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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NOTE: This order is nonprecedential.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.

MERIT SYSTEMS PROTECTION BOARD,
Respondent

2021-1559

Petition for review of the Merit Systems Protection
Board in No. SE-0731-01-0261-M-1.

ON MOTION

PER CURIAM.

O R D E R

In response to the court's February 24, 2021 order to show cause, the Merit Systems Protection Board urges dismissal of this petition for review as untimely. Henry E. Gossage opposes dismissal.

Mr. Gossage's petition filed at this court indicates that he seeks judicial review of an August 25, 2006 decision of an administrative judge of the Merit Systems Protection Board in SE-0731-01-0261-M-1, which on September 29, 2006 became the Board's final decision in that matter.

Section 7703(b)(1)(A) of title 5 of the U.S. Code states that a petition for review from the Board “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). In his response to this court’s show cause order, Mr. Gossage argues that the cause of his untimeliness and delay in seeking judicial review was the result of misconduct on the part of the Office of Personnel Management.

This court has held that section 7703(b)(1)(A)’s deadline is jurisdictional and not subject to equitable tolling. *See Fedora v. Merit Sys. Prot. Bd.*, 848 F.3d 1013, 1016 (Fed. Cir. 2017) (confirming that § 7703(b)(1)(A)’s deadline is jurisdictional). Thus, we may only consider whether the petition for review was timely filed at this court and can not toll the deadline based on Mr. Gossage’s personal circumstances. Because the petition here was received outside of the 60-day filing deadline, we must dismiss.

Accordingly,

IT IS ORDERED THAT:

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

April 20, 2021
DATE

S24

FOR THE COURT

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

APPENDIX A-2

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

HENRY GOSSAGE, *Petitioner*

v.

MERITS SYSTEMS PROTECTION BOARD, *Respondent*

2021-1559

Petition for review of the Merit Systems Protection
Board in No. SF-0731-01-0261-M-1.

ON MOTION

PER CURIAM.

O R D E R

Henry E. Gossage submits a motion to vacate. This court considers whether to dismiss the petition for review.

Mr. Gossage's petition filed at this court on December 28, 2020 indicates that he is seeking judicial review of an August 25, 2006 decision of an administrative judge of the Merit Systems Protection Board in SE-0731-01-0261-M-1, which

appears to have become the Board's final decision in that matter on September 29, 2006.

Section 7703(b)(1)(A) of title 5 of the U.S. Code states that a petition for review from the Board "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). This court has held that deadline is jurisdictional and not subject to equitable tolling. *See Fedora v. Merit Sys. Prot. Bd.*, 848 F.3d 1013, 1016 (Fed. Cir. 2017) (confirming that § 7703(b)(1)(A)'s deadline is jurisdictional).

Accordingly,

IT IS ORDERED THAT:

- (1) Mr. Gossage's motion is held in abeyance.
- (2) The parties are directed to show cause, within 30 days of the date of filing of this order, why this petition should not be dismissed as untimely.
- (3) The briefing schedule is stayed.

FOR THE COURT

February 24, 2021

Date

/s/ Peter R. Marksteiner

APPENDIX A-3

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition
is not citable as precedent. It is a public record.

United States Court of Appeals for the Federal Circuit

05-3155

HENRY E. GOSSAGE,

Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

DECIDED: January 25, 2006

Before NEWMAN, MAYER, and SCHALL, Circuit Judges.
NEWMAN, Circuit Judge.

Henry E. Gossage seeks review of the decision of the Merit Systems
Protection Board, Docket No. SE0731010261-I-2, dismissing on grounds of mootness
and collateral estoppel, his appeal of a May 2001 decision by the Office of Personnel
Management

- (i) disqualifying him from an industrial hygienist position with the
Occupational Safety and Health Administration,
- (ii) cancelling 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.

OPM requests remand. We agree that remand of this appeal is appropriate. The dismissal is vacated, and the case is remanded to the MPSB for further proceedings consistent with this opinion.

DISCUSSION

On April 22, 2002, the Administrative Judge granted OPM's motion to dismiss the appeal that Mr. Gossage had filed from OPM's debarment. In that motion OPM stated that it was withdrawing its debarment of Mr. Gossage 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 AJ 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 Mr. Gossage's prior felony conviction and incarceration, consideration of whether this action should be sustained was precluded by collateral estoppel.

The AJ's collateral estoppel ruling was grounded in the fact that an earlier unsuitability decision, based on the same conviction and incarceration, had been sustained in a prior appeal to the Board with respect to a different application for employment as an industrial hygienist. Since the existence of the conviction and incarceration were not disputed, the AJ 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 AJ therefore dismissed the appeal. The full Board split (one to one) on the disposition of Mr. Gossage's appeal, although the Members of the Board agreed as to certain subsidiary findings. Thus the AJ's decision became the final decision of the Board.

I

On this appeal, OPM argues that the administrative judge erred in refusing to review whether the disqualification of Mr. Gossage for the industrial hygienist position was a constructive suitability determination. OPM states that the issue of suitability, not merely the existence of the conviction and incarceration, was properly before the AJ, and that the AJ misinterpreted 5 C.F.R. §731.501 in the same manner as did the AJ in *Folio v. Office of Personnel Management*, 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." OPM thus requests remand to the MSPB for 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." OPM also states that on remand the Board "should address and decide Mr. Gossage's discrimination claims."

Mr. Gossage protests that this request for a remand is tardy, having been raised for the first time in OPM's responsive brief on this appeal. He asks this court to review, and decide, the question of whether his 1992 felony conviction and incarceration outweigh his veterans status and professional qualifications for the position for which he applied. He states that when OPM rescinded its unsuitability determination, that ended its opportunity and right to challenge the grounds of the pass-over.

OPM's January 14, 2002 Motion to Dismiss included the following statement:

OPM's unilateral determination to withdraw its negative suitability rating and reinstate Appellant's eligibility for competitive registers completely rescinds the action appealed and there is no further relief that may be granted.

Mr. Gossage states that OPM is now estopped from arguing that he is not suitable for the industrial hygienist position, in view of its withdrawal of its negative suitability rating and concession that such withdrawal "completely rescinds the action appealed." See *Davis v. Wakelee*, 156 U.S. 680, 689 (1895) (the doctrine of judicial estoppel provides that a party that successfully urged a particular position in a legal proceeding is estopped from taking a contrary position in a later proceeding where its interests have changed).

However, OPM's notice of withdrawal further stated that notwithstanding its withdrawal of the debarment and cancellation of eligibility:

OPM's decision sustaining the Occupational Safety & Health Administration's (OSHA) objection to certifying Appellant as eligible for the Industrial Hygienist position and granting OSHA's request for permission to pass over him in filling that position remains intact.

Although in moving for dismissal OPM stated that its unilateral determination to withdraw its negative suitability rating and to reinstate Mr. Gossage's eligibility for competitive registers completely rescinded "the action appealed," OPM had contended that Mr. Gossage had only appealed "OPM's determination of unsuitability and cancellation of his eligibility on competitive registers." OPM did not concede that the decision to disqualify him was an appealable constructive negative suitability determination rather than a non-appealable non-selection decision. Neither of the two members of the Board took that position, and the record is to the contrary, for OSHA and OPM repeatedly stated their concerns about the extent to which Mr. Gossage's criminal record, incarceration, and false statements in connection with his prior applications, would limit his effectiveness in the industrial hygienist position, since OSHA's compliance safety and health officers are routinely called on to testify in court. We conclude that OPM's rescission of its cancellation of Mr. Gossage'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.

II

Mr. Gossage also argues that it is highly inappropriate for OPM now to bring forth, in its brief to this court, the question of whether he did or did not complete the restitution payments to the victim of his crime as required by his felony conviction, stating that this was not in the MSPB record. However, OPM specifically referred to this alleged failure to make restitution in its May 16, 2001 decision here

appealed. Although OPM withdrew its cancellation of debarment from competition, as discussed supra, it maintained its decision to rate Mr. Gossage ineligible for the industrial hygienist position, a decision that OPM justified in part by Mr. Gossage's failure to make restitution.

III

Thus we agree with OPM that remand is now appropriate, for 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. The Board erred in holding that collateral estoppel resolved this issue, for collateral estoppel requires, *inter alia*, that the issue is identical to that presented in the prior action. See *Thomas v. Gen. Servs. Admin.*, 794 F.2d 661, 664 (Fed. Cir. 1986). Although the criminal conviction remains on the record, there are additional considerations in a suitability determination, including subsequent good behavior. See 5 C.F.R. §731.202(c) (among the considerations in a suitability determination are the "recency of the conduct" and the "absence or presence of rehabilitation").

IV

We also agree that remand is required for consideration of Mr. Gossage's discrimination claims. Mr. Gossage has outstanding discrimination claims, and OPM's rescission of its cancellation of eligibility and general debarment from competition do not resolve this issue.

APPENDIX A-4

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF
WASHINGTON AT TACOMA

Case No. C04-5669RJB

HENRY E. GOSSAGE, Plaintiff

v.

OFFICE OF PERSONNEL MANAGEMENT, and U.S. DEPARTMENT OF LABOR,
Defendants.

ORDER ON PLAINTIFF'S MOTION FOR RECONSIDERATION, DEFENDANTS'
MOTION TO DISMISS AND FOR SUMMARY JUDGMENT, PLAINTIFF'S
APPLICATION FOR COURT-APPOINTED COUNSEL IN TITLE VII ACTION,
PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT, AND
PLAINTIFF'S MOTION FOR SANCTIONS

This matter comes before the court on plaintiff's Motion for Reconsideration. Dkt. 29. The court has reviewed all pleadings and exhibits filed in support of and in opposition to the Motion for Reconsideration, and the remainder of the record herein.

PROCEDURAL AND FACTUAL BACKGROUND

On October 8, 2004, plaintiff filed this case against the Office of Personnel (OPM) Management and U.S. Department of Labor (DOL), alleging that he is over forty years old, is Japanese-American, is a compensable disabled veteran, and is a person with physical disabilities; that he was employed by the State of Washington Department of Labor and Industries as an Industrial Hygienist Compliance Officer in the early 1990s; that he served three years in prison and was released in 1995;

that he sought federal employment in 1995, and was denied employment by OPM because of its "negative suitability determination"; that OPM "debarred plaintiff from federal employment for a period of two and one-half years, which ended July 21, 2000"; that, following expiration of the period of debarment, he sought employment with the Occupational Safety and Health Administration of the Department of Labor (OSHA) in September of 2000, but the job was not offered to him, even though the other two candidates were offered and then declined the position; that, based on score, education and experience, plaintiff was the highest ranking applicant of the three for this position; that OSHA obtained permission from OPM to pass over plaintiff for this position; that OPM determined that plaintiff was unsuitable for federal employment and issued a debarment for an additional three years; that plaintiff appealed OPM's decision to the Merit System Protection Board (MSPB); that OPM withdrew its negative suitability determination for federal employment yet maintained that its decision to permit OSHA to pass him over was correct; and that, as of September 27, 2004, the MSPB could not agree as to the resolution of this case. Dkt. 1. In his complaint, plaintiff claims that his civil rights were violated when defendants discriminated against him and failed to honor federally mandated veterans' preferences, in violation of 42 U.S.C. § 1981, 42 U.S.C. § 1981a, and 42 U.S.C. § 1983, 5 C.F.R. Section 731.103(d) and 731.501, 5 U.S.C. § 2302, 42 U.S.C. § 2000(e)-16, 5 U.S.C. § 1221(a), 29 C.F.R. § 1401.101, 102, and 103, 28 U.S.C. § 2509, 38 U.S.C. § 4301, et seq., and 5 U.S.C. § 330(a). Dkt. 1, at 6-7. In the complaint, plaintiff stated that "[t]his is a mixed

Board case, encompassing discrimination and non-discrimination issues.” Dkt. 1, at 4.

On December 8, 2004, plaintiff filed an application for appointment of counsel in a Title VII case (Dkt. 15) and a Motion for Sanctions (Dkt. 16). Defendants filed a motion to dismiss and for summary judgment (Dkt. 8), and plaintiff filed a cross-motion for summary judgment (Dkt. 14).

In their motion to dismiss and motion for summary judgment, defendants contended in part that this court lacked jurisdiction over the Department of Labor and the Office of Personnel Management, the only named defendants in this case. Dkt. 8, at 4-5. On January 5, 2005, the court issued an order (hereafter, the January 5, 2005 Order), granting Defendants’ Motion to Dismiss and for Summary Judgment (Dkt. 8), denying plaintiff’s Application for Court-Appointed Counsel in Title VII Action (Dkt. 15), denying plaintiff’s Cross-Motion for Summary Judgment (Dkt. 14), and denying plaintiff’s Motion for Sanctions (Dkt. 16). Dkt. 25.

At the time the court issued the January 5, 2005 order, plaintiff’s response to defendants’ motion to dismiss and for summary judgment had been received by the court but not yet docketed by the Clerk; accordingly, at the time the January 5, 2005 order was issued, the court had not reviewed plaintiff’s response. The response stated as follows:

Counsel raised a lack of jurisdiction (page 4) issue. The information provided from the MSPB seems to contradict Seder (Appendix B). This information indicates the Agency and not the director should be served and 5 U.S.C. § 7703(b)(2) [sic] in part states, applicant for employment

seeks review of a final order or decision on the merits on the underlying personnel action or on a request for attorney fees, in which case the agency responsible for taking the personnel action shall be the respondent.

Further, pursuant to 29 C.F.R. § 1614.310(b), an individual who has a complaint processed pursuant to 5 CFR part 1201, subpart E or this subpart is authorized by 5 U.S.C. § 7702 to file a civil action in the appropriate United States District Court.

Dkt. 14, at 1-2 (emphasis in plaintiff's document). Plaintiff's response also included documents related to his case before the Merit Systems Protection Board (MSPB). The court reviewed plaintiff's response, including the MSPB documents plaintiff filed, and issued a Supplemental Order, affirming the court's January 5, 2005 order, with correction of one factual issue. Dkt. 27.

On January 10, 2005, plaintiff filed a Motion for Reconsideration, which is now before the court. Along with the motion for reconsideration, plaintiff filed additional documents related to the MSPB case. Dkt. 29. Defendants filed a response to the motion for reconsideration, and provided additional documents related to the MSPB case.

MOTION FOR RECONSIDERATION

In his Motion for Reconsideration, plaintiff requests that the court reconsider the January 5, 2005 order, arguing that (1) defendants have produced no evidence supporting their motion for summary judgment; (2) the court's refusal to grant plaintiff the opportunity for discovery and production of documents places a burden on him, a pro se plaintiff; (3) this court has jurisdiction to consider plaintiff's appeal of the MSPB decision because plaintiff has pled claims of discrimination and claims

regarding his rights as a veteran, pursuant to VEOA and USERRA; and (4) plaintiff exhausted his administrative remedies prior to filing the civil action in this district court. Dkt. 29.

In response to the motion for reconsideration, defendants contend that (1) the district court is without jurisdiction to consider plaintiff's appeal of the MSPB decision because MSPB appeals must be filed in the Court of Appeals for the Federal Circuit and plaintiff has no viable discrimination claim because he failed to exhaust administrative remedies; and (2) to the extent that the filing of this civil action equitably tolled an appeal of the MSPB's September 27, 2004 decision, plaintiff's allegations of discrimination under the VEOA and the USERRA are not ripe because he failed to exhaust his administrative remedies. Dkt. 37.

The court requested further briefing of the parties related to this court's jurisdiction over the MSPB decision; the parties timely responded to the court's request.

Local Rule CR 7(h) provides in relevant part as follows:

Motions for reconsideration are disfavored. The court will ordinarily deny such motions in the absence of a showing of manifest error in the prior ruling or a showing of new facts or legal authority which could not have been brought to its attention earlier with reasonable diligence.

In the January 5, 2005 order, the court ruled on multiple issues, based upon the that was before the court at that time. Since that time, both parties have submitted record documents related to proceedings before the MSPB. As the proceedings developed, the MSPB proceedings have come to the forefront. It now appears to the court that plaintiff is attempting to appeal the September 27, 2004

decision of the MSPB, in addition to prosecuting other claims involving discrimination. Plaintiff believes that this is a "mixed case," involving an appeal of the MSPB decision in addition to a civil action raising claims of discrimination.

Based upon the arguments of the parties and review of all of the documents filed in this case, the court now has a more well developed picture of the claims, the factual and procedural context, and arguments related to the claims. At issue is whether the court has jurisdiction over the claims in this case. That issue must be resolved before the court can rule on defendant's motion to dismiss and for summary judgment. Accordingly, plaintiff's Motion for Reconsideration should be granted. The court should vacate the January 5, 2005 and January 7, 2005 orders. The court should determine whether this court has jurisdiction over this case.

MOTION TO APPOINT COUNSEL

As a preliminary matter, the court should decide whether plaintiff is entitled to court-appointed counsel. On December 8, 2004, plaintiff filed a request for appointment of counsel in a Title VII action. Dkt. 15. Pursuant to 42 U.S.C. § 2000e-5(f)(1), "[u]pon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security." In deciding whether to appoint counsel in a Title VII case, the court assesses the applicant's financial resources, efforts the applicant has already made to secure counsel, and whether the claim has merit. *Bradshaw v. Zoological Society of San Diego*, 662 F.2d 1301 (9th Cir. 1981). Plaintiff has not made a

sufficient showing that he is unable to afford counsel in these proceedings. See Dkt. 15, Financial Affidavit, & Dkt. 40. Although plaintiff's counsel in the MSPB proceedings is deceased, plaintiff has not shown that he has attempted to retain other counsel. Plaintiff is well able to articulate his claims and place issues before the court. Finally, as discussed below, the court does not have jurisdiction over the claims in this case. Plaintiff's request for appointment of counsel should be denied without prejudice.

JURISDICTION

On June 18, 2001, plaintiff appealed to the MSPB from OPM's May 16, 2001 decision finding him unsuitable for Federal employment and debarring him for two years. In that appeal, plaintiff claimed that OPM committed harmful procedural errors regarding collateral estoppel and res judicata, lack of nexus between his 1992 conviction and his job, and violation of OPM and FPIC policy. Dkt. 37, Exh. 7. In addition, plaintiff stated that he was discriminated against because he was the best candidate; was qualified; was a disabled veteran, over age 40, Japanese, and a person with a disability; was not selected; and because the agency continued to [undecipherable]. Dkt. 37, Exh. 7.

On April 22, 2002, Administrative Judge (AJ) James H. Freed issued an Initial Decision, dismissing plaintiff's appeal. Dkt. 29, MSPB Initial Decision. Judge Freed concluded that OPM's general cancellation of eligibilities and general debarment from future consideration was mooted by OPM's reinstatement

decisions, and that the issue of OSHA's request to disqualify plaintiff was mooted by collateral estoppel. *Id.*

On May 14, 2002, plaintiff, through counsel, filed with the MSPB a petition for review of the Initial Decision of the AJ. Dkt. 37, Exh. 6. In his petition for review, plaintiff argued that collateral estoppel did not render moot the issues of suitability for the position of industrial hygienist for which plaintiff was disqualified; that the initial decision did not address plaintiff's discrimination claims and his right to a veteran's preference in Federal employment; that the case was not rendered moot because plaintiff was not made whole by the agency's action; that the agency's action was not complete; and that plaintiff did not consent to the nonsuitability finding as it related to the industrial hygienist job for which he was qualified. Dkt. 37, Exh. 6, at 4.

On September 27, 2004, the MSPB issued its decision on plaintiff's petition for review. That decision included a separate opinion of one Board member that provides a factual and procedural context for plaintiff's claims, as follows:

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, M.S.P.R. 651 (1998) (Table), review dismissed, 215 F.3d 1340 (Fed.Cir. 1999) (Table); IAF, 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 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 21. 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 debaring 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.

The appellant filed an appeal of OPM's May 16, 2001 decision finding him unsuitable for Federal employment and debaring him for two years. IAF, Tabs 2, 3. 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 tendered 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.

Dkt. 14, Exh. D., Separate Opinion of Neil A.G. McPhie, at ¶¶ 2-4.

The two MSPB members, Neil A.G. McPhie and Susanne T. Marshall, could not agree on the disposition of the petition for review, and therefore the AJ's initial decision became final. *Id.* Dkt. 29, September 27, 2004 decision of the MSPB.

At the time defendants filed the motion to dismiss and for summary judgment, the basis for plaintiff's claims and the procedural context in which the claims were raised, were murky. As the record developed, the basis for the claims became more clear. It now appears to the court that plaintiff is attempting to appeal the MSPB decision and to allege claims of discrimination. Plaintiff claims that this is a "mixed case," involving an appeal of the MSPB decision and allegations of discrimination under various veterans' preference statutes, and on the basis of race and disability. Plaintiff alleges that, because this is a mixed case, the district court has jurisdiction over all of his claims, including the appeal of the MSPB decision.

A review of the federal court's jurisdiction is a threshold question which must be answered prior to the disposition of each case before it. See Fed. R. Civ. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."). Lack of jurisdiction is a threshold issue that must be raised sua sponte. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998). Jurisdiction is an issue at all stages of the proceedings. *Chicago, Burlington & Quincy Ry. v. Willard*, 220 U.S. 413 (1911).

A federal employee or applicant for employment, may submit an appeal to the MSPB from any action that is appealable to the MSPB under any law, rule, or regulation. 5 U.S.C. § 7701(a). Suitability determinations by OPM are appealable to the MSPB. 5 C.F.R. § 731.501. The MSPB may hear an appeal or may refer the

case to an administrative law judge or other employee. 5 U.S.C. § 7701(b)(1). Once the AJ issues an initial decision in the case, the employee or applicant may file a petition for review by the three member Board of the MSPB. *Sloan v. West*, 140 F.3d 1259. A petition for judicial review of an adverse MSPB decision shall be filed in the United States Court of Appeals for the Federal Circuit within 30 days of the final decision of the Board. 5 U.S.C. § 7703(b)(1).

A person who alleges that an agency violated the Uniformed Services Employment and Reemployment Rights Act (USERRA) or the Veterans Employment Opportunity Act (VEOA) may also appeal to the MSPB. 38 U.S.C. § 4324. Judicial review of such an MSPB decision is also with the United States Court of Appeals for the Federal Circuit, in accordance with 5 U.S.C. § 7703. See 38 U.S.C. § 4324(d)(1).

When a federal employee claims he or she has been affected by both an adverse employment action and a related Title VII violation, administrative remedies may be exhausted for Title VII purposes by asserting both claims before the MSPB. *Sloan v. West*, 140 F.3d at 1259, citing *McAdams v. Reno*, 64 F.3d 1137, 1141 (8th Cir.1995).

This type of case constitutes the paradigmatic "mixed case complaint," that is, a complaint which alleges the employee suffered an adverse employment action that was affected, in whole or in part, by unlawful discrimination. 29 C.F.R. § 1614.302 (1997). A "mixed case appeal" is a case determined by the Board to be within its jurisdiction; namely, a case which presents an appealable non-discrimination claim coupled with a discrimination claim. 29 C.F.R. § 1614.302(a)(2) (1997).

Sloan v. West, 140 F.3d at 1259.

The district court has jurisdiction over an appeal from a decision by the MSPB in a mixed case appeal. See 5 U.S.C. § 7703(b)(2); *Coons v. Secretary of U.S. Dept. of Treasury*, 383 F.3d 879 (9th Cir. 2004); *Ballentine v. MSPB*, 738 F.2d 1244, 1245 (Fed.Cir.1984). The district court does not have jurisdiction over an appeal that is not a mixed case appeal.

In this case, the AJ issued an initial decision dismissing plaintiff's appeal as moot and on the basis of collateral estoppel, threshold issues that were resolved against plaintiff. The AJ did not address plaintiff's discrimination claims. Because the MSPB could not agree as to the disposition of the case, the initial decision of the AJ became the final MSPB decision. The final decision of the MSPB, issued September 27, 2004, resulted in a decision that dismissed plaintiff's appeal on procedural grounds and did not reach the merits of plaintiff's discrimination claims and veterans' rights claims. Therefore, any appeal of the MSPB decision here is not a "mixed case appeal," but is only an appeal from the MSPB's procedural ruling.

Plaintiff's discrimination claims are not properly before this federal district court. The September 27, 2004 MSPB decision resulted in dismissal of plaintiff's appeal of his suitability determination. The final decision of the MSPB regarding the mootness of plaintiff's appeal and collateral estoppel was appealable to the Federal Circuit. Only if the Federal Circuit were to reverse the September 27, 2004 MSPB decision, and only if the Federal Circuit were to remand the case to the MSPB, would it be possible for plaintiff to develop his discrimination claims and his veterans rights preference claims before the MSPB. Issues including whether

plaintiff properly raised discrimination and veterans preference claims, whether he properly exhausted administrative remedies, whether discovery is appropriate, and whether plaintiff is entitled to relief on the merits of his discrimination claims could be raised and ruled upon only if the matter were remanded to the MSPB by the Federal Circuit. Then, only if the MSPB rules against plaintiff on his discrimination claims, based upon a full record, could plaintiff file an appeal of such an adverse MSPB decision and allege discrimination claims as a mixed appeal within the jurisdiction of the federal district court. At this point, however, the federal court does not have jurisdiction over plaintiff's claims because the discrimination claims have not been exhausted before the MSPB.

When an individual timely files an appeal, but files it in the wrong forum, the court can transfer the case to another court if this court determines that it is in the interest of justice to do so. 28 U.S.C. § 1631; *Afifi v. United States Department of Interior*, 924 F.2d 61 (4th Cir. 1991); *Hayes v. Postmaster General*, 868 F.2d 328 (9th Cir. 1989). Defendant contends that an appeal of the September 27, 2004 MSPB decision should be dismissed without prejudice rather than transferred to the Federal Circuit. The court disagrees. Plaintiff raised his discrimination and veterans' rights claims in his MSPB appeal. Those claims were not resolved by the September 27, 2004 MSPB decision. The threshold issues of mootness and collateral estoppel are issues appealable to the Federal Circuit. Plaintiff should be afforded the opportunity to pursue his appeal in the proper forum. The court should transfer

this appeal to the Federal Circuit. This court, however, takes no position on whether the appeal is timely; that decision is for the Federal Circuit.

Because this court does not have jurisdiction over the claims in this case, defendants' motion to dismiss and for summary judgment and plaintiff's cross motion for summary judgment should be stricken.

Plaintiff has filed a motion for sanctions, requesting that the court grant his motion for summary judgment and assess money damages against the federal government for bad faith conduct for the purpose of harassing him. Dkt. 16. Plaintiff contends that defendants' counsel misinformed the court about a prior proceeding; raised frivolous arguments; fabricated inaccurate conclusions from the facts; multiplied proceedings in this court; wasted judicial resources; and intentionally failed to serve plaintiff with several pleadings, requiring that plaintiff personally file the response to defendants' motion to dismiss and for summary judgment. Id.

Under Fed.R.Civ.P. 11, sanctions must be imposed on the signer of a paper if either the paper is filed for an improper purpose, or the paper is frivolous. See *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 832 (9th Cir.1986). Under 28 U.S.C. § 1927, "[a]ny attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees unreasonably incurred because of such conduct."

The court has carefully reviewed the pleadings in this case. Plaintiff has not made a showing sufficient to warrant Rule 11 sanctions against defendants. It does not appear that plaintiff has registered to access the court's electronic filing system; nonetheless, he was not prejudiced by any alleged failure to serve him by mail since the court has considered plaintiff's response to defendants' motion to dismiss and for summary judgment, even though it was not timely filed. Further, defendants' arguments are not frivolous. Finally, the record does not show that defendants' counsel multiplied the proceedings in this case unreasonably and vexatiously. Plaintiff's motion for sanctions should be denied.

Therefore, it is hereby

ORDERED that Plaintiff's Motion for Reconsideration (Dkt. 29) is GRANTED. Plaintiff's Application for Court-Appointed Counsel in Title VII Action (Dkt. 15) is DENIED WITHOUT PREJUDICE. The court's January 5, 2005 Order on Defendants' Motion to Dismiss and for Summary Judgment, Plaintiff's Application for Court-Appointed Counsel in Title VII Action, Plaintiff's Cross-Motion for Summary Judgment, and Plaintiff's Motion for Sanctions (Dkt. 25) is VACATED. The court's January 7, 2005 Supplemental Order (Dkt. 27) is VACATED. Defendants' Motion to Dismiss and for Summary Judgment (Dkt. 8) is STRICKEN. Plaintiff's Cross-Motion for Summary Judgment (Dkt. 14) is STRICKEN. Plaintiff's Motion for Sanctions (Dkt. 16) is DENIED. **Because this court does not have jurisdiction over the claims in this case, and because it is in the interest of justice to transfer this case to the proper court, the**

case is hereby TRANSFERRED to the United States Court of Appeals for the Federal Circuit as an appeal of the September 27, 2004, decision of the Merit System Protection Board.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing pro se at said party's last known address. The Clerk is further directed to transfer this case to the United States Court of Appeals for the Federal Circuit.

DATED this 24th day of March, 2005.

Robert J. Bryan
United States District Judge

APPENDIX B-1
Merit Systems Protection Board Initial 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-M-1

DATE: August 25, 2006

Paul D. Doumit, Esquire, Olympia, 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 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) cancelling 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.

For the reasons set forth below, the appeal is DISMISSED WITHOUT REJUDICE.

DISMISSAL

Administrative judges have broad discretion to control the proceedings before them, and dismissal without prejudice is a procedural option committed to their sound discretion. *Hinton-Morgan v. Department of the Army*, 75 M.S.P.R. 382, 399 (1997). The Board has found that such dismissals are in accordance with the Board's policy of processing cases in an expeditious manner. *See Espinoza v. Department of the Navy*, 69 M.S.P.R. 679, 682 (1996). The Board has found an administrative judge may properly dismiss an appeal without prejudice to its later refiling if a party requests a lengthy continuance of the appeal. *See Milner v. Department of Justice*, 87 M.S.P.R. 660, ¶13 (2001). In this case, due to the appellant's recent decision to retain an attorney and the need for additional discovery, I find the parties need a minimum of 60 days before they proceed to hearing in this appeal. *See Refiled Appeal File (RAF)*, Tab 35. I find the parties need for additional time constitutes what is, in effect, a request for a continuance. The Board has found an administrative judge may properly dismiss an appeal without prejudice to its later refiling if the parties request a lengthy continuance of the appeal.

Therefore, in the interest of judicial economy, I dismiss this case without prejudice to its refiling.

DECISION

The Board will automatically refile the appeal on **October 3, 2006**.

FOR THE BOARD: Jeremiah Cassidy, Administrative Judge

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 34ligible, 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 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.**