UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

94 MSPR 632

ARMANDO A. MERINO,
Appellant,

v.

DEPARTMENT OF JUSTICE,
Agency.

DOCKET NUMBER
SF-0731-01-0423-I-1

DATE: September 30, 2003

Armando A. Merino, Calexico, California, pro se.

Carolyn D. Jones, Esquire, South Burlington, Vermont, for the agency.

BEFORE

Susanne T. Marshall, Chairman
Neil A. G. McPhie, Member

Chairman Marshall and Member McPhie both issue concurring opinions.

OPINION AND ORDER

¶1 The agency petitions for review of an initial decision that reversed its finding that the appellant was unsuitable for employment. For the following reasons, we GRANT the agency's petition, REVERSE the initial decision, and SUSTAIN the agency's negative suitability finding.

BACKGROUND

¶2 On January 3, 2001, the agency's Immigration & Naturalization Service (INS), after a background investigation by the Office of Personnel Management (OPM), charged the appellant, an applicant for a Border Patrol Agent (Trainee)

position, with being unsuitable for employment. Appeal File (AF), Tab 3, Subtab 2C. The charges were: (1) Criminal or dishonest conduct related to the duties to be assigned the applicant or appointee; and (2) intentional false statement or deception or fraud in examination or appointment. *Id.* Under the "Criminal or Dishonest Conduct" charge, the agency alleged that the appellant pled guilty to a criminal charge of driving under the influence of alcohol in December 1996, while under the age of eighteen, attended and completed a twelve-step program with Alcoholics Anonymous (AA), pled guilty in mid-1998 to criminal charges of possession and sale of marijuana, smoked marijuana one time in June 1989, one time every two weeks from late 1991 to mid-1992, two to three times per week from April 1995 to June 1995, and three times from June 1995 to mid-1997, and smoked PCP cocaine thirteen to fifteen times between March 1997 and May 1997. *Id.* After the appellant did not respond to the proposal, the agency determined that employing the appellant would not promote the efficiency of the service; the agency therefore rated his application ineligible, and withdrew its tentative employment offer. *Id.*, Subtab 2B.

¶3 The appellant filed a petition for appeal asserting, among other things, that he had grown and matured, he is now a husband and a father, he has received a high school diploma, and he is going to receive an "AA" in Administration of Justice in early 2001. *Id.* Based on the written record, because the appellant did not request a hearing, the administrative judge (AJ) reversed the agency's action. AF, Tab 6 (ID). The AJ did not sustain the charge of "Criminal or Dishonest Conduct" based on a finding that the appellant was motivated and committed to his continuing efforts to rehabilitate himself and to separate himself from the indiscretions of his youth, which he willingly revealed to OPM and the agency; the AJ therefore found that the agency did not establish an ongoing pattern of conduct that would be incompatible with or interfere with the duties of a Border Patrol Agent (Trainee). AF, Tab 6 (ID) at 5. The AJ also did not sustain the

"Intentional False Statement" charge which, as set forth below, *infra* ¶ 14, we need not address in this Opinion and Order. *Id*. at 5-7.

¶4 The AJ ordered the agency to cancel its suitability finding and return the appellant to the eligibility list for Federal employment. *Id*. The AJ also ordered the agency to provide interim relief, and noted that any petition for review filed by the agency must be accompanied by a certification that the agency has complied with the interim relief order. *Id*. at 8. The initial decision informed the parties that the Board would afford the agency an opportunity to submit evidence of its compliance "[i]f the appellant challenges this certification," and noted that if the agency's petition for review did not provide evidence of compliance in response to a Board order, the Board "may dismiss" the petition on that basis. *Id*.

ANALYSIS

The Board declines to dismiss the agency's petition for review for failure to provide certification that the agency complied with the interim relief order.

¶5 The agency has not submitted a certification of compliance with the interim relief order. Instead, the agency requests that the Board review the AJ's decision to order interim relief. The agency contends that cancellation of the suitability determination in this case, even on an interim basis, renders the suitability question moot by causing the appellant's placement on a list of eligibles for employment, from which he can be appointed as a Border Patrol Agent (Trainee) while the agency's petition is pending. The appellant has not responded to the petition for review or challenged the agency's failure to provide a certification of compliance with the interim relief order. The appellant also has not contested the agency's argument that the AJ should not have ordered interim relief.

¶6 If an employee or applicant for employment is the prevailing party in the initial decision, the employee or applicant shall be granted the relief provided in the initial decision effective upon the making of the decision and remaining in effect pending the outcome of any petition for review, unless, among other

things, "the deciding official determines that the granting of such relief is not appropriate." 5 U.S.C. § 7701(b)(2)(A)(i). As part of the initial decision, *see* 5 U.S.C. § 7701(b)(2); 5 C.F.R. § 1201.111(c), an interim relief order is subject to challenge on petition for review, *Brown v. U.S. Postal Service*, 54 M.S.P.R. 275, 277 (1991). Interim relief may not be appropriate in all Board cases in which the appellant prevails; rather, the determination as to whether such relief is proper must be made by balancing the benefits and burdens to the parties anticipated by compliance with the order. *Ginocchi v. Department of the Treasury*, 53 M.S.P.R. 62, 67 n.3 (1992), *disagreed with on other grounds, King v. Jerome*, 42 F.3d 1371, 1374 (Fed. Cir. 1994); *see, e.g., Evono v. Department of Justice*, 69 M.S.P.R. 541, 544 (1996) (when an appellant is receiving Office of Workers' Compensation Programs benefits at the time that an initial decision is issued, interim relief generally should not be ordered). However, where the initial decision granted interim relief, any petition for review filed by the agency must be accompanied by a certification that the agency has complied with the interim relief order. 5 C.F.R. § 1201.115(b)(1). Failure to provide such certification may result in dismissal of the agency's petition for review. 5 C.F.R. § 1201.115(b)(4).

¶7 Despite the fact that the agency has not provided certification that it has complied with the interim relief granted by the initial decision, the Board exercises its discretion not to dismiss the agency's petition for review on that basis. *See Byers v. Department of Veterans Affairs*, 89 M.S.P.R. 655, ¶ 13 (2001) (the Board may exercise its discretion and not dismiss an agency's petition for review even if the agency is in noncompliance with an interim relief order). As explained in the attached concurring opinions, the two Board members applied different analyses to arrive at this conclusion, but they agree that the agency's failure to submit a certificate of compliance should not result in the dismissal of the agency's petition for review under the circumstances of this case.

The initial decision is reversed.

¶8 OPM promulgated revised regulations governing suitability determinations. 65 Fed. Reg. 82,239 (2000). However, the revised regulations, which require the Board to remand the case to the agency if the Board sustains fewer than all the charges, do not apply to administrative proceedings pending on January 29, 2001. *Id*. at 82,246 (5 C.F.R. § 731.601, as revised). The administrative proceeding was pending on January 29, 2001, because the agency issued its notice of proposed action on January 3, 2001. AF, Tab 3, Subtab 2C; see 5 C.F.R. § 731.601. Therefore, we do not apply the revised suitability regulations in this case. *See Jordan v. Department of Justice*, 91 M.S.P.R. 635, ¶ 6 n.1 (2002).

¶9 The agency asserts, among other things, that the AJ erred in not sustaining the "Criminal or Dishonest Conduct" charge. It argues that in light of the nature of the Border Patrol Agent (Trainee) position, which is the nation's first line of defense against the importation of illegal drugs, it would be unconscionable for the agency to place the appellant in such a position of trust, given his recent history of illegally selling and using narcotics. We agree.

¶10 A suitability inquiry is directed toward whether the "character or conduct" of a candidate is such that employing him would adversely affect the efficiency of the service. 5 C.F.R. § 731.101 (2001). The agency makes its determination on the basis of whether the individual's conduct may reasonably be expected to interfere with, or prevent, efficient service in the position or effective accomplishment by the employing agency of its duties or responsibilities. 5 C.F.R. § 731.202(a)(1)-(2) (2001). Among the factors that may be considered in rendering a negative suitability determination is criminal or dishonest conduct related to the duties to be assigned to the applicant or appointee, or to that person's service in the position or the service of other employees. 5 C.F.R. § 731.202(b)(2) (2001). "Additional considerations" that agencies shall consider "to the extent that they deem these factors pertinent to the individual case," include the kind of position for which the person is applying, including the

degree of public trust or risk in the position; the nature and seriousness of the conduct; the circumstances surrounding the conduct; the recency of the conduct; the age of the person at the time of the conduct; and the absence or presence of rehabilitation or efforts toward rehabilitation. 5 C.F.R. § 731.202(c) (2001). The agency is required to support its determination by preponderant evidence. *Hurlbut v. Office of Personnel Management*, 36 M.S.P.R. 250, 257 (1988).

¶11 There is no dispute that the facts underlying the charge of "Criminal or Dishonest Conduct" have been proven by the agency. The appellant's convictions based on driving while intoxicated, and possession and sale of marijuana, are serious, as is his history of repeated illegal drug use. The position of Border Patrol Agent (Trainee) involves a high degree of public trust and risk, as the qualities of good judgment, honesty, trustworthiness, reliability, dependability, professionalism, and integrity are critical for the position. AF, Tab 3, Subtab 2C. Border Patrol Agents enforce the applicable laws and criminal code, take part in international boundary security operations, and facilitate the apprehension and expulsion of illegal aliens, prevention of unauthorized persons entering the United States, and promotion of crime detection and prevention at and near the borders of the United States. *Id.*, Subtab 4L. In sustaining a negative suitability determination involving an applicant for a Border Patrol Agent position, the Board has found that law enforcement officials occupy positions of substantial responsibility and trust, and may be held to a higher standard of conduct than other Federal employees. *Forbez v. Department of Justice*, 36 M.S.P.R. 185, 191 (1988). The Board has also held that in reviewing an applicant's suitability for employment, "it is permissible for the agency to consider the public trust in the agency in expressing its own level of trust and confidence in the appellant." *Richardson v. Resolution Trust Corp.*, 66 M.S.P.R. 302, 311 (1995). Thus, "[t]he public will not, and should not be expected to, place trust and confidence in a government employee found guilty of a criminal

misdemeanor, especially where the criminal activity relates to the role of the government agency." *Id.*

¶12 We further note that the appellant's most recent arrest occurred in May 1997, which resulted in his mid-1998 conviction for possession and sale of marijuana, and his last use of PCP cocaine also occurred in May 1997. AF, Tab 3, Subtabs 2E and 2F. This conduct occurred less than three years from the January 30, 2000 date of the appellant's completion of numerous agency application forms, AF, Tab 3, Subtabs 2F, 2G, 2H, 2I, and 2J, and less than four years from the agency's April 24, 2001 decision finding him unsuitable for employment, *id.*, Subtab 2B. Misconduct is considered "quite recent" when a criminal offense occurs only three years before the agency's unsuitability finding. *Buhl v. Office of Personnel Management*, 37 M.S.P.R. 305, 313 (1988).

¶13 Although the AJ relied upon the appellant's unsworn statement to find that he was motivated and committed to his continuing effort to rehabilitate himself, we are not persuaded that the appellant's statement, even if true, is enough to find that the agency did not prove its charge in this case. There is no indication, for example, that the fact that the appellant got married, had a child, completed high school, and attended college, is evidence *per se* of rehabilitation sufficient to overturn the agency's finding of unsuitability. While the AJ relied in part on the appellant's college attendance, ID at 4, the record provides limited and conflicting information about the appellant's attendance and performance in college, AF, Tab 3, Subtab 2E at 11 (although the appellant indicated during his background interview that he attended Imperial Valley College (IVC) since January 1998, he could not recall the number of credits he completed or his cumulative grade point average), and 13 (a student records technician informed the investigator that the appellant attended IVC since August 1998, and had earned 16.5 credits). Although the AJ relied upon the appellant's candid answers to OPM and the agency to find that he was motivated and committed to continuing efforts at rehabilitation, ID at 5, the appellant had an obligation to

provide truthful responses on those forms because they were certified as correct or signed under penalty of perjury. AF, Tab 3, Subtabs 2F, 2G, 2H, and 2I.

¶14 We find, under these circumstances, that the appellant's alcohol and drug convictions and illegal drug usage are related to the duties assigned to a Border Patrol Agent (Trainee), and may reasonably be expected to interfere with efficient service in that position. 5 C.F.R. § 731.202(a)(1) (2001). We therefore find that the agency has proven by preponderant evidence that its finding of unsuitability, based on the "Criminal or Dishonest Conduct" charge, will promote the efficiency of the service. 5 C.F.R. § 731.201 (2001); *see Leibowitz v. Department of Justice*, 88 M.S.P.R. 635, ¶¶ 13-14 (2001) (affirming a negative suitability determination when the applicant for an INS District Adjudications Officer position admitted that he allowed an illegal alien to reside with him), aff'd, 41 Fed. Appx. 412 (Fed. Cir. 2002); *Vannoy v. Office of Personnel Management*, 75 M.S.P.R. 170, 177 (1997) (a conviction for concealment of stolen property struck at the core of the appellant's job and the agency's mission, and was so egregious that it rendered him unsuitable for employment). In light of this finding, we need not address the agency's argument that the AJ erred in finding that it did not prove the "Intentional False Statement" charge. *See McClain v. Office of Personnel Management*, 76 M.S.P.R. 230, 235-41 (1997); *Katchmeric v. Office of Personnel Management*, 33 M.S.P.R. 118, 121-22 (1987).

¶15 Accordingly, we sustain the agency's finding that the appellant is unsuitable for employment in the position of Border Patrol Agent (Trainee), as well as its determination to rate the appellant's application for that position ineligible, and its withdrawal of its tentative offer of employment.

ORDER

¶16 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

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

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

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

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

FOR THE BOARD:

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Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.

CONCURRING OPINION OF SUSANNE T. MARSHALL

in

Armando A. Merino v. Department of Justice

MSPB DOCKET NO. SF-0731-01-0423-I-1

¶17 I concur in the result and the reasoning set forth in the majority opinion in this appeal. I write separately to express my views regarding the appropriateness of the interim relief order in this case.

¶18 As set forth in the majority opinion, an interim relief order is subject to challenge on petition for review, and the determination as to whether such relief is proper must be made by balancing the benefits and burdens to the parties anticipated by compliance with the order. Majority opinion, ¶ 6. With respect to a suitability appeal, the Board has held that when it reverses a negative suitability determination, and there has not been an appointment to the position, the proper remedy is to order the agency to both cancel the unsuitability rating and to return the affected applicant to the eligibility list for employment. *Lewis v. General Services Administration*, 54 M.S.P.R. 120, 123 (1992). However, when an administrative judge rules in favor of an applicant in a decision that is subject to further review by the Board, an order which places the applicant back on the eligibility list is problematic. Placement on the eligibility list during the interim relief period lays the foundation for appointment to the very position for which the agency has found the applicant unsuitable, even while the ultimate suitability question remains pending before the Board. Moreover, an appointment in the competitive service based on consideration the applicant received during the interim period could result in certain procedural protections and appeal rights being afforded to the applicant, *see*, *e.g.*, 5 U.S.C. § 7511(a)(1)(A), 5 C.F.R. § 315.806, even if the agency's original negative suitability determination is ultimately upheld by the Board. Thus, an appellant who receives interim relief in the form of placement on an eligibility list, and who therefore becomes eligible

for appointment to a position from that list, is in a position to receive more relief than that specified in the initial decision.

¶19 As set forth in the majority opinion, the appellant has not addressed the interim relief issue. Majority opinion, ¶ 5. Balancing the benefits and burdens to the parties anticipated by compliance with the interim relief order, *Gnocchi v. Department of the Treasury*, 53 M.S.P.R. 62, 67 n.3 (1992), *disagreed with on other grounds*, *King v. Jerome*, 42 F.3d 1371, 1374 (Fed. Cir. 1994), I find that the administrative judge should not have ordered interim relief in this case.[1] Accordingly, I conclude that the agency's failure to certify its compliance with the interim relief order should not result in the dismissal of its petition for review.

_____ _____

Date Susanne T. Marshall
Chairman

[1] This case does not present, and my concurring opinion does not address, whether interim relief, in the form of an interim appointment, should be ordered when an applicant for employment prevails in a corrective action case brought by the Office of Special Counsel (OSC), or in an individual right of action (IRA) appeal. *See Jordan v. Department of Justice*, 91 M.S.P.R. 635, ¶ 7 n.2 (2002) (the Board did not decide whether it is authorized under 5 U.S.C. §§ 1214(g) and 1221(g) to order the appointment of an applicant who has prevailed in a corrective action brought by OSC or in an IRA appeal).

CONCURRING OPINION OF NEIL A. G. MCPHIE

in

Armando A. Merino v. Department of Justice

MSPB DOCKET NO. SF-0731-01-0423-I-1

¶20 I concur in the opinion of the Board as to the disposition of this appeal and the determination not to dismiss the agency's petition for review for failure to provide interim relief. I write separately to state my rationale for finding that dismissal of the petition under the circumstances of this appeal is not warranted.

¶21 If an employee or applicant for employment is the prevailing party in a Board appeal, the employee or applicant shall be granted the relief provided in the initial decision effective upon the making of the decision and remaining in effect pending the outcome of any petition for review, unless, among other things, "the deciding official determines that the granting of such relief is not appropriate." 5 U.S.C. § 7701(b)(2)(A)(i). As part of the initial decision, *see* 5 U.S.C. § 7701(b)(2); 5 C.F.R. § 1201.111(c), an interim relief order is subject to challenge on petition for review, *Brown v. U.S. Postal Service*, 54 M.S.P.R. 275, 277 (1991). Here, the administrative judge (AJ) ordered interim relief, but the agency has not submitted a certification of compliance with the interim relief order. It argues that the AJ should not have ordered interim relief. The appellant has not responded to the petition for review or challenged the agency's failure to provide a certification of compliance with the interim relief order.

¶22 In *Lewis v. General Services Administration*, 54 M.S.P.R. 120, 122 (1992), the Board found that it was without authority to order that an individual be appointed to a position following the reversal of a negative suitability determination. The remedy, i.e., final relief, in such a case is to cancel the suitability determination and place the appellant's name on the list of eligibles for consideration in filling subsequent vacancies. *Id.* at 123. In the context of interim relief, however, I would find that the agency need not cancel the negative

suitability determination, just as in an appeal of a removal action, the agency is not required to cancel the removal decision as interim relief pending a decision by the full Board on the action. *See Nanette v. Department of the Treasury*, 92 M.S.P.R. 127, ¶ 13 n.1 (2002) (although the agency exceeded the requirements of the interim relief order by canceling the removal action, the Board would not dismiss the appeal as moot). I would also find that, because in a suitability appeal like this one the Board lacks authority to order the agency to place the employee in the position, an agency need not select and appoint during the interim relief period an appellant who has prevailed before the AJ in a suitability appeal.

¶23 Here, the agency could have and should have placed the appellant's name on the list of eligibles pursuant to the interim relief order. Doing so would not have rendered the appeal moot. *See Moscato v. Department of Education*, 72 M.S.P.R. 266, 270-71 (1996), *aff'd*, 155 F.3d 568 (Fed. Cir. 1998) (Table). Nevertheless, the interim relief of placing the appellant's name on the list of eligibles is little more than a tentative change in the documentation, pending the outcome of the appeal. Given that the nature of the relief available to this appellant is limited and that he has not requested under 5 C.F.R. § 1201.116(a) that the Board dismiss the agency's petition for failure to provide interim relief or even responded to the agency's argument on petition for review that the AJ should not have ordered interim relief, under the circumstances of this case, I agree with the Board's decision to exercise its discretion under 5 C.F.R. § 1201.115(b)(4) and decline to dismiss the agency's petition for failure to certify compliance with the interim relief order.

_____ _____

Date Neil A. G. McPhie
Member