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APPENDIX A-1

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

HENRY E. GOSSAGE, Petitioner

v.

OFFICE OF PERSONNEL MANAGEMENT, Respondent

2021-1026

Petition for review of the Merit Systems Protection Board
in No. SE-0731-01-0261-L-3.

PER CURIAM.

O R D E R

Having considered the parties' responses to the court's November 3, 2020 order to show cause, we dismiss.

By way of background, Henry E. Gossage previously filed an appeal at the Merit Systems Protection Board challenging the Office of Personnel Management (OPM)'s decision disqualifying him from a position with the Occupational Safety and Health Administration and disbaring him from federal government employment. While those proceedings were pending, OPM withdrew its disbarment but sustained OSHA's request to disqualify Mr. Gossage. After additional proceedings, the Board issued a final decision in March 2009 sustaining that

determination. Since then, Mr. Gossage has made several unsuccessful attempts to reopen that Board decision.

On September 9, 2020, Mr. Gossage filed a petition for review at this court, which identified a May 8, 2020 letter from the Board's regional office informing him that his request to reopen a suitability appeal was being forwarded to the Office of the Clerk of the Board for consideration. The Clerk of the Board informs this court that no further action by the Board was taken on that repetitive request.

Mr. Gossage's response to this court's show cause order further suggests that he may also be attempting to seek this court's review of a December 27, 2004 notation on an OPM form stating that Mr. Gossage's "[e]ligibility [was] reinstated during MSPB appeal." Pet'r's Resp. at Ex. B.

We agree with OPM that Mr. Gossage has not shown that this court has jurisdiction over his petition. To begin, the May 2020 letter identified in the petition is merely an administrative response to Mr. Gossage's submission forwarding the letter to the Board. It is not "a final order or decision" of the Board that is subject to our review under 28 U.S.C. § 1295(a)(9). *See McCarthy v. Merit Sys. Prot. Bd.*, 809 F.3d 1365, 1370 (Fed. Cir. 2016). As to OPM's December 2004 notation, Mr. Gossage insists that "[n]o decision on the MERITS from OPM's December 27, 2004 New and Final determination has been adjudicated by the MSPB and Federal Circuit." Pet'r's Resp. at 3. However, even if this were true and not subject to the finality of the March 2009 decision, we would still lack jurisdiction because we have no authority to directly review OPM decisions. *See In re McAfee*, 65 F. App'x 292 (Fed. Cir. 2003).

Accordingly,

IT IS ORDERED THAT:

- (1) The petition is dismissed.
- (2) Each side shall bear its own costs.
- (3) All other pending motions are denied.

December 18, 2020

Clerk of Court

* Circuit Judge Hughes did not participate.

APPENDIX A-2

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

HENRY E. GOSSAGE, Petitioner

v.

OFFICE OF PERSONNEL MANAGEMENT, Respondent

2021-1026

Petition for review of the Merit Systems Protection Board
in No. SE-0731-01-0261-L-3.

**ON PETITION FOR PANEL REHEARING AND
REHEARING EN BANC**

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

PER CURIAM.

ORDER

Henry E. Gossage filed a combined petition for panel rehearing and rehearing en banc. The petition was referred to the panel that issued the order, and thereafter the petition or 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 panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue on February 12, 2021.

February 5, 2021

FOR THE COURT
/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

* Circuit Judge Hughes did not participate.

APPENDIX A-3

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

HENRY E. GOSSAGE,

Petitioner

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent

2021-1026

Petition for review of the Merit Systems Protection
Board in No. SE-0731-01-0261-L-3.

PER CURIAM.

O R D E R

The court considers its jurisdiction over this recently docketed petition for review.

On September 9, 2020, the court received Henry E. Gossage's petition for review identifying a May 8, 2020 letter from the Merit Systems Protection Board's regional office in docket number SE-0731-01-0261-L-3, explaining that his request to reopen a suitability appeal was being forwarded to the Office of the Clerk of the Board for consideration.

It does not appear that the court has jurisdiction over this matter. This court's jurisdiction is limited to final orders or decisions of the Board, *see* 28 U.S.C. § 1295(a)(9); *see also Weed v. Soc. Sec. Admin.*, 571 F.3d 1359, 1361 (Fed. Cir. 2009),

and the Board's letter does not appear to be a final decision in this matter. Moreover, in order to be timely, a petition for review must be received by the court within the filing deadline. *Pinat v. Off. of Pers. Mgmt.*, 931 F.2d 1544, 1546 (Fed. Cir. 1991) (explaining that petition is filed when received by this court); *see also* Fed. R. App. P. 25(a)(2)(A). The time for filing a petition from a Board decision or order is governed by 5 U.S.C. § 7703(b)(1), which provides, in relevant part, that "any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board." 5 U.S.C. § 7703(b)(1)(A). Thus, even if the Board's May 8, 2020 letter was a final decision, Mr. Gossage's petition received on September 9, 2020 appears to be untimely.

Accordingly,

IT IS ORDERED THAT:

(1) The parties are directed to show cause, within 30 days from the date of filing of this order, why this petition should not be dismissed as premature.

(2) The briefing schedule is stayed.

FOR THE COURT

November 03, 2020

Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

APPENDIX B-1

Case: 21-1026 Document: 1-2 Page: 2 Filed: 10/09/2020



U.S. MERIT SYSTEMS PROTECTION BOARD

Western Regional Office
1301 Clay Street, Suite 1350N
Oakland, CA 94612

Phone: (510) 273-7022, Fax: (510) 273-7136

Date: May 8, 2020

Henry Gossage
9421 Johnson PT LP NE
Olympia, WA 98516
hegossage@gmail.com

Case Docket Number: SE-0731-01-0261-L-3

Case Name: Henry Gossage v. Office of Personnel Management

REFERRAL

Subject: Your request to reopen your suitability appeal, received in the Western Regional Office on May 6, 2020, has been forwarded to the Office of the Clerk of the Board.

Forwarding Instructions: We forwarded the item identified in the above subject to the office address shown below because it appears to be a matter for their consideration. Please direct any future correspondence on this subject to that address.

FORWARDED FOR ACTION TO:

Merit Systems Protection Board
Office of the Clerk of the Board
1615 M Street, NW
Washington, DC 20419
Telephone No. (202) 653-7200
Fax No. (202) 653-7130
V/TDD 1-800-877-8339

APPENDIX B-2
Merit Systems Protection Board Order

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).

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 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 be denied.

Date

Susanne T. Marshall
Member

APPENDIX B-3
Administrative Law Judge Decision

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

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. It 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 21. In that decision, OPM also rated ineligible a particular application for the position of Industrial Hygienist which the appellant has 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, Tab2b (OPM Form86A). 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 CFR § 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, 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 Submission 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.S.P.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 his 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 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 SE-0731-98-0139-I-1 (Initial Decision, June 30, 1998), *petition for review denied*, 81 M.S.P.R. 651 (1998) (Table), review

dismissed, 215 F.3d 1340 (Fed. Cir. 1999) (Table). The appellant was found to have engaged in this criminal conduct. *See Gossage*, slip. At 3-4.

Since the charge concerning the appellant's conviction and incarceration has been established by collateral estoppel, no issue remains for the 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. § 731.501(a) (Jan. 29, 2001) ("If the Board find that one or more charges are supported by 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.¹

FOR THE BOARD

James H. Freet
Administrative Judge

¹ The appellant has raised the issue of attorney fees. The matter is premature. See 5 CFR § 1201.203(d) (time of filing of attorney fee motions).

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