

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

JOSHUA E. KAPPELMAN,
Appellant,

DOCKET NUMBER
CH-0731-10-0603-I-1

v.

DEPARTMENT OF THE TREASURY,
Agency.

DATE: December 14, 2010

THIS FINAL ORDER IS NONPRECEDENTIAL

Joshua E. Kappelman, Shiloh, Illinois, pro se.

Eileen R. Jimenez, Chicago, Illinois, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

The agency tentatively selected the appellant for the position of Special Agent, subject to, *inter alia*, the appellant's successful completion of a background investigation prior to appointment. *See* Initial Appeal File, Tab 6, Attachment C at 2. The agency later withdrew the appellant's tentative offer of employment based upon "unsatisfactory results" from his background investigation. Initial Appeal File, Tab 6, Attachment D. The agency based its decision on the appellant's perceived financial irresponsibility, as evidenced by the appellant's credit history, which included a bankruptcy and numerous other unsatisfied debts. *Id.* at 2. The appellant filed a timely appeal to the Board. Initial Appeal File, Tab 1. In her initial decision, the administrative judge dismissed the appeal for lack of jurisdiction, concluding that the appellant's non-selection for the single position of Special Agent was not an appealable suitability action. Initial Appeal File, Tab 8 at 1-3. On petition for review, the appellant claims that the administrative judge erred and that the agency discriminated against him, or committed harmful procedural error, by illegally rejecting him on the basis of his bankruptcy. Petition for Review File, Tab 1.

The administrative judge correctly concluded that the Board had no jurisdiction over the appellant's non-selection. Generally, an unsuccessful candidate for a federal civil service position has no right to appeal his non-selection. *Tines v. Department of the Air Force*, 56 M.S.P.R. 90, 93 (1992). Furthermore, while the Board has jurisdiction over certain matters involving "suitability" for federal employment, *see Upshaw v. Consumer Product Safety Commission*, 111 M.S.P.R. 236, ¶ 7 (2009), these are limited to "suitability actions" defined as a cancellation of eligibility, a removal, a cancellation of reinstatement eligibility, or a debarment. *See Kazan v. Department of Justice*, 112 M.S.P.R. 390, ¶ 6 (2009); 5 C.F.R. §§ 731.501(a), 731.203(a). In fact, OPM's regulations specify that a non-selection for a specific position is not a "suitability action," even if it is based on the criteria for making suitability determinations set forth at 5 C.F.R. § 731.202. *Kazan*, 112 M.S.P.R. 390, ¶ 6;

5 C.F.R. § 731.203(b); *see also Upshaw*, 111 M.S.P.R. 236, ¶ 8 (under the current regulations, “denial of appointment” is not on the list of actions appealable to the Board).

The decision letter here simply withdraws the appellant’s tentative job offer for the position of Special Agent. Initial Appeal File, Tab 6, Attachment D. The Board has indicated that such a non-selection does not amount to a suitability action within the Board’s jurisdiction. *See generally Kazan*, 112 M.S.P.R. 390, ¶ 7 (the agency decision that the appellant was ineligible for the position of Aviation Security Officer appears outside the Board’s jurisdiction); *see also Alvarez v. Department of Homeland Security*, 112 M.S.P.R. 434, ¶¶ 3, 8 (2009) (agency decision finding the appellant unsuitable for Customs and Border Protection Officer position appears outside the Board’s jurisdiction); *Rodriguez v. Department of Homeland Security*, 112 M.S.P.R. 446, ¶¶ 2, 10 (2009) (agency decision finding the appellant unsuitable for Customs and Border Protection Agricultural Specialist position appears outside the Board’s jurisdiction).

Significantly, the agency did not take any broader action regarding the appellant’s eligibility for federal positions, such as debarment or canceling any other eligibilities on other existing competitive registers. *See, e.g., Riggsbee v. Office of Personnel Management*, 111 M.S.P.R. 129, ¶ 2 (2009) (referring to OPM’s cancellation of eligibilities “on existing competitive registers”); *Sazegari v. Office of Personnel Management*, 101 M.S.P.R. 254, ¶ 2 (2006) (noting that OPM rated the appellant ineligible for the position of Immigration Inspector and cancelled any other eligibilities he may have obtained). Indeed, the opposite appears true, as the agency’s e-mail correspondence with the appellant states that he may apply for the next open position. *See* IAF, Tab 6, Attachment G at 1. Therefore, the agency’s action is a simple non-selection for a specific position, an action outside the Board’s jurisdiction. *See* 5 C.F.R. § 731.203(b).

As to the appellant’s discrimination and harmful procedural error claims, neither claim provides a basis for Board jurisdiction. *See generally Tardio v.*

Department of Justice, 112 M.S.P.R. 371, ¶ 31 (2009) (a claim of agency discrimination does not provide an independent source of Board jurisdiction); *Deans v. Department of Labor*, 15 M.S.P.R. 326, 327 (1983) (a claim that the agency committed a harmful procedural error is an affirmative defense that does not create an independent source of Board jurisdiction).

While not raised by the appellant on petition for review, we do note one error in the administrative judge's initial decision. The administrative judge failed to provide the appellant with adequate information regarding how he could establish the Board's jurisdiction over his non-selection as a suitability action under the OPM regulations. *See* Initial Appeal File, Tab 2 at 2. This was error. *See Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643-44 (Fed. Cir. 1985) (an appellant must receive explicit information on what is required to establish an appealable jurisdictional issue). However, the agency's jurisdictional response and the initial decision cured the omission by providing the necessary information to the appellant. *See* Initial Appeal File, Tab 6 at 4-7; Tab 8 at 2-4; Petition for Review File, Tab 3 at 6 n.3. Thus, the administrative judge's *Burgess* error was harmless. *See Harris v. U.S. Postal Service*, 112 M.S.P.R. 186, ¶ 9 (2009) (the necessary jurisdictional notice may be provided by the agency pleadings or the initial decision).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review. Except as modified by this final order, the initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

**NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS**

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

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

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's

"Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board

Washington, D.C.