APPENDIX INDEX

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NOTE: This order is nonprecedential.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

2020-2178

Petition for review of the Merit Systems Protection Board in No. SE-0731-01-0261-I-2.

HENRY E. GOSSAGE,
Petitioner
v.
OFFICE OF PERSONNEL MANAGEMENT,
Respondent

2020-2194

Petition for review of the Merit Systems Protection Board in No. SF-0731-13-0252-I-1.

HENRY E. GOSSAGE,
Petitioner
v.
OFFICE OF PERSONNEL MANAGEMENT,
Respondent

2020-2195

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

ON MOTION

PER CURIAM.

O R D E R

The Office of Personnel Management (OPM) moves to dismiss the above-captioned petitions for lack of jurisdiction. Henry E. Gossage has not responded.

Mr. Gossage's petitions concern a matter before the Merit Systems Protection Board that has been closed since 2009. He identifies case number SE-0731-01-0261-I-2 in which the Board issued a decision in September 2004 that was subsequently vacated by this court in *Gossage v. Office of Personnel Management*, 163 F. App'x 909 (Fed. Cir. 2006), and remanded for further proceedings. He also identifies No. SE-0731-01-0261-I-5, which was assigned to the same controversy after our remand in which the Board issued its final decision in March 2009. *Gossage v. Office of Pers. Mgmt.*, No. SE-0731-01-0261-I-5, 2009 WL 982584 (M.S.P.B. Mar. 24, 2009). Finally, he identifies SF-0731-13-0252-I-1, which was initially assigned to a submission Mr. Gossage filed with the Board's Western Regional Office in February 2013 and seven days later construed as a motion to reopen SF-0731-01-0261-I-5 and forwarded to the Board. The Board subsequently informed Mr. Gossage

through letters that he had no further right to review of that decision, and this court has explained that those letters were not subject to our review. *Gossage v. Office of Pers. Mgmt.*, No. 2018-1970 (Fed. Cir. Oct. 3, 2018), ECF No. 22.

We agree with OPM that we lack jurisdiction over these petitions. This court previously vacated the Board's September 2004 decision. The Board's subsequent decision on remand in SE-0731-01-0261-I-5 became final upon the Board's March 24, 2009 denial of Mr. Gossage's petition for review. *See* 5 C.F.R. § 1201.113(b) ("If the Board denies all petitions for review, the initial decision will become final when the Board issues its last decision denying a petition for review."). Mr. Gossage had 60 days to file an appeal from that decision, which he failed to do. *See* 5 U.S.C. § 7703(b)(1); *Fedora v. Merit Sys. Prot. Bd.*, 848 F.3d 1013, 1016 (Fed. Cir. 2017). Finally, we have already determined that the letters identified in connection with SF-0731-13-0252-I-1 are not reviewable.

Accordingly,

IT IS ORDERED THAT:

(1) The motions are granted. The petitions are dismissed.

(2) Each side shall bear its own costs.

(3) All other pending motions are denied.

FOR THE COURT

October 20, 2020
Date

/s/ Peter R. Marksteiner

s31

ISSUED AS A MANDATE: October 20, 2020

APPENDIX A-2

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

HENRY GOSSAGE, *Petitioner*

v.

OFFICE OF PERSONNEL MANAGEMENT, *Respondent*

2020-2178

Petition for review of the Merit Systems Protection Board in No. SF-0731-01-0261-I-2.

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.

O R D E R

Henry 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 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 panel rehearing is denied.

The petition for rehearing en banc is denied.

FOR THE COURT

February 24, 2021
Date

/s/ Peter R. Marksteiner

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* Circuit Judge Hughes did not participate.

APPENDIX A-3

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

HENRY GOSSAGE, *Petitioner*

v.

OFFICE OF PERSONNEL MANAGEMENT, *Respondent*

2020-2194

Petition for review of the Merit Systems Protection Board in No. SF-0731-13-0252-I-1.

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.

O R D E R

Henry 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 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 panel rehearing is denied.

The petition for rehearing en banc is denied.

FOR THE COURT

February 24, 2021
Date

/s/ Peter R. Marksteiner

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* Circuit Judge Hughes did not participate.

APPENDIX A-4

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

HENRY GOSSAGE, *Petitioner*

v.

OFFICE OF PERSONNEL MANAGEMENT, *Respondent*

2020-2195

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

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.

O R D E R

Henry 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 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 panel rehearing is denied.

The petition for rehearing en banc is denied.

FOR THE COURT

February 24, 2021
Date

/s/ Peter R. Marksteiner

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* Circuit Judge Hughes did not participate.

APPENDIX B-1
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 14ligible, 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. § 731.202I 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. § 731.202I. 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.

_____ _____

Date

Susanne T. Marshall
Member

APPENDIX B-2
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 as 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 dee motions).

APPENDIX B-3

Administrative Law Judge Cassidy Decision

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
OFFICE OF REGIONAL OPERATIONS

HENRY E. GOSSAGE,
Appellant,
v.
OFFICE OF PERSONNEL
MANAGEMENT,
Agency.
DOCKET NUMBER
SE-0731-01-0261-I-5
DATE: July 8, 2008
Aaron K. Owada, Esquire, Lacey, Washington, for the appellant.
Judy S. McLaughlin, Esquire, Washington, D.C., for the agency.

BEFORE
Jeremiah Cassidy
Administrative Judge

INITIAL DECISION

INTRODUCTION

On January 25, 2006, the United States Court of Appeals for the Federal Circuit (the court) remanded this appeal for further consideration regarding the May 2001 decision by the Office of Personnel Management (OPM) (i) disqualifying the appellant from an industrial hygienist position with the Occupational Safety and Health Administration, (ii) canceling any eligibility he

may have obtained for this or any other competitive position, and (iii) debarring him from applying for any position in the competitive Federal service for two years. See Remand Appeal File (RAF), Tab 1. On November 7, 2007, I held a hearing in this appeal in Seattle, Washington.

For the reasons set forth below, OPM's action is AFFIRMED.

ANALYSIS AND FINDINGS

Background

The appellant pleaded guilty in 1992 to charges of rape and incest. After serving approximately three years in prison, he was released on parole. See Appeal File (AF), Tab 1. He then applied for various positions with the Federal government. See id., at Subtab 2u. 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. See id., at Subtab 2o. The appellant appealed that decision to the Board. An administrative judge, however, affirmed OPM's decision, and the Board denied his petition for review. See Gossage v. Office of Personnel Management, MSPB Docket No. SE-0731-98-0139-I-1 (Initial Decision, Jun. 30, 1998), review denied, 81 M.S.P.R. 651 (1998) (Table), review dismissed, 215 F.3d 1340 (Fed.Cir.1999) (Table); AF, Tab 10, Subtab 2o.

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 then requested authority from OPM to pass over his application. See AF, 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. See id., at Subtab 2l. After notifying the appellant that it proposed to find him unsuitable and affording him an opportunity to respond, OPM issued a May 16, 2001 decision 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. See id., at Subtabs 2a, 2b, 2d.

The appellant filed an appeal of OPM's May 16, 2001 decision finding him unsuitable for Federal employment and debarring him for two years. See AF, Tabs 1, 2. During the processing of the appeal, OPM withdrew its May 16, 2001 negative suitability and debarment determination. OPM then filed a motion to dismiss the appeal as moot. See Refiled Appeal File, Tab 6. The appellant objected to the dismissal of his appeal. See id., Tabs 7, 9.

Nevertheless, in an April 22, 2002 decision, the administrative judge granted OPM's motion to dismiss the appeal the appellant had filed from OPM's debarment. In that motion, OPM stated that it was withdrawing its debarment of the appellant and reinstating his eligibility for competitive registers, but was sustaining OSHA's request to disqualify him for the Industrial Hygienist position for which he had applied. The administrative judge held that OPM's withdrawal of the debarment and cancellation of eligibility mooted the appeal of those actions, and that no appeal was available from the action to disqualify him from the particular position for which he had applied, either because it was a non-selection decision, which is not appealable, or because, even if OPM's action were viewed as a "constructive suitability determination" based on the appellant's prior felony conviction and incarceration, consideration of whether this action should be sustained was precluded by collateral estoppel. See Refiled Appeal File, Tab 12.

The administrative judge's collateral estoppel ruling was grounded in the fact that the earlier unsuitability decision, based on the same conviction and incarceration, had been sustained in the prior appeal to the Board with respect to a different application for employment as an Industrial Hygienist. Because the existence of the conviction and incarceration were not disputed, the administrative judge reasoned that no issue remained for adjudication, interpreting 5 C.F.R. § 731.501(a) as limiting the Board to a determination of whether factual support existed for the charges, and precluding the Board from

reviewing whether the charges actually warranted OPM's unsuitability determination. The administrative judge therefore dismissed the appeal. Subsequently, the administrative judge's decision became the final decision of the Board.

The appellant then filed an appeal with the court. At that point, OPM argued that the administrative judge erred in refusing to review whether the disqualification of the appellant for the industrial hygienist position was a constructive negative suitability determination. See Gossage v. Office of Personnel Management, 163 Fed. Appx. 909 (Fed. Cir. 2006)(nonprecedential). OPM stated that the issue of suitability, not merely the existence of the conviction and incarceration, was properly before the administrative judge, and that the administrative judge misinterpreted 5 C.F.R. § 731.501 in the same manner as did the administrative judge in Folio v. Department of Homeland Security, 402 F.3d 1350, 1356 (Fed.Cir.2005), wherein the Federal Circuit held that § 731.501 "provides the Board with jurisdiction to review all aspects of an unsuitability determination, including whether the charged conduct renders an individual unsuitable for the position in question." Id. OPM requested that the court remand the appeal to the Board for a determination of "whether OPM's May 2001 decision was an appealable constructive negative suitability determination and, if so, whether OPM's decision is supported by substantial evidence, applying all relevant considerations pursuant to 5 C.F.R. § 731.202." Id. OPM also stated that on remand the Board "should address and decide the appellant's

discrimination claims." Id.

The appellant argued that OPM's request for a remand was untimely, having been raised for the first time in OPM's responsive brief to the court. See Gossage, 163 Fed. Appx. at 909-911. The appellant asked the court to review, and decide, the question of whether his 1992 felony conviction and incarceration outweighed his veteran's status and professional qualifications for the position for which he applied. He stated that when OPM rescinded its unsuitability determination, that ended its opportunity and right to challenge the grounds of the passover.

The court found that OPM's rescission of its cancellation of the appellant's debarment from competition for any position in the competitive service did not remove its objection to his appointment to the Industrial Hygienist position with OSHA. See Gossage, 163 Fed. Appx. at 912. The court further found that although OPM withdrew its debarment from competition, it maintained its decision to rate the appellant ineligible for the Industrial Hygienist position, a decision that OPM justified in part by the appellant's failure to make restitution. In finding that the Board erred in holding that collateral estoppel resolved the issues concerning whether OPM subjected the appellant to a constructive negative suitability determination, the court noted that the appellant's criminal conviction remained intact, but that there were other considerations in a suitability determination, including subsequent good behavior. Id. The court, therefore, agreed with OPM that the appeal should be remanded to the Board to determine

whether OPM's May 2001 decision was an appealable constructive negative suitability determination and, if so, whether OPM's decision was supported by substantial evidence.[1] Id.

OPM's May 2001 decision constituted a constructive negative suitability determination.

Although the Board generally lacks jurisdiction to consider an appeal regarding a nonselection for a vacant position, it has jurisdiction to consider the denial of an appointment that is the result of a negative suitability determination made by OPM or by an agency operating under delegated authority from OPM. Metzenbaum v. General Services Administration, 83 M.S.P.R. 243, ¶ 4 (1999). Pursuant to the standard for suitability determinations, an applicant or appointee, such as the appellant, may be denied Federal employment "only when the action will protect the integrity or promote the efficiency of the service." See 5 C.F.R. § 731.201.

In order to establish the Board's jurisdiction over an alleged constructive suitability determination, an appellant must establish that: (1) The position for which he was not selected was in the competitive service; (2) the agency had delegated authority from the Office of Personnel Management to make suitability

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1. The court also remanded the appeal for the Board to consider the appellant's discrimination claims. See Gossage, 163 Fed. Appx. at 912. The appellant, however, withdrew his Title VII claims prior to the hearing. Although the appellant raises Veterans Employment Opportunities Act (VEOA) of 1998 issues in his closing brief, those claims cannot, as I explained to the parties prior to the hearing, be raised in this appeal pursuant to 5 U.S.C. § 3330a(e)(2). Instead, the statute provides that

the appellant may file a VEOA appeal after the decision in this appeal becomes final.

determinations; and (3) the agency's decision not to select him was a finding that he was unsuitable for employment within the meaning of 5 C.F.R. part 731. In determining whether an agency's action was an unappealable nonselection or an appealable suitability determination, the Board looks to the substance of the action, rather than the form. *See Nashkin v. Department of Justice*, 104 M.S.P.R. 604, ¶¶ 3-4 (2007).

In its closing brief, OPM argues that although OSHA submitted a Standard Form (SF) 62, "Agency Request to Pass Over a Preference Eligible or Object to an Eligible," OSHA's "specific reason actually pertained to Appellant's inability to qualify for the industrial hygienist position because of his conviction." See Gossage v. Office of Personnel Management, MSPB Docket No. SE-0731-01-0621-I-5 (Gossage 5), AF, Tab 6 (OPM's Closing Brief, at 9)(emphasis in the original). OPM points out that Floria Jones, OSHA's Chief of Employment at the time, wrote, "OSHA Compliance Officers must testify in Court on behalf of the agency. His conviction may effect [sic] his credibility." See AF, Tab 2o. OPM argues that this stated basis for the passover was "separate and distinct" from OSHA's November 17, 2000 OPI Form 86, "Request for a Suitability Determination," which was based on his "criminal background." See AF, Tab 2m.

I do not find OPM's argument persuasive. I see no difference between the

appellant's "conviction," which OPM argues was the basis of his passover, and his "criminal background," which OPM argues was the basis for the rescinded government-wide negative suitability determination and debarment. Indeed, in the absence of his "conviction," he would not have had a "criminal background." I find, therefore, OPM's action constitutes a negative suitability determination because it was based on the appellant's conviction, which is one of the reasons to find an applicant for employment unsuitable under OPM's regulations. See 5 C.F.R. § 731.202(b)(2)(criminal or dishonest conduct).

The agency established by substantial evidence that the appellant was not suitable for employment as an Industrial Hygienist.

In the appellant's closing brief, he argues OPM's action constitutes a constructive negative suitability determination. See Gossage 5, AF, Tab 5 (Appellant's Closing Brief, at 18-35). He argues, however, the agency's decision is not supported by substantial evidence and does not promote the efficiency of the service. The crux of OPM's argument now is that its action was a passover, and not a negative suitability determination. In the alternative, OPM argues that if the Board were to find that the action was a constructive negative suitability determination, then the appellant's criminal behavior, failure "to discharge his restitution obligation," and lack of rehabilitation show that OPM's decision finding him unsuitable for employment promotes the integrity and efficiency of the service.

As stated above, it is undisputed that in 1992 the appellant was convicted of incest and rape. Further, at the time of OPM's May 2000 decision the

appellant had still failed to completely pay the court-ordered restitution to his victim. On August 31, 1992, the court ordered the appellant to pay restitution in the amount of $2,374.88 as a condition of his sentencing. See AF, Tab 2e. At the time of OPM's decision at issue in this matter, the appellant had paid back only a fraction of that amount. As of March 12, 2001, he still owed $4,095.77 in restitution payments due to his failure to pay because interest had accrued on the original amount due. Id. I find, therefore, his failure to pay his restitution shows the absence of rehabilitation on his part. See 5 C.F.R. § 731.202(c)(7). I find this is an additional consideration supporting OPM's finding of unsuitability.

Further, the appellant has still not completed his restitution payments. During the hearing, the appellant gave two reasons why he has not completed his restitution payments. First, he argued that the court order requiring that he pay restitution violated his due process rights because, among other things, he was not present in court when the order was made. See Hearing Transcript (HT), at 59-63, and 69-73. Apparently, he has been involved in litigation for several years in the Washington courts seeking to have the restitution order invalidated. See id.; Gossage 5, AF, Tab 5 (Appellant's Closing Brief, at 31-33). Second, he argues that he has not had the money to pay the court-ordered restitution.

Nevertheless, I do not find that either of these reasons justifies the appellant's failure to make the court-ordered restitution payments. I am precluded from finding he is not bound by the court's order. I lack the authority to determine whether the state court properly entered the order that he pay

restitution. If the appellant were to succeed in his efforts to have that order vacated, however, he could reapply for federal employment and argue that the government cannot find him unsuitable because he did not complete his restitution payments.

With respect to the appellant's second reason for not making his payments, I do not find credible his assertion that he lacked the money to make the restitution payments at the time of OPM's decision, or that he currently has insufficient funds to do so. During my examination of the appellant, the following exchange took place:

ADMINISTRATIVE JUDGE: So you're basically saying it was the due process issue. I mean, I understand what your legal argument is and partially because you didn't have much income.

THE WITNESS: Well, that's definitely true. I'll gladly give you my income tax returns the last five years if you would like to see them.

ADMINISTRATIVE JUDGE: And even now?

THE WITNESS: All my money comes from the Veterans Administration today.

ADMINISTRATIVE JUDGE: But you said you could have done better?

THE WITNESS: I think anybody could – anybody can do better. I mean, I can always be a better father, but if I had a job, that would have taken a major relief.

ADMINISTRATIVE JUDGE: So, if you had the job, you would have been willing to ignore the due process issue, it seems?

THE WITNESS: I would have had the extra money to pay. That would have been, what are we talking? I don't remember. I think the salary is like 55, 60,000 a year or something. You know, something like that versus what I am getting. I mean, it's like night and day.

ADMINISTRATIVE JUDGE: Have you been on vacation this year?

THE WITNESS: First vacation in ages, yes.

ADMINISTRATIVE JUDGE: Where did you go?

THE WITNESS: Alaska.

ADMINISTRATIVE JUDGE: Anyplace else?

THE WITNESS: No.

ADMINISTRATIVE JUDGE: Just Alaska?

THE WITNESS: Yes.

. . . .

BY MR. OWADA:

Q Mr. Gossage, with regard to the Judge's last questions, did you go to Europe this past summer?

A. Did I go to Europe?

Q. Yes. Because I believe I advised the Court that I thought you said that to me, but I don't know if I misheard that or not.

A. Yes, I did earlier for a couple of weeks. I had some points I had that I used.

See HT, at 72-74. I find the appellant's admission that he recently went to Europe shows that his assertion that he cannot afford to complete his restitution payments is inherently incredible. *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987) (among the factors an administrative judge can use to evaluate the appellant's testimony are the contradiction of the appellant's version of events with evidence of record, and the inherent improbability of the witness's version of events). I find that if the appellant can afford to travel to Europe, or can use his credit card to such an extent that he has a sufficient amount of points

to travel to Europe, he cannot persuasively argue to the Board that he is unable to pay his victim restitution. Further, I find the appellant's testimony regarding his current finances was so deceptive that I do not find credible his testimony regarding his financial situation at the time OPM made its decision. *Cross v. Department of the Army*, 89 M.S.P.R. 62, ¶ 14 (2001) (although an administrative judge is not required to discredit a witness's credibility on all issues once he has found the witness not credible on one issue, the specific instance of lack of credibility is a proper consideration in assessing the witness's overall credibility); *Hawkins v. Smithsonian Institution*, 73 M.S.P.R. 397, 404 (1997) (an administrative judge's finding that a witness is not credible with respect to some testimony may call into question the witness's character for truthfulness with respect to other related testimony). In this connection, I note the appellant had three opportunities to inform me in response to my questions that he went to Europe. Yet in response to each question he stated he had gone only to Alaska. [2]

Therefore, I find OPM's action denying the appellant federal employment protects the integrity of the federal service due to his prior conviction and failure to pay his court-ordered restitution. Consequently, I find OPM has shown by substantial evidence that the appellant was not suitable for employment.

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2. In this decision, I have considered the quoted portion of the hearing transcript only for purposes of evaluating the appellant's credibility. While the appellant's testimony might arguably constitute an example of dishonest conduct that could be the basis for a finding of unsuitability, I find that I am precluded from considering

it as such in this appeal because the scope of my review is limited to the information available to OPM at the time it made the May 2001 decision. In this connection, I note in Prehoda v. Department of Homeland Security, 98 M.S.P.R. 418, ¶¶ 14-17, aff'd, 157 Fed. Appx.

The appellant's other arguments are unpersuasive.

In his closing brief, the appellant raises other issues that were not briefed prior to the hearing, such as claims under VEOA, and the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at 38 U.S.C. §§ 4301-4333) (USERRA). Nevertheless, I have not considered these arguments because the appellant, who was represented by counsel during this appeal, did not raise these issues during the prehearing conference, or object when I did not include these issues in my summary of the telephonic prehearing conference. See Gossage v. Office of Personnel Management, SE-0731-01-0261-I-4 (Gossage 4), AF, Tab 15; *Smart v. Department of the Army*, 105 M.S.P.R. 475, ¶ 11 (2007). Further, to the extent that he suggests OPM and/or OSHA made procedural errors of some kind in effecting the instant action, I find arguments of this kind are inapposite in a negative suitability appeal because the right to appeal such an action is only regulatory, and an agency's failure to properly effect an action of this kind does not raise the due process considerations involved with an adverse action. See 5 C.F.R. § 731.501; Smart, 105 M.S.P.R. 475, at ¶¶ 8-9 (finding that the administrative judge properly sustained the agency's constructive negative suitability determination, but remanding the appeal for further consideration of

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311 (Fed.Cir. 2005) (nonprecedential), the Board found that a negative suitability determination based on the applicant's lack of credibility in prior testimony could not be sustained because it was not based on one of the exclusive factors specified in

"OPM's suitability regulations at 5 C.F.R. § 731.202(b)." Arguably, Prehoda is factually distinguishable from the instant appeal, and its specific reference to 5 C.F.R. § 731.202(b) is questionable in light of the Board's decision in Nashkin. See Nashkin, 104 M.S.P.R. 604, at ¶¶ 3-4.
the appellant's discrimination claims). Given that the court's remand decision in this appeal ordered the Board to determine whether OPM's constructive negative suitability decision was supported by substantial evidence, I am precluded from finding that this action must not be sustained due to OPM's failure to adhere to its own regulations in effecting a "constructive" action. Cf. *Garcia v. Department of Homeland Security*, 437 F.3d 1322, 1341 (Fed. Cir. 2006)(in a constructive action case, even if jurisdiction is established under 5 U.S.C. § 7512, the merits of the case are determined by the agency's compliance with 5 U.S.C. § 7513(a)-(b)).

DECISION

OPM's action is AFFIRMED.

FOR THE BOARD: _____
Jeremiah Cassidy
Administrative Judge

APPENDIX B-4

Administrative Law Judge Decision

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
HENRY E. GOSSAGE,
Appellant,
v.
OFFICE OF PERSONNEL
MANAGEMENT,
Agency.
DOCKET NUMBER
SF-0731-13-0252-I-1
DATE: February 14, 2013

ORDER FORWARDING PETITION

This office has received the appellant's petition for appeal, a copy of which is being sent to the agency with this Order. After reviewing the substance of the petition, however, it appears that the appellant is not filing a new appeal but instead asking the Board to reopen his earlier appeals—including at a minimum *Gossage v. Office of Personnel Management*, Docket No. SE-0731-01-0261-I-5 (final order dated March 24, 2009)—on the grounds of fraud and newly discovered evidence. The appellant's references to Federal Rule of Civil Procedure 60, which governs relief from a judgment or order, also supports this characterization.

Fraud might be grounds for reopening an appeal under 5 C.F.R. § 1201.118. *See Anderson v. Department of Transportation*, 46 M.S.P.R. 341, 349 (1990). But any such

request must be made to the Board's headquarters in Washington, not the regional office. *See* 5 C.F.R. § 1201.112(a); *Miller v. U.S. Postal Service*, 82 M.S.P.R. 660, ¶ 9 (1999).

Accordingly, the petition for appeal is **FORWARDED** to the Board's headquarters to be processed as a request to reopen the appellant's earlier appeals. The petition will not be further processed as a new appeal at the regional office, and the appeal that was opened under this docket number will be closed administratively.

FOR THE BOARD: _____

Benjamin Gutman
Administrative Judge

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