiss an appeal as moot if the appealable action has been completely rescinded, i.e., the employee must be returned to the status quo ante and not left in a worse position because of the cancellation than he would have been if the matter had been adjudicated. *Gillespie v. Department of Defense*, 90 M.S.P.R. 327, ¶ 7 (2001).

¶7 Nevertheless, when an appellant has outstanding, viable claims for compensatory damages before the Board, the agency's complete rescission of the action appealed does not afford him all of the relief available before the Board and therefore does not render the appeal moot. *Currier v. U.S. Postal Service*, 72 M.S.P.R. 191, 197 (1996). Here, the appellant raised claims of discrimination based on race, age, and disability. IAF, Tab 2. The AJ failed to inform him of his burden of proof on the discrimination issues or any necessity to raise a claim for compensatory damages to avoid dismissal of the appeal as moot. Based on that failure, I would remand this appeal to the AJ for adjudication of the appellant's discrimination claims. *See Botello v. Department of Justice*, 76 M.S.P.R. 117, 124 (1997) (the Board ordered the AJ on remand to adjudicate the appellant's claims of reprisal for filing equal employment opportunity complaints, if he found that the action appealed was a negative suitability determination within the Board's jurisdiction); *Vannoy v. Office of Personnel Management*, 75 M.S.P.R. 170, 175-77 (1997) (the AJ erred in failing to apprise the appellant of his burden of proof and the elements of proof on his disability discrimination claim, but the error did not harm his substantive rights because he was not a qualified disabled individual). I would instruct the AJ to notify the appellant of his burden of proof and the elements of such discrimination claims, and to afford him an opportunity to engage in discovery relevant to his discrimination claims and to raise a claim for compensatory damages. I would also instruct the AJ to convene a hearing, if the appellant expressed his desire for one. The Board may have jurisdiction over

the alleged constructive negative suitability determination and the matter is not barred by collateral estoppel.

¶8 The appellant argues that, despite OPM's withdrawal of the May 16, 2001 negative suitability determination, the appeal is not moot because the continued existence of the authority for OSHA to pass over his application constitutes a constructive negative suitability determination governed by the holding in *Edwards v. Department of Justice*, 86 M.S.P.R. 365, ¶¶ 5-14 (2000). In that case, the Board found that, under certain circumstances, a sustained objection to consideration of an applicant could constitute a negative suitability determination.

¶9 In this case, the AJ found that, even if the approval of OSHA's request to pass over the appellant were a constructive negative suitability determination, the appellant was collaterally estopped from making that argument because the only issue within the Board's authority to review under OPM's revised regulation had already been adjudicated. Initial Decision at 2-3. I disagree.

¶10 Under OPM's regulation at 5 C.F.R. § 731.501, which is the source of the Board's jurisdiction over appeals of negative suitability determinations and which, effective January 29, 2001, revised OPM's previous regulation, [a]n individual who has been found unsuitable for employment may appeal the determination to [the Board]. If the Board finds one or more charges are supported by a preponderance of the evidence, it shall affirm the determination. If the Board sustains fewer than all the charges, the Board shall remand the case to OPM or the agency to determine whether the action taken is still

appropriate based on the sustained charge(s). This determination of whether the action taken is appropriate shall be final without any further appeal to the Board. 5 C.F.R. § 731.501 (2003). The AJ interpreted this regulation to mean that the Board's review of a negative suitability determination is limited to the substance of the conduct on which the negative suitability determination is based. The AJ found that the conduct underlying this alleged constructive negative suitability determination was previously adjudicated in the earlier appeal in which it was found that the appellant engaged in the criminal conduct and that the conduct supported a negative suitability determination. Based on his interpretation of OPM's revised regulation, the AJ in this case gave collateral estoppel effect to that earlier finding.

¶11 OPM's regulations at 5 C.F.R. part 731 do not define "charge," and the Board has not yet interpreted OPM's revised regulation. "Charge" is susceptible of two meanings. It can mean the factual basis for the negative suitability determination or the suitability determination itself.

¶12 In the supplementary information in the Federal Register notice regarding the revised regulation, OPM responded to comments to its proposed regulations, specifically in regard to Board appeal rights. OPM explained the revised regulation, stating:

Specifically, the regulation is designed to clarify that the Board's role in reviewing OPM or agency unsuitability decisions always has been a limited one. The Board may determine only whether a charge of unsuitability is sustained by a

preponderance of the evidence in accordance with the substantive standard set forth in section 731.202. 65 Fed. Reg. 82239, 82242-43 (Dec. 28, 2000). Based on OPM's reference to a "charge of unsuitability," I would find that 5 C.F.R. § 731.501 provides the Board with jurisdiction to review the determination of whether an individual is suitable for Federal employment. That determination encompasses the factors set forth at 5 C.F.R. §§ 731.202(a) and (b) as well as the additional considerations listed at subpart 731.202(c).

¶13 Thus, I would find that the AJ judge erred in affording collateral estoppel effect in this case to the Board's previous decision affirming the negative suitability determination in *Gossage*, MSPB Docket No. SE-0731-98-0139-I-1 (Initial Decision, June 30, 1998). 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.

Kroeger v. U.S. Postal Service, 865 F.2d 235, 239 (Fed. Cir. 1988). Although the instant alleged constructive negative suitability determination and request to pass over his application were based on the same criminal conduct, the additional

considerations appropriate to a suitability determination require further review to determine whether the felony conviction and incarceration continue to warrant a determination of unsuitability. Among the additional considerations at 5 C.F.R. § 731.202(c) are the recency of the conduct and the absence or presence of rehabilitation or efforts toward rehabilitation. As these circumstances may have changed between the issuance of the first negative suitability determination and this alleged constructive negative suitability determination, these issues, as they relate to the appellant's current suitability for Federal employment, were not previously litigated.

¶14 Therefore, I would remand this matter to the AJ for a determination of whether the request to pass over the appellant is within the Board's jurisdiction as a constructive negative suitability determination. If so, then I would instruct the AJ to decide whether that determination is supported by preponderant evidence, on the basis of not only the fact of the appellant's conviction and incarceration but also the additional considerations at 5 C.F.R. § 731.202(c). I would further instruct the AJ to adjudicate the appellant's claims of discrimination as they relate to the alleged constructive negative suitability determination.

_____

Date Neil A. G. McPhie

Acting Chairman

SEPARATE OPINION OF SUSANNE T. MARSHALL

in

Henry E. Gossage v. Office of Personnel Management

MSPB Docket No. SE-0731-01-0261-I-2

¶15 The administrative judge correctly found that this appeal is moot because all of the issues previously litigated in this negative suitability determination were the same as the ones raised in the present appeal and therefore had collateral estoppel effect. Indeed, the Office of Personnel Management (OPM) cancelled the negative suitability determination and reinstated the appellant so he could compete for federal positions, except for the positions for which OPM, acting under proper authority, previously found the appellant unsuitable.

¶16 A June 30, 1998 initial decision by the Board's administrative judge sustained OPM's decision that the appellant was unsuitable for federal employment, including positions as an Industrial Hygienist or a Safety & Occupational Specialist with the Occupational Safety & Health Administration (OSHA). *Gossage v. Office of Personnel Management*, MSPB Docket No. SE-0731-98-0139-I-1 (Initial Decision June 30, 1998). The administrative judge based his decision on the appellant's plea of guilty in state court to four criminal counts – two counts of incest (first degree), one count of rape (third degree), and one count of attempted incest (first degree). *Id.* at 3. The appellant spent ten years in jail on those charges. Petition for Review File, Tab 1. The June 30, 1998 initial decision also found that the appellant

made false and deceptive statements during his application process for the OSHA jobs regarding his criminal record. Initial Decision at 4-6. That initial decision became the Board's final decision when the Board denied the appellant's petition for review by final order. 81 M.S.P.R. 651 (1998) (Table). The United States Court of Appeals for the Federal Circuit dismissed the appellant's request for review of the Board's decision in that case. *Gossage v. Office of Personnel Management*, 215 F.3d 1349 (Fed. Cir. 1999) (Table).

¶17 As thoroughly explained in the administrative judge's April 22, 2002 initial decision, OPM's decision to reinstate the appellant for consideration for federal employment moots out the appeal. *Gossage v. Office of Personnel Management*, MSPB Docket No. SE-0731-01-0261-I-2, Initial Decision at 2 (April 22, 2002). What OPM did here was simply keep in place the appellant's disqualification for the OSHA positions for which he was previously found unsuitable – the Industrial Hygienist and Safety & Occupational Specialist positions. *Id.* at 1-2. That was a decision which the Board sustained in its final decision in the 1998 initial decision, and which was not overturned by the Federal Circuit. The administrative judge properly concluded that OPM's decisions on the OSHA positions, which were fully decided in a final 1998 Board decision, collaterally estopped the appellant from raising those matters in the instant appeal. Collateral estoppel also precludes the appellant from raising any discrimination or claims of violations of the Veterans Employment Opportunities Act of 1998 (VEOA) that he raised or could have raised in the 1998 appeal. *Id.* at

2-3; *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).

¶18 In the present appeal, the appellant has merely argued that he is "of Japanese heritage" and has a "physical disability" of an unspecified nature. Initial Appeal File, Tab 1. Such bare assertions are insufficient to raise a suitability determination claim based on a final Board decision in a 1998 appeal. In fact, on petition for review, the appellant acknowledges that OPM's actions moot out the appeal except for the matter of the OSHA positions which were filled many years ago. That case is long over. Remand under these circumstances serves no purpose. The administrative judge therefore correctly decided that the prior Board decision has collateral estoppel effect with regard to the OSHA positions at issue.

¶19 The administrative judge's decision here was neither arbitrary, capricious, nor an abuse of discretion, and it comported with Board procedures. *See United States Postal Service v. Gregory*, 534 U.S. 1, 6-7, 122 S. Ct. 431, 434 (2001). Absolutely no reason exists to disturb it. The appellant's petition for review should therefore denied.

Susanne T. Marshall

Appendix P

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

97 M.S.P.R. 366

HENRY E. GOSSAGE,

Appellant,

v.

OFFICE OF PERSONNEL

MANAGEMENT,

Agency.

DOCKET NUMBER

SE-0731-01-0261-I-2

DATE: April 22, 2002

Paul D. Doumit, Esquire, Olympia, Washington, for the appellant.

Kimya I. Jones, Esquire, Washington, D.C., for the agency.

Before

James H. Freet

Administrative Judge

INITIAL DECISION

By appeal refiled October 12, 2001, the appellant has challenged a May 16, 2001, suitability decision by the Office of Personnel Management (OPM). For the reasons discussed below, the appeal is DISMISSED.

In its suitability decision, OPM found the appellant unsuitable for Federal employment cancelled all eligibilities for employment which the appellant might currently have and debarred him from competition for, or appointment to, any position in the competitive Federal service for a period of 2 years. *See* OPM File, Tab 2a. In that decision, OPM also rated ineligible a particular application for the position of industrial Hygienist which the appellant had filed with the Occupational Safety & Health Administration (OSHA). *See* id. OSHA had requested that the appellant be removed from consideration - because his prior conviction and incarceration for a felony would interfere with his ability represent OSHA as an expert witness in court. Such court appearances are expected of OSHA' s compliance officers. *See* OPM File, Tab 2b (OPM Form 86A). An agency may make such objection to a particular candidate; OPM has authority to grant the objection by disqualifying the candidate for particular positions. *See* 5 C.F.R. § 332.406 (2001).

By Motion filed January 16, 2002, OPM stated that it was thereby reinstating the appellant's eligibility for competitive registers and withdrawing its debarment of him from competition for, or appointment to, Federal positions. OPM stated,

however, that its action did not change its decision to grant OSHA' s request for permission to disqualify the appellant for the Industrial Hygienist position OPM moved that the appeal be dismissed as moot. The appellant has objected to that motion. *See* Appellant's Submissions of January 24 and March 8, 2002. For the reasons discussed below, OPM's motion *is* GRANTED.

It is clear that OPM's action moots the portions of its May 16, 2001, suitability decision which concerned the general cancellation of eligibilities for employment and the general 2-year debarment. The appellant has received full relief on these elements of his appeal.

The remaining question is the reviewability of the OPM permission for OSHA to disqualify the appellant for the Industrial Hygienist position. Such actions by OPM are not necessarily appealable to the Board. Depending on the true nature of the grounds for an agency's request for disqualification, OPM' s approval may be either a non-appealable non-selection decision or an appealable constructive suitability decision. *See Edwards v. Department of Justice,* 87 M.SP.R. 518, 522-23 (2001)

Even if it is assumed that OPM's permission to OSHA to disqualify the appellant is a constructive suitability determination, there is no issue for the Board to resolve in this particular appeal. OSHA's disqualification request was based on the appellant's felony conviction in 1992 and bis resulting incarceration. The issue of the appellant's felony conviction and incarceration is barred from further consideration by the Board by the doctrine of collateral estoppel. 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. *See Kroeger v. U.S. Postal Service,* 865 F.2d 235, 239 (Fed. Cir. 1988); *Jay v. Department of the Navy,* 90 M.S.P.R. 635, 641 (2001). The same conviction and incarceration which is the basis for OSHA' s request for permission to disqualify the appellant was an element in a prior appeal to this Board concerning an earlier suitability decision by OPM which covered the period ending July 21, 2000. *See Gossage v. Office of Personnel Management,* MSPB Docket No. SE-0731-98-0139-I-l (Initial Decision, Jun. 30, 1998), *petition for review denied,* 81 M.S.P.R. 651 (1998) (Table), *review dismissed,* 215 F.Jd 1340 (Fed. Cir 1999) (Table). The appellant was found to have engaged in this criminal conduct. *See Gossage,* slip op. at 3-4.

Since the charge concerning the appellant's conviction and incarceration has been **established by collateral estoppel, no issue remains for adjudication by the Board.** Having found the charge to be factually accurate, the Board is precluded by regulation from considering whether the charge warrants the suitability determination made by OPM. *See* 5 C.F.R. *§* 731.S0I(a) (Jan. 29, 2001) ("lf the Board find that one or more charges are supported by a preponderance of the evidence, it shall affirm the [suitability] determination.").

In summary, the issues of OPM's general cancellation of eligibilities and general debarment

from future consideration are mooted by OPM's reinstatement decisions and the issue of OSHA's request to disqualify the appellant is mooted by collateral estoppel. Therefore, there is no matter for adjudication by the Board.

DECISION

The appeal is DISMISSED.

FOR THE BOARD:

James H. Freet

Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on Mav 27, 2002, 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 this initial decision is received by you 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. 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

Additional material from this filing is available in the Clerk's Office.