NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

DEAN SENECA,
Petitioner

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent

DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Intervenor

2020-1842

Petition for review of the Merit Systems Protection Board in No. DC-0731-16-0470-I-1.

Decided: September 26, 2022

DENNIS GRADY CHAPPABITTY, Elk Grove, CA, argued for petitioner.

DEANNA SCHABACKER, Office of General Counsel, United States Merit Systems Protection Board, Washington, DC, argued for respondent. Also represented by TRISTAN L. LEAVITT, KATHERINE MICHELLE SMITH.

MATTHEW JUDE CARHART, Civil Division, Commercial Litigation Branch, United States Department of Justice, Washington, DC, argued for intervenor. Also represented by JEFFREY B. CLARK, SR., ALLISON KIDD-MILLER, ROBERT EDWARD KIRSCHMAN, JR.

Before PROST, TARANTO, and STOLL, *Circuit Judges*.

TARANTO, *Circuit Judge*.

Dean Seneca, an employee of the Centers for Disease Control and Prevention (CDC), which is a component of the Department of Health and Human Services (HHS), applied for a higher level position at another HHS component, the National Institutes of Health (NIH). NIH sent him a letter stating that it had selected him for the position, with appointment to take effect a month later, but within a week of sending that letter, NIH rescinded the promotion offer, well before the effective date of the appointment. Mr. Seneca appealed the promotion rescission to the Merit Systems Protection Board. The Board dismissed Mr. Seneca's appeal, determining that it lacked jurisdiction to review NIH's action, which it concluded was a non-selection for a specific position and not a reviewable "suitability action" under 5 C.F.R. pt. 731. *Seneca v. Department of Health and Human Services*, No. DC-0731-16-0470-I-1, 2016 WL 4088357 (M.S.P.B. July 26, 2016) (*Board Opinion*) (hereafter cited with page numbers shown at Appx. 1–9). We affirm.

I

On March 3, 2016, Mr. Seneca received a letter from NIH "confirm[ing]" his promotion to the position of Health Science Policy Analyst, "with an effective date of April 3, 2016." Supp. App'x (S.A.) 77. On March 8, 2016, however, Mr. Seneca received another letter from NIH, notifying him that the promotion offer was rescinded due to "information received." S.A. 78.

Mr. Seneca appealed the rescission to the Board. He alleged that the rescission by HHS (through NIH) constituted a negative "suitability action"—based, he said, on an improper "constructive" negative suitability determination—which was appealable under the grant to the Board of jurisdiction to review "a suitability action." 5 C.F.R. § 731.501(a); *see also id.* § 1201.3(a)(9) (jurisdiction to review "suitability action"). Although Mr. Seneca also alleged that the NIH promotion rescission violated certain other statutory and constitutional rights of his, those allegations of wrong are not asserted to provide an independent basis of Board jurisdiction: It is undisputed before us that the Board's jurisdiction over Mr. Seneca's appeal depends on whether the NIH action was a suitability action appealable under 5 C.F.R. § 731.501(a).

HHS moved to dismiss the appeal for lack of jurisdiction, arguing that NIH's promotion rescission was not a suitability action (indeed, not based on a determination of Mr. Seneca's suitability for federal employment) and, in particular, that it was a non-selection for a specific position, which, under 5 C.F.R. § 731.203(b), is "*not* a suitability action," *id.* (emphasis in original). The administrative judge assigned to the case stayed discovery deadlines and ordered Mr. Seneca to address the Board's jurisdiction by furnishing "evidence and argument amounting to a nonfrivolous allegation" to support the asserted basis of jurisdiction. S.A. 30; *see also* S.A. 60–61. In response, Mr. Seneca asserted that the promotion rescission was a "[c]ancellation of eligibility," which is one of the "suitability action[s]" listed in § 731.203(a).

On July 26, 2016, the administrative judge, rejecting Mr. Seneca's assertion, dismissed Mr. Seneca's appeal without a hearing. *Board Opinion* at 3–4. To establish jurisdiction under § 731.501(a), the administrative judge stated, the promotion rescission needed to come within § 731.203(a), which defines "suitability action" as a cancellation of eligibility, removal, cancellation of reinstatement

eligibility, or debarment, and also needed to fall outside § 731.203(b), which excludes a non-selection for a specific position from the category of suitability actions. The administrative judge, without repeating the nonfrivolous-allegation standard he had recited earlier, concluded that the promotion rescission was a non-selection for a specific position, before the proposed appointment ever occurred, and was not a suitability action, leaving the Board without jurisdiction here. *Board Opinion* at 3.

The administrative judge's decision became the final decision of the Board on March 27, 2020, after Mr. Seneca was permitted by the Clerk of the Board to withdraw his request for the full Board to review the administrative judge's decision. Mr. Seneca timely appealed within the allowed 60 days. 5 U.S.C. § 7703(b)(1)(A). We have jurisdiction under 28 U.S.C. § 1295(a)(9).

II

Mr. Seneca challenges the Board's determination that it lacked jurisdiction and its stay of discovery before deciding the jurisdictional issue. We must affirm the Board's decision unless it is "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence . . . ." 5 U.S.C. § 7703(c). We review the Board's jurisdictional ruling de novo, *Stoyanov v. Department of Navy*, 474 F.3d 1377, 1379 (Fed. Cir. 2007), and the Board's discovery ruling for an abuse of discretion, *Curtin v. Office of Personnel Management*, 846 F.2d 1373, 1378 (Fed. Cir. 1988).

A

An employee appealing to the Board generally has the burden of establishing, by a preponderance of the evidence, that the Board has jurisdiction over his appeal. 5 C.F.R. § 1201.56(b)(2)(i)(A); *Stoyanov*, 474 F.3d at 1379. At the

threshold, the employee must make "non-frivolous allegations that, if proven, could establish the Board's jurisdiction," *Garcia v. Department of Homeland Security*, 437 F.3d 1322, 1325 (Fed. Cir. 2006) (en banc), which requires a "plausible" allegation of the elements material under the asserted jurisdictional standard, 5 C.F.R. § 1201.4(s)(2); *see Hessami v. Merit Systems Protection Board*, 979 F.3d 1362, 1369 (Fed. Cir. 2020). Without such allegations, dismissal without a hearing is appropriate. *Garcia*, 437 F.3d at 1325.

The Board does not have plenary appellate jurisdiction over personnel actions. *Lazaro v. Department of Veterans Affairs*, 666 F.3d 1316, 1318 (Fed. Cir. 2012). Its jurisdiction is limited to actions made appealable to it by law, rule, or regulation. 5 U.S.C. § 7701(a). Here, only one basis for Board jurisdiction is asserted.

Under regulations promulgated by the Office of Personnel Management (OPM), the Board has jurisdiction to review a "suitability action" taken against a person by an agency with OPM-delegated authority. 5 C.F.R. § 731.501(a); *see id.* § 1201.3(a)(9). The definitional regulation first states that, for purposes of 5 C.F.R. pt. 731, "a suitability action is one or more of the following: (1) Cancellation of eligibility; (2) Removal; (3) Cancellation of reinstatement eligibility; and (4) Debarment." *Id.* § 731.203(a). It immediately adds, however:

> A non-selection, or cancellation of eligibility for a specific position based on an objection to an eligible or pass over of a preference eligible under 5 CFR 332.406, is *not* a suitability action even if it is based on reasons set forth in § 731.202.

Id. § 731.203(b) (emphasis in original). The referred-to § 731.202 identifies the "[c]riteria for making suitability determinations," which govern the determination on which a "suitability action" is to be based. *See id.* § 731.203(c) ("A suitability action may be taken against an applicant or an

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