

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
[REDACTED] REGIONAL OFFICE**

[REDACTED],
Appellant,

DOCKET NUMBER
[REDACTED]

v.

DEPARTMENT OF JUSTICE,
Agency.

DATE: October 14, 2009

ORDER TO SHOW CAUSE

JURISDICTION

The agency has moved to dismiss the instant appeal for lack of Board jurisdiction. Initial Appeal File (IAF), Tab 3. The Board's jurisdiction is limited to those matters over which it has been given jurisdiction by statute or regulation. *See* 5 U.S.C. § 7701(a); 5 C.F.R. § 1201.3(a); *Garcia v. Department of Homeland Security*, 437 F.3d 1322, 1327 (Fed. Cir. 2006) (en banc); *Saunders v. Merit Systems Protection Board*, 757 F.2d 1288, 1290 (Fed. Cir. 1985). The appellant has the burden of proving, by preponderant evidence,¹ that the Board has jurisdiction over his appeal. 5 C.F.R. § 1201.56(a)(2)(i). The Board will grant a hearing on the issue of jurisdiction only if the appellant makes non-frivolous allegations² to support Board jurisdiction (*i.e.*, claims that, if proven, establish

¹ A preponderance of the evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.56(c)(2).

² Non-frivolous allegations of Board jurisdiction are allegations of fact which, if proven, could establish a prima facie case that the Board has jurisdiction over the matter at issue. *See Ferdon v. U.S. Postal Service*, 60 M.S.P.R. 325, 329, (1994). The

the Board's jurisdiction). *Coradeschi v. Department of Homeland Security*, 439 F.3d 1329, 1332 (Fed. Cir. 2006) (citations omitted).

It is well-settled that, with exceptions not relevant here, the Board does not have jurisdiction to consider an applicant's nonselection for a vacant position. *See Brown v. Office of Personnel Management*, 91 M.S.P.R. 314, ¶ 7 (2002). Nor does the Board possess any general authority to review agency selection actions. *See Prewitt v. Merit Systems Protection Board*, 133 F.3d 885, 886 (Fed. Cir. 1998).

For an appointment to take effect, an authorized appointing officer must take an action that reveals his awareness that he is making a promotion or appointment in the United States civil service, and the affected employee must take some action denoting acceptance. *Deida v. Department of the Navy*, 110 M.S.P.R. 408, ¶ 13 (2009); *Watts v. Office of Personnel Management*, 814 F.2d 1576, 1580 (Fed. Cir.), *cert. denied*, 484 U.S. 913 (1987). In addition, an appointment that has been effected may still be revoked prior to the employee's entrance on duty or performance in the higher grade. *See National Treasury Employees Union v. Reagan*, 663 F.2d 239, 253 (D.C. Cir. 1981).

To establish Board jurisdiction over the cancellation of a promotion or appointment, the appellant must show that: (1) the promotion or appointment actually occurred; that is, that it was approved by an authorized appointing official aware that he or she was making the promotion or appointment; (2) the appellant took some action denoting acceptance of the promotion or appointment; and (3) the promotion or appointment was not revoked before the appellant actually performed in the position. *Deida*, 110 MSPR at ¶¶ 14, 16. The Board has held that once an appellant has made a prima facie case of jurisdiction by

allegations should be supported by affidavits, declarations or other evidence if they are to be deemed non-frivolous. *Marcino v. U.S. Postal Service*, 344 F.3d 1199, 1204 (Fed. Cir. 2003).

showing that he was appointed to a position by an authorized official, that he took some action to denote acceptance of the promotion, and that he actually performed in the position, the burden of production shifts to the agency to show that the promotion or appointment was an error contrary to law or regulation. *Deida*, 110 MSPR at ¶ 16, *Lomax*, 78 M.S.P.R. 559-60.

The agency must be afforded an opportunity to show that the appellant's promotion was an error contrary to law or regulation. *See Mulligan v. U.S. Postal Service*, 81 M.S.P.R. 1, ¶ 12 (1999). Given that the appellant bears the ultimate burden of proof on the issue of jurisdiction, he must be afforded the opportunity to rebut any showing that the agency may make. *Id.* The appellant must prove the Board has jurisdiction by a preponderance of the evidence.

The appellant alleges that the agency made a negative suitability determination. IAF, Tab 1. The right to appeal negative suitability determinations relates only to positions in the competitive service, a position in the excepted service where the incumbent can be noncompetitively converted to the competitive service, and a career appointment in the Senior Executive Service. *See* 5 C.F.R. §§ 731.101, 731.501(a). The Board has held that it does not have jurisdiction over suitability determinations of individuals in the excepted service. *See McBride v. U.S. Postal Service*, 78 M.S.P.R. 411, 414 (1998). All positions in the Federal Bureau of Investigation are excepted from the competitive service and the incumbents of such positions occupy positions in the excepted service. 28 U.S.C. § 536.

In the Acknowledgment Order issued on September 29, 2009, the appellant was advised that the Board may not have jurisdiction over his appeal and directed to file evidence and argument to establish Board jurisdiction over his appeal within 15 days, in addition to showing that his appeal was timely filed or good cause existed for any untimely filing. IAF, Tab 2. To date, the Board has not received any response from the appellant to its Acknowledgment Order. On October 13, 2009, the Board received the agency's motion to dismiss for lack of

jurisdiction. IAF, Tab 3. However, before dismissing the appeal for lack of jurisdiction, I will give the appellant one more opportunity to come forward with a non-frivolous allegation to support Board jurisdiction. Therefore, the record on jurisdiction and timeliness is reopened, as set forth below.

I **ORDER** the appellant to submit evidence and argument establishing Board jurisdiction over his appeal, to be received in this office and by the agency on or before October 26, 2009. The agency may file a further response on this issue within this same timeframe. Additionally, I **ORDER** the agency to file with the Board all documents relating to the appellant's application for employment with the agency, the agency's conditional offer of employment to the appellant, any investigation (or summary thereof) of the appellant related to the offer of employment, any documents showing whether the appellant was in fact appointed to a position with the agency, any documents reflecting acceptance by the appellant of the appointment, any documents reflecting the agency revoked the appointment before the appellant actually performed in the position, any evidence that the appointment was contrary to law or regulation, and any materials relating to the decision to rescind the appointment offer. These documents are necessary for the efficient determination of jurisdiction in this appeal. These documents must be received by the Board on or before October 26, 2009.

If the appellant fails to make non-frivolous allegations establishing Board jurisdiction, then his appeal will be dismissed without a hearing for lack of jurisdiction. Unless I notify the parties to the contrary, the record on jurisdiction will close on October 26, 2009. No evidence or argument received thereafter will be accepted unless accompanied by information showing that it is new and material evidence which was not available before the record closed.

TIMELINESS

Generally, the appellant must file an appeal with the Board no later than 30 calendar days after the effective date, if any, of the action you are challenging, or 30 calendar days after the date you receive the agency's decision, whichever is later. 5 C.F.R. § 1201.22(b). Under 5 C.F.R. § 1201.4(l), the filing or refiling date for each of the ways in which an appeal can be filed or refiled is: Mail – the postmark date, but if there is no legible postmark date, mailing is presumed to have been five business days before receipt; Personal Delivery - the date we receive the appeal; Fax - the date of the fax; Commercial Overnight Delivery - the date the document was delivered to the commercial overnight delivery service; Electronic Mail - the date on which the electronic mail is sent.

The evidence of record establishes that the agency issued its letter rescinding your conditional appointment on July 1, 2009. IAF, Tab 1. The petition for appeal was not filed until September 25, 2009, more than 30 days later. *Id.* Because your appeal appears to have been filed after the time limit under these rules, it may be untimely.

If you and the agency agreed in writing to participate in an alternative dispute resolution process before filing your appeal, the time limit for filing your appeal is extended for an additional 30 calendar days, for a total of 60 calendar days. In such a case, your response to this Order must include a copy of the written agreement.

Further, there is an exception to the 30-day filing rule of 5 C.F.R. § 1201.22(b), set out in 5 C.F.R. § 1201.154(b). Pursuant to this provision, an appellant who was subject to an action that is appealable to the Board and who filed a timely formal discrimination complaint with the agency, may file an appeal (1) within 30 days after receipt of the agency resolution or final decision on the complaint or, (2) at any time after the expiration of 120 calendar days if the agency has not resolved the matter or issued a final decision within the 120-day period. “When . . . an appellant has filed a timely formal complaint of

discrimination with the agency, an appeal to the Board “must be filed within 30 days after *the appellant* receives the agency resolution or final decision on the discrimination issue. . . .” *Foley v. Department of Health and Human Services*, 84 M.S.P.R. 402, 404 (1999), (emphasis in original), quoting 5 C.F.R. § 1201.154(b). “The time limit under section 1201.154(b) begins to run when the appellant or his duly designated representative receives the agency’s final decision, *whichever is earlier*.” *Id.* (emphasis in original).

Before the Board will consider any other issue raised by your appeal, other than jurisdiction, you must show by preponderant evidence that the appeal was filed on time or that good cause exists for the delay in filing. Preponderant evidence is the degree of relevant evidence that a reasonable person, considering the record as a whole, would need to find that a contested fact is more likely true than untrue. 5 C.F.R. § 1201.56(c)(2). In other words, you must show that it is more likely than not that your appeal was filed on time or that good cause exists for the delay.

Accordingly, if you claim that you filed your appeal on time under any of the filing rules listed above, I **ORDER** you to file evidence and/or argument showing that you did so. You must provide all of the details explaining your actions concerning the filing. If the apparent untimeliness of your appeal is due to your late receipt of the decision you are appealing, you must also submit evidence and argument as to the date you received it. If you have postal receipts or other proof of mailing, you should send a legible copy of them with your response.

If you did not file your appeal on time, I **ORDER** you to file evidence and/or argument showing that good cause exists for the delay in filing. To show that there was good cause for a delay in filing, you must show that you acted reasonably and with due diligence under the particular circumstances of your case. The factors the Board will look at to determine whether you acted reasonably include, but are not limited to: (1) the length of the delay; (2) whether

you were notified of the time limit or were otherwise aware of it; (3) the existence of circumstances beyond your control which affected your ability to comply with the time limit, and the possibility of negligence on your part; (4) circumstances which show that any neglect on your part was excusable; (5) whether there was unavoidable casualty or misfortune that affected your ability to timely file your appeal; and (6) whether not applying the time limit to you would harm the agency. In your response to this Order addressing the timeliness issue, be as specific as possible by giving all of the details. You should also include any evidence that supports the reason for your delay.

If an illness prevented you from filing your appeal within the time limit, you must identify the time period during which you suffered from the illness, submit medical evidence and any other supporting evidence showing that you suffered from the illness during the relevant time period, and explain how the illness prevented you from filing your appeal on time or requesting an extension of time to file. If medical evidence is not available, you must submit other supporting evidence and explain why medical evidence is not available.

Any explanation of the reason for a late appeal must also address why you could not have filed a timely request for an extension of the filing time limit. Your response to this Order must be in the form of an affidavit, sworn statement, or declaration under penalty of perjury, 28 U.S.C. § 1746, a form for which is found in the Board's regulations at 5 C.F.R. Part 1201, Appendix IV. Although there are limited circumstances in which a hearing may be held on the question of the timeliness of an appeal, you should submit all evidence and argument you wish me to consider on that issue, and not withhold anything in expectation that a hearing may be held. Your submission must be **received in this office** on or before **October 26, 2009**, and you must serve a copy of it on the agency at the same time.

The agency is **ORDERED** to file any additional evidence that it has on the timeliness issue within this same timeframe.

Unless I tell the parties otherwise, the record on the timeliness issue will close on **October 26, 2009**. That means I will not accept any more evidence or argument on that issue that is filed after that date unless the party submitting it shows it was not readily available prior to the close of the record. 5 C.F.R. § 1201.58(c). All prior Orders remain unchanged unless specifically referenced and specifically changed by this Order.

FOR THE BOARD:

[Redacted]
Administrative Judge

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent as indicated this day to each of the following:

Appellant

Electronic Mail



Agency Representative

Facsimile

Patricia A. Miller
Department of Justice
Federal Bureau of Investigations
935 Pennsylvania Avenue, N.W.
Room PA-400N
Washington, DC 20535

October 14, 2009

(Date)

Paralegal Specialist

