2022-1788

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

KEVIN D. JONES,

***Petitioner*,**

v.

MERIT SYSTEMS PROTECTION BOARD

***Respondent*.**

Petition for Review from the Merit Systems Protection Board
in DC-0752-21-0375-I-1

BRIEF OF PETITIONER KEVIN D. JONES AND ADDENDUM

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September 7, 2022

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 2022-1788

Short Case Caption Jones v. MSPB

Filing Party/Entity Petitioner, Kevin D. Jones

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box**. Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 6/28/2022

Signature: /s/ Avni J. Amin

Name: Avni J. Amin

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☒ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☒ None/Not Applicable
Kevin D. Jones		

☐ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

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Kalijarvi, Chuzi, Newman & Fitch, P.C.		

5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

☒ None/Not Applicable ☐ Additional pages attached

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

☒ None/Not Applicable ☐ Additional pages attached

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STATEMENT OF RELATED CASES

This case has not previously been before this Court on any occasion. Additionally, there are currently no other cases known to Petitioner that will be affected by this Court's decision in the pending appeal.

STATEMENT OF JURISDICTION

Petitioner received an Initial Decision from a Merit Systems Protection Board Administrative Judge on February 10, 2022. He did not appeal the Initial Decision to the full Merit Systems Protection Board; therefore, it became the final decision of the Board on March 17, 2022. *See* 5 U.S.C. § 7701(e)(1). Petitioner

timely petitioned this Court for review of the Board's decision on May 12, 2022. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1295(a)(9).

STATEMENT OF THE ISSUES

Whether the Board's decision was not in accordance with the law when it determined that it lacked jurisdiction to hear Appellant's appeal based on its conclusion that Appellant has not proved by preponderant evidence that he was an "employee," entitled to notice and an opportunity to respond, because his position with the Department of Justice (DOJ) was not the "same or similar" to his prior position with the U.S. Department of Agriculture (USDA), per 5 U.S.C. § 7511(a)(1)(B)(i).

STATEMENT OF THE CASE

Petitioner Kevin D. Jones, a preference eligible employee, was employed by the Office of Chief Counsel (OCC), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), U.S. Department of Justice, in the Excepted Service position of Attorney Adviser, GS-905-14, from August 4, 2019, until December 21, 2019. Appx23-24. On December 18, 2019, Jones' second-line supervisor, Joel Roessner, told him the Agency intended to terminate him for purportedly misrepresenting his contract law experience during his interview with DOJ. Appx3. Roessner also informed Jones that he would be terminated without appeal rights because he was a probationary employee. In fact, Jones was hired by DOJ from the Department of

Agriculture (USDA), where he had also served in the Excepted Service position of Attorney Adviser, GS-905-14 from April 15, 2018 until August 3, 2019, when he transferred to DOJ without a break in service on August 4, 2019. Appx27, Appx35.

On December 19, 2019, Jones involuntarily resigned from his position after Roessner threatened him with termination for purportedly misstating his contract law experience.[1] Appx38, Appx92. Because DOJ determined that Jones was a probationer, it did not afford him the due process guaranteed by 5 U.S.C. § 7513(b): 30 days advance written notice of a proposed adverse action and a reasonable time to respond orally and in writing to the proposed adverse action. Both of Jones' Attorney Adviser positions had the same title, grade, and series, and were in the same competitive category for reduction in force purposes. Appx36. The Attorney Adviser position with DOJ required no training, and the fundamental character of the work Jones was engaged in—employment law—was the same or similar to the work he performed at the USDA.

Jones filed a mixed-case EEO complaint on March 19, 2020, alleging that his involuntary resignation was discriminatory. He received a Final Agency Decision (FAD) on the complaint on March 30, 2021, and he timely appealed that decision to the Board on April 26, 2021. 29 C.F.R. § 1614.302(d).

[1] The effective date of Jones' resignation was December 21, 2019. Appx24.

The Initial Decision

In his Board appeal, Jones alleged that he was denied his statutory due process rights to notice and an opportunity to be heard.[2]

Following briefing and a hearing on the Board's jurisdiction, the AJ issued her Initial Decision on February 10, 2022, finding that the Board lacked jurisdiction over Jones' appeal. Specifically, the AJ held that Jones did not meet the definition of "employee" because he had failed to establish that he had one year of current, continuous service. 5 U.S.C. § 7511(a)(1)(B). As noted above, when Jones did not appeal the AJ's initial decision to the full MSPB, it became a final decision of the Board on March 17, 2022.

SUMMARY OF THE ARGUMENT

DOJ denied Jones due process when it terminated him without advance notice and an opportunity to respond. Contrary to the Board's finding, as a preference eligible employee, Jones satisfied the definition of an "employee" with appeal rights because he "completed 1 year of current continuous service in the same or similar positions" in the "excepted service." Section 7511(a)(1)(B). The AJ took too narrow a view of Jones' Attorney Adviser positions with the USDA and DOJ when she found that the two positions were not the "same or similar,"

[2] In his mixed-case appeal, Jones also claimed that his resignation from DOJ and the denial of due process violated Title VII. Because the AJ dismissed the case for lack of jurisdiction, this claim was not resolved and is not at issue in this Petition.

given that both positions had the same title, grade, and series, and the duties Jones performed in both positions were extraordinarily similar. The AJ's analysis of Jones' job duties in each position was inconsistent with well-settled Federal Circuit case law on the issue, including *Mathis v. U.S. Postal Service*, 865 F.2d 232, 234 (Fed. Cir. 1988) (finding two positions were the "same or similar" based on the fundamental character of the work though they were not identical). In finding that the USDA position was litigation heavy, while the DOJ position was more advisory in nature, the AJ ignored the fact that the fundamental character of the work in both positions involved employment law and personnel matters.

Moreover, while Jones engaged in voluntary and nominal training at the start of his DOJ position, the AJ erroneously found the training dispositive, ignoring well-settled case law that training must be "extensive" in order to find two positions dissimilar. *See, e.g.*, *Coradeschi v. Dep't of Homeland Sec.*, 439 F.3d 1329, 1334 (Fed. Cir. 2006); *Mathis*, 865 F.2d at 235.

The Board also erroneously relied on *Amend v. Merit Syst. Prot. Bd.*, 221 F. App'x 983, 984-86 (Fed. Cir. 2007) (finding two positions dissimilar where they were in different grades and classification series and the second position required substantial training). *Amend* does not control this case. Finally, the AJ erroneously relied upon duties DOJ admitted Jones did not perform when she found his two positions were not the "same or similar."

Jones argues herein that the Board's decision that it lacked jurisdiction over his appeal because he did not complete one year of current, continuous service diverges from well-established case law. Jones asks that the Court reverse the Board's decision and remand the case for appropriate proceedings.

ARGUMENT

I. STANDARD OF REVIEW

"Under 5 U.S.C. § 7703(c), [this Court may] set aside any action, finding, or conclusion [of the MSPB] that is: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." *Lal v. Merit Sys. Prot. Bd.*, 821 F.3d 1376, 1378 (Fed. Cir. 2016). Whether the MSPB has jurisdiction to adjudicate an appeal is a question of law, which this Court reviews de novo. *Id.* (citing *Bennett v. Merit Sys. Prot. Bd.*, 635 F.3d 1215, 1218 (Fed. Cir. 2011)). Findings of fact underlying the MSPB's jurisdictional decision, on the other hand, are reviewed for substantial evidence. *Bledsoe v. Merit Sys. Prot. B*d., 659 F.3d 1097, 1101 (Fed. Cir. 2011). "Substantial evidence is more than a mere scintilla of evidence, but less than the weight of the evidence." *Jones v. Health and Human Serv*., 834 F.3d 1361, 1366 (Fed. Cir. 2016) (internal quotation marks and citations omitted). On appeal, "[t]he petitioner bears the burden of establishing error in the [MSPB]'s decision." *Harris v. Dep't of*

Veterans Affairs, 142 F.3d 1463, 1467 (Fed. Cir. 1998); *Jenkins v. Merit Sys. Prot. Bd.*, 911 F.3d 1370, 1373 (Fed. Cir. 2019).

II. AS AN ATTORNEY ADVISER IN THE USDA AND DOJ, JONES ENGAGED IN SIMILAR WORK

A. It is Undisputed that Jones was a Preference Eligible Employee Who Transferred to DOJ from USDA Without a Break in Service.

Whether the Board had jurisdiction over Jones' appeal pursuant to 5 U.S.C. § 7513(b) depends on whether Jones was an "employee" under 5 U.S.C. § 7511(a)(1)(B). Jones was an "employee" if, immediately before his termination, he was a "preference eligible in the excepted service who has completed 1 year of current continuous service in the same or similar positions in an Executive agency." 5 U.S.C. § 7511(a)(1)(B)(i); *Carrow v. Merit Syst. Prot. Bd.*, 564 F.3d 1359, 1366 (Fed. Cir. 2009) (finding that requirement for "continuous service" in "same or similar positions" may be satisfied by "adding periods of service in different Executive Branch agencies").

It is undisputed that Jones was a preference eligible employee. Appx35-36. It is also undisputed that Jones worked for the USDA as a GS-905-14 Attorney from April 15, 2018, until August 3, 2019, and at DOJ as a GS-905-14 Attorney beginning on August 4, 2019, without a break in service. *Id.*

The AJ agreed that Jones was a preference eligible employee who transferred from the USDA to ATF without a break in service. Appx2.

Accordingly, the only issue before this Court is the AJ's finding that Jones did not complete one year of current continuous service "in the same or similar positions."

B. The Administrative Judge Erred in Taking Too Narrow a View of the Meaning of "Similar Positions" Under Section 7511(a)(1)(B)

Section 7511(a)(1)(B) requires not only one year of continuous service, but also that the service be "in the same or similar positions." Under OPM's regulations, if an individual's service was in two positions, those positions are "similar" for purposes of section 7511(a)(1)(B) if they are "positions in which the duties performed are similar in nature and character and require substantially the same or similar qualifications so that the incumbent could be interchanged between the positions without significant training or undue interruption to the work." 5 C.F.R. § 752.402.

In analyzing Jones' positions with the USDA and DOJ, the AJ failed to apply well-settled Federal Circuit case law, including *Mathis v. U.S. Postal Serv.*, 865 F.2d 232 (Fed. Cir. 1988), *Davis v. Merit Sys. Prot. Bd.*, 340 F. App'x 660 (Fed. Cir. 2009), and *Coradeschi v. Dep't of Homeland Security*, 439 F.3d 1329 (Fed. Cir. 2006). The AJ erroneously drew a distinction between Jones' positions at USDA and DOJ based on the EEOC litigation work he did at USDA, inter alia, when the correct analysis required the Board to consider the "fundamental character" of the legal work that Mr. Jones engaged in—the practice of employment law—rather than the manner in which Jones engaged in the practice

of law, i.e., litigation, which included advice and counsel at USDA, as opposed to only advice and counsel at DOJ.

In *Mathis*, the Court considered whether the two jobs petitioner held during his last year of employment in the Postal Service were "similar positions" under Section 7511(a)(1)(B). 865 F.2d at 233-34. The Court found that the Board had interpreted Section 7511(a)(1)(B) too narrowly, resulting in the erroneous finding that the two positions were not "similar." *Id*. at 233.

> The Board apparently deemed it critical that a special delivery messenger delivered the mail outside the Post Office after it had been sorted, but a distribution clerk worked solely inside the Post Office and separated both incoming and outgoing mail and then distributed it inside the facility. Those differences in the nature of the work performed in the two jobs, however, are not inconsistent with their being "similar positions." *In each position the critical fact is that the petitioner handled the mail.* The fact that he did that handling in different physical locations and in different steps of the mail distribution process did not alter the fundamental character of the work he did, which was sufficiently closely related in the two jobs to make those positions "similar."

Id. at 235 (emphasis added).

The facts in *Mathis* parallel the facts herein and thus support a finding that Jones' two positions were also the "same or similar." While the AJ cited *Mathis* in her Initial Decision, she nonetheless found that while at the USDA, Jones handled primarily employment discrimination litigation cases rather than disciplinary or Board-appealable actions in an advisory capacity. Appx10-11. The AJ reasoned that Jones' advice during EEOC litigation and settlement options was distinct from

the advice he provided to ATF's Professional Review Board (PRB) and Bureau Deciding Official (BDO), whether particular disciplinary actions should be taken and how that process should be performed so as to withstand potential legal review. Appx10. However, the AJ failed to consider that the advice and counsel Jones provided at both DOJ and USDA involved similar elements of federal employment law. Instead, the AJ found that Jones was "advising on different types of employment situations appealable in different forums, with different procedural requirements, burdens of proof, and relevant legal principles," which precluded a finding that his positions were "the same or similar." Appx10.

The AJ's breakdown of Jones' duties and responsibilities in this manner runs contrary to the holding in *Mathis*, which requires a consideration of whether the "fundamental character of the work" is the same or similar, and expressly precludes a nuanced analysis of each and every *job duty* in which an employee engaged. Certainly, advising senior management on legal issues and litigation risks in employment situations requires a common set of skills regardless of the particular category of employment law involved.

Jones testified that as an Attorney Adviser for USDA, he reviewed EEO reports of investigation. Similarly, at DOJ, he reviewed reports of investigation from either the Internal Affairs Division and/or the Office of Inspector General. Appx72-73. The fact that the reports concerned different types of investigations

did not render the positions dissimilar. Jones testified he reviewed the reports at both agencies not only for legal sufficiency, but to make "recommendations to those decisionmakers on appropriate dispositions" and to make recommendations as to whether those reports of investigation "supported the action that the agency or department was looking to execute or impose" or "needed to be supplemented." Appx72.

The job duties and responsibilities associated with both positions overlapped to the extent they required him to: (1) provide legal advice and recommendations to agency officials on complex matters; (2) review and draft memorandum of understanding and memoranda of agreement; (3) master statutes, regulations, and precedents related to agency program areas; (4) make recommendations/provide assistance concerning litigation involving the agencies; (5) provide legal advice or drafting contracts; and (6) demonstrate or master written and oral advocacy. Appx49-52, Appx87-88. Jones also testified that he utilized the same legal research engines for EEOC and MSPB decisions -- including using cyberFeds and Westlaw -- in both positions. Appx75-76.

The distinctions the AJ made with respect to Jones' duties and responsibilities in his two Attorney Adviser positions also run contrary to the factual analysis and holding in *Davis v. Merit Sys. Prot. Bd.*, 340 F. App'x 660, 664 (Fed. Cir. 2009). In *Davis*, prior to her termination the petitioner performed the

same basic duties in both of her positions: managing unit data, analyzing data, and fulfilling requests. *Id.* As a Statistical Assistant with the Department of Navy, the Board found that Davis primarily spent most of her time managing unit data, and the remainder of her time doing "data extraction" in response to data requests (analyzing data and fulfilling requests). *Id.* As a Mathematical Statistician, on the other hand, the Board found that Davis spent the majority of her time analyzing data and fulfilling requests and the remainder of her time managing unit data. *Id.* Thus, although Davis switched from spending the majority of her time managing unit data to spending the majority of her time analyzing data and fulfilling requests, she performed all three functions in each of her two positions, albeit in different degrees. Because the two positions required the same "knowledge[ ], skills, and abilities," the Court found that it was error for the Board to find that the two positions were not "in the same line of work." *Id.*

As an Attorney Adviser for DOJ, Jones testified he spent 40 percent of his time handling PRB and BDO cases, helping to process those cases to "some type of conclusion." Appx79-80. At the USDA, Jones spent 40 percent of his time managing and "working" cases through the EEOC system. *Id.* at 80. Similarly, at the USDA Jones spent 30 percent of his time advising decision makers and senior management officials at USDA, e.g., the Director of the National Finance Center,

and at DOJ he spent 30 percent of his time advising senior management officials, e.g., the Chair of the PRB and Bureau Deciding Official.[3] *Id.* at 80-81.

The Board has long held that the factors to be considered with respect to whether two positions are similar include whether they require the same qualifications; whether they are in the same competitive level for reduction-in-force purposes; and whether an employee can move between the two without significant training or undue interruption to the work program. *See, e.g.*, *Spillers v. U.S. Postal Serv.*, 65 M.S.P.R. 22, 26 (1994) (citing *Van Skiver v. U.S. Postal Serv.*, 7 M.S.P.R. 18, 20 (1981)).

In the present matter, the qualifications required for the two positions were the same. The DOJ position required "experience advising senior management officials in the area of employment law; and experience working employment law issues with a high degree of difficulty and importance, including independently

[3] The similarity between Jones' Attorney Adviser positions at the USDA and DOJ stand in stark contrast to other cases where the courts have found two positions to be dissimilar. *See, e.g.*, *Bell v. U.S. Postal Serv.*, 965 F.2d 1065, 1992 WL 82446, at *2 (Fed. Cir. 1992) (finding that a position as an Equal Opportunity Specialist is not the same or similar to a position as a flat sorting machine operator because they are not positions "that involve related or comparable work that requires the same or similar skills."); *Weinberger v. United States*, 229 Ct. Cl. 612, 614–15 (1981) (petitioner's position as a Plant Protection Aide with the DOA with the primary responsibility to survey and control work in the eradication of black fly citrus infestation in the field with property owners was not similar to petitioner's Machine Distribution Clerk position with the USPS, where he operated a letter sorting machine at a specified rate of accuracy.).

exercising responsibility for the provision of employment law advice." Appx45. Jones also advised senior management officials, i.e., decision makers, on employment cases during his time at the USDA. Both positions required a J.D. degree and an active bar membership. Appx36. Jones was in Tenure Group 3, Indefinite—the same competitive level for reduction-in-force purposes. Appx23; 25. The AJ did not opine on whether the qualifications for the positions were similar or whether the positions were in the same competitive level for reduction-in-force purposes. Regardless, undisputed record evidence supports a finding that the qualifications for both positions was the same and that both positions were in the same competitive level for reduction-in-force purposes.

With respect to the issue of training, the AJ erroneously found that because Jones paid for a week-long subject matter seminar (on Federal Dispute Resolution)[4] at the start of his employment with DOJ and purchased reference books on disciplinary case law, that this evidence weighed against a finding that his two positions were the same or similar. Appx9. On the contrary, DOJ stipulated that Jones was not required to attend any training prior to starting with the agency. Appx37. The Agency also did not require Jones to purchase or review any reference books. Appx63. While acknowledging that Jones' training and reference materials were "self-initiated" and not "'required,'" the Board nevertheless noted

[4] The training was a four-day training, not a week-long training. Appx93.

Jones' concession that the training and materials were "useful or necessary for his performance." Appx9. While the AJ is correct that Jones did not dispute the usefulness of the training and materials, he testified that "just like with any new organization," "the real legal work involved doing the analysis and doing the assessment of whether or not that case or evidence supported what the PRB and the BDO was doing." Appx84-85. Any reading he did at the start of the position was to familiarize himself with the "internal regulations and the procedures that govern the PRB and BDO." *Id.* Jones testified that he "already knew how to do that type of analysis and that type of legal services support." Appx85. Jones received "[m]aybe a couple of hours" of on-the-job training during no more than two to three weeks. Appx84. Thus, Jones' limited and non-mandatory training supports a finding that the positions were the "same or similar."

The Court in *Coradeschi* considered the issue of training in the context of 5 U.S.C § 7511(a)(1)(C)(ii) and whether Coradeschi's positions as an inspector with the Immigration and Naturalization Service (INS) and his subsequent position as a Federal Air Marshal (FAM) with the Transportation Safety Administration (TSA), were the same or similar when he was terminated without appeal rights. *Coradeschi*, 439 F.3d at 1331.

When Coradeschi started work as a FAM, he underwent a seven-day Air Marshal Training Program, which included over 31 hours of administrative

matters, 12.5 hours of firearms training, and 13.75 hours of tactical and operations training. *Coradeschi*, 439 F.3d at 1331. Citing this FAM training, the Board dismissed Coradeschi's appeal on the ground his previous work as an INS Agent was not "sufficiently 'similar'" to the FAM position to grant jurisdiction under 5 U.S.C § 7511(a)(1)(C)(ii). On appeal, however, the Federal Circuit found that notwithstanding the requirement for Coradeschi's specialized FAM training, there was no evidence to suggest the retraining was "extensive." *Coradeschi*, 439 F.3d at 1334; *see Mathis*, 865 F.2d at 235 (finding petitioner's two positions the "same or similar" despite petitioner having to undergo training because there was no indication petitioner was unable to perform the duties of a distribution clerk, or that the performance of those duties required him to undergo "extensive retraining."). In fact, Coradeschi claimed that fewer than 15 hours of the training was substantively new training. *Id.* at 1334.

The "self-initiated," non-mandatory, and not required training in which Jones engaged at DOJ, certainly less "extensive" than the training at issue in *Coradeschi*, cannot possibly render his DOJ position dissimilar from his USDA position. On the contrary, DOJ relied on Jones' experience with the USDA when it hired him, noting specifically that it considered his USDA experience when it included him on the "best qualified" list of candidates for the DOJ Attorney

Adviser position.[5] Appx66-68. *See Shobe v. U.S. Postal Serv.*, 5 M.S.P.R. 466, 471 (1981) (determining completion of a probationary period, the Board has held that positions are in the same line of work if the experience gained in one demonstrates the knowledge, skills, and abilities required to perform the work of the other.). Unlike the training Coradeschi was required to take as a FAM, the voluntary training Jones took at the start of his employment with DOJ was a single course covering current developments in employee discipline cases, among other topics, not the highly specialized, seven-day Air Marshal Training Program Coradeschi was required to take.

In sum, while Coradeschi's training was both specialized and mandatory, Jones training was not sufficiently "extensive" so as to preclude his appeal to the MSPB. Given the nature of Jones' training at DOJ, this Court should similarly find that the Board's failure to find Jones' positions "same or similar" for purposes his appeal constitutes reversible error.

Accordingly, Jones has satisfied the third criterion in § 7511(a)(1)(B)(i), and he is an "employee" under the statute, and the Board's decision should be overturned.

[5] During the interview for the position, all candidates, including Jones, were asked about their litigation experience. Appx97.

C. The Board's Reliance on *Amend* in Finding That Jones' Duties with the USDA and DOJ Were Not the "Same or Similar" Was in Error

The Board also erroneously relied on this Court's decision in *Amend v. Merit Systems Protection Board*, 221 F. App'x 983 (Fed. Cir. 2007) when it held that Jones' Attorney Adviser positions with USDA and DOJ were not "similar" for purposes of establishing current, continuous service. Appx11. *Amend* is wholly distinguishable from this case. In *Amend*, an Immigration Inspector with the Immigration and Customs Enforcement, Department of Homeland Security (DHS), transferred to the excepted service as an Inspector for ATF. When Amend was terminated, he appealed to the Board and the issue was whether the two positions were "the same or similar." *Amend*, 221 F. App'x at 983-85. The Board found the two positions were not similar based on the following factors: 1) the positions "held different grades and classification series;" 2) the ATF position required substantial additional training, and the positions required different knowledge and skills;" 3) the ATF Inspector position was a GS–1854-9, while the Immigration Inspector position was a GS–1816-11; 4) the positions also required different qualifications (ATF Inspectors were expected to have knowledge of federal, state, and local alcohol, tobacco, firearm, and explosive laws and regulations; Immigration Inspectors were required to understand "U.S. immigration, customs, public health, and agriculture laws, regulations, and related precedent decisions and court injunctions);" and 5) to become an ATF Inspector, applicants were

required to complete a seven week training course, after which their first two years of employment were considered an "internship" before the employee "may be non-competitively converted to a career or career-conditional position." *Id.* at 984-86. Not surprisingly, this Court affirmed the Board's finding that the Immigration and ATF Inspector positions were not sufficiently the "same or similar" to satisfy § 7511(a)(1)(B).

Given the foregoing factors, the Board's reliance upon *Amend* to justify the same outcome in this case is arbitrary and capricious and not supported by substantial evidence. The positions Jones held at the USDA and DOJ were Attorney Adviser positions, with the same grade and series—GS-0905-14; both positions required the same qualifications: a J.D. degree from an American Bar Association accredited law school and active membership in good standing of the bar. Appx36.

In the present case, Jones was expected to serve as a legal advisor, counsel, and representative in the employment law area. He advised senior managers on employee disciplinary matters at DOJ and represented USDA in EEOC cases. Appx71-72. At both the USDA and DOJ, Jones was responsible for providing direct legal advice and counsel to senior management decision makers, i.e., members of the senior executive service and GS-15 managers, primarily in the employment law area, in the same line of work and level of responsibility.

Appx80-81. Jones' duties and responsibilities overlapped significantly between the two positions in that he was expected to, inter alia, provide legal advice and recommendations to agency officials on complex employment matters, make recommendations, and provide litigation assistance to the agencies. Appx49-52, Appx87-88, Appx80-81. *See Martinez v. Dep't of Homeland Sec.*, 118 M.S.P.R. 154, 158 (2012) (citing *Mathis*, 865 F.2d 232 at 234 (positions may be deemed similar if they are in the "same line of work" which has been interpreted as involving related or comparable work that requires the same or similar skills)).

The AJ's finding that while "advising senior management on legal issues and litigation risks requires a particular skill set regardless of substantive topic," those "similarities do not render the positions sufficiently similar," constitutes an unfortunate misreading of *Amend*. Appx11-12.

Accordingly, the Board's reliance on *Amend* in finding that that Jones' Attorney Adviser positions with the USDA and DOJ were not the "same or similar" was in error, and its decision should be overturned.

D. Only the Actual Duties Jones Performed are Dispositive of the Issue of Whether Jones' Positions at the USDA and DOJ Were "Same or Similar"

While DOJ presented evidence to the Board that Jones was designated as the "alternate" contracts attorney and would be expected to perform duties related to the agency's contracts matters, the Board erred in considering *anticipated* job

duties Jones did not perform rather than the work he *actually* performed. Appx7-8. Only duties actually performed determine whether positions are the same or similar pursuant to 5 U.S.C. §7511(a)(1)(B)(i). *See, e.g.*, *Davis*, 340 Fed. App'x. at 663 (Prior service counts toward completion of probation when the prior service is "in the same line of work (determined by the employee's *actual* duties and responsibilities") (emphasis added); *see also Coradeschi*, 439 F.3d at 1333–34; *Mathis*, 865 F.2d at 233–35. The Board also erred in considering language in the ATF vacancy announcement from which Jones was selected, which stated that in addition to employment law work, the incumbent may also practice in the areas of ethics, contracts, and fiscal law.[6] Appx44. The Agency failed to submit any evidence that Jones actually engaged in any contract matters or ethics or fiscal matters during his four months with DOJ.

The AJ's consideration of job duties Jones did not actually perform at the DOJ in finding that Jones' positions were not the same or similar is reversible error.

CONCLUSION

In summary, the MSPB erred in taking too narrow a view of Jones' Attorney Adviser positions with the USDA and DOJ when she found that the two positions

[6] Interestingly, the ATF position description states that the incumbent may be expected to serve as an agency representative before Administrative Boards, i.e., engage in litigation work. Appx87.

were not the "same or similar" under Section 7511(a)(1)(B). The AJ parsed Jones' job duties in each position in a manner inconsistent with well-settled Federal Circuit case law on the issue, and she drew baseless distinctions between the facts in this case and facts in other cases in which the Court found the two positions were similar. The AJ also erred in considering the voluntary and nominal training Jones engaged in at the start of his employment with DOJ and the duties DOJ admits Jones did not perform when she found his two positions were not the "same or similar."

For the foregoing reasons, Petitioner requests that the Administrative Judge's Initial Decision rejecting jurisdiction over his appeal be reversed and the appeal be remanded for further proceedings.

Respectfully submitted,

/s/ Avni J. Amin

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ADDENDUM

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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

KEVIN D. JONES,
Appellant,

v.

DEPARTMENT OF JUSTICE,
Agency.

DOCKET NUMBER
DC-0752-21-0375-I-1

DATE: February 10, 2022

Avni J. Amin, Washington, D.C., for the appellant.

Gregg A. Hand, Springfield, Virginia, for the agency.

BEFORE
Monique Binswanger
Administrative Judge

INITIAL DECISION

On December 21, 2019, the appellant resigned from his position as an Attorney-Advisor with the agency's Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). *See* Appeal File (AF), Tab 1 at 9. The appellant filed an EEO complaint regarding his alleged involuntary resignation and, on March 30, 2021, the agency issued a Final Decision finding no evidence of discrimination. *Id.* at 59. On April 26, 2021, the appellant timely appealed the decision to the Board and requested a hearing. AF, Tab 1. On December 10, 2021, I held a hearing to determine whether the Board has jurisdiction over the appeal. AF, Tab 38 (Hearing CD) (HCD).

For the reasons discussed below, the appellant's appeal is DISMISSED for lack of jurisdiction.

BACKGROUND

On August 4, 2019, the appellant transferred without a break in service from a term appointment as an Attorney, GS-0905-14, with the U.S. Department of Agriculture (USDA) to the position of Attorney, GS-0905-14, with the defendant agency's Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). AF, Tab 13 at 33. At ATF, the appellant served as the advisor to the Professional Review Board (PRB), on a team of attorneys in the Management Division of the ATF Office of the General Counsel (OGC). AF, Tab 38 (HCD). The appellant reported directly to Sheryl Williams, Associate Chief Counsel of the Management Division. *Id.* His second line supervisor was Angel Williams[1] (Deputy Chief Counsel), and his third line supervisor was Joel Roessner (Chief Counsel). *Id.* The Management Division handled legal issues in the areas of Employment, Contracts, Fiscal, and Ethics. *Id.* As the PRB advisor, the appellant's primary duties were in the employment field; however, he also served as the "alternate" contracts attorney. *Id.*

ATF delegates hiring and personnel matters regarding attorneys in OGC to an internal Office of Attorney Recruitment and Management (OARM). AF, Tab 38 (HCD). OARM reviews and recommendation to terminate an agency attorney and, where approved, issues a termination action directly. *Id.*

In or around November 2019, Sheryl Williams learned that the Division's primary contracts attorney, Hillary Martinson, was leaving the agency. AF, Tab 38 (HCD). Williams directed the appellant to conduct a "turnover" with Martinson prior to her departure so that the appellant would be prepared to take over her contracts matters. *Id.* Several weeks later, Williams and Roessner learned the appellant did not have the contracts law experience they previously

[1] During the appellant's tenure, Angel Williams left the agency and Pamela Hix became the Deputy Chief Counsel.

thought he had.[2] *Id.* Shortly thereafter, on December 18, 2019, Roessner informed the appellant that he intended to submit a memorandum to OARM recommending that it terminate his appointment. *Id.* He informed the appellant that, as he was serving a probationary period, he would have no procedural rights to respond to OARM's action. *Id.* Roessner gave the appellant the opportunity to resign by the following day before he submitted the recommendation to OARM. *Id.* As a result, the appellant resigned effective December 21, 2019. *Id.*

On March 19, 2020, the appellant filed an EEO complaint alleging the agency discriminated against him on the basis of his race, sex, age, disability, and reprisal when it forced him to resign. AF, Tab 1 at 59. On March 30, 2021, the agency issued a Final Decision finding no evidence of discrimination and provided the appellant with notice of his right to appeal the decision to the Board. *Id.* On April 26, 2021, the appellant timely filed the instant appeal and requested a hearing. AF, Tab 1.

JURISDICTION

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). It is well established that the Board does not have jurisdiction over all actions that are alleged to be unfair or incorrect, and that the appellant has the burden of proving that the Board has jurisdiction over his appeal. *See* 5 C.F.R. § 1201.56(a)(2); *see also Marren v. Department of Justice*, 49 M.S.P.R. 45, 51 (1991). In most cases, an appellant is entitled to a jurisdictional hearing only if he makes a nonfrivolous allegation that the Board has jurisdiction over his appeal. S*ee Garcia v. Department of Homeland Security*, 437 F.3d 1322, 1344 (Fed. Cir. 2006); *Yusuf*

[2] There is much dispute between the parties as to whether the appellant misrepresented his contracts experience or whether the agency simply misinterpreted the appellant's stated contracts experience. I do not resolve that dispute in this decision, as it is not material to the jurisdictional issues before me.

v. U.S. Postal Service, 112 M.S.P.R. 465, ¶ 15 (2009). Nonfrivolous allegations of Board jurisdiction are allegations of fact that, if proven, could establish the Board has jurisdiction over the appeal. Mere *pro forma* allegations, however, are insufficient to satisfy this nonfrivolous standard. *See Yusuf*, 112 M.S.P.R. 465, ¶15.

The appellant alleges his December 2019 resignation was involuntary and is therefore an adverse action within the Board's jurisdiction. He argues the agency's notification that his termination would be effected without due process because he was a probationary employee was both incorrect and forced him to resign the following day. In the alternative, the appellant alleges that, if he had been a probationary employee, the agency nevertheless attempted to terminate him for pre-appointment reasons and that it failed to follow the procedures set forth in 5 C.F.R. § 315.805.

Because there were multiple jurisdictional issues presented by the appellant's appeal, on June 7, 2021, I issued an "Order to Show Cause – Jurisdiction" informing the appellant of the Board's jurisdictional requirements with respect to probationary employees and involuntary resignations. AF, Tab 9. In particular, I informed the parties of the definition of "employee" with Board appeal rights, as set forth in 5 U.S.C. § 7511(a)(1)(B), and ordered the parties to address whether he was an "employee" with appeal rights at the time of his termination. *Id*. I further notified the parties of the Board's jurisprudence regarding involuntary resignations and noted that, if the appellant established that he is an "employee" under 5 U.S.C. § 7511(a)(1)(B), he must make a nonfrivolous allegation that his resignation was involuntary in order to establish a right to a jurisdictional hearing. Finally, I informed the appellant of the Board's regulations providing for limited appeal rights for probationary employees and stated, if the appellant failed to establish he was an "employee" under 5 U.S.C. § 7511(a)(1)(B), that he make a nonfrivolous allegation that any such limited appeal rights apply to his case. *Id*.

On July 21, 2021, the parties each filed their responses to my Jurisdictional Order. AF, Tabs 11-17. On July 28, 2021, the appellant filed a Reply to Agency's Response to Jurisdictional Order, in which addressed allegedly new and material information submitted by the agency in its July 21, 2021 response. AF, Tab 18. On September 29, 2021, I scheduled a hearing to take additional evidence on the jurisdictional issues. AF, Tab 20. On December 10, 2021, I held the scheduled hearing. AF, Tab 38. The record on jurisdiction is now closed and ripe for a determination.

The appellant was not an "employee" at the time of his termination

Based on the evidence of record, I find the appellant has failed to make a nonfrivolous allegation that he was an employee at the time of his termination. 5 U.S.C. § 7511(a)(1)(B). As a preference-eligible in an excepted service appointment, the appellant must make a nonfrivolous allegation that he has completed one year of current continuous in the same or similar positions in an Executive agency or in the United States Postal Service or Postal Regulatory Commission – regardless of his probationary status. *Id.* "Current continuous service" means service immediately prior to the action at issue without a break in service of one workday. 5 C.F.R. § 752.402(b); *McCrary v. Department of the Army*, 103 M.S.P.R. 266, ¶ 8 (2006). Service in an agency other than the one that took the action now on appeal may be counted toward meeting the service requirement. *See Carrow v. Merit Systems Protection Board*, 564 F.3d 1359, 1366 (Fed. Cir. 2009); *Greene v. Defense Intelligence Agency*, 100 M.S.P.R. 447, ¶ 12 (2005). Accordingly, whether the appellant is considered an employee with due process rights is dependent on whether his service with the U.S. Department of Agriculture (USDA) was in a similar position as the one from which he resigned, and therefore considered current and continuous from his service with the defendant agency. *Id.*

The regulations implementing 5 U.S.C. chapter 75, subchapter II, define "similar positions" as "positions in which the duties performed are similar in

nature and character and require substantially the same or similar qualifications, so that the incumbent could be interchanged between the positions without significant training or undue interruption to the work." 5 C.F.R. § 752.402. In addition, positions may be deemed "similar" if they are in the "same line of work," which has been interpreted as involving "related or comparable work that requires the same or similar skills." *Mathis v. U.S. Postal Service*, 865 F.2d 232, 234 (Fed. Cir. 1988). The Board has interpreted such language to mean that positions are similar "if experience in [one] position demonstrates the knowledge, skills, and abilities required to perform the work of the other job." *Coradeschi v. Department of Homeland Security*, 439 F.3d 1329, 1333 (Fed. Cir. 2006) (quoting *Shobe v. U.S. Postal Service*, 5 M.S.P.R. 466 (1981); *accord Mathis*, 865 F.2d at 234; *Spillers v. U.S. Postal Service*, 65 M.S.P.R. 22, 26 (1994). In conducting this analysis, the Board must consider the nature of the work actually performed. *Davis v. Merit Systems Protection Board*, 340 Fed. App'x 660, 663 (Fed. Cir. 2009); *see also Coradeschi*, 439 F.3d at 1333-34; *Mathis*, 865 F.2d at 233–35.

I find the appellant's position with the agency was not the same or similar to his prior position with USDA. Both positions have the same title, series and grade: Attorney – Advisor, GS-0905-14. AF, Tab 28 at 171, 178. However, the title of the position alone is not dispositive of whether they are the same or similar in nature. I find instructive the witness testimonies regarding the specific duties the appellant was responsible for in both positions. AF, Tab 38 (HCD). Regarding the appellant's ATF position, Sheryl Williams credibly testified that the appellant provided advice and counsel to the PRB on employment law matters related to disciplinary actions, to include those appealable to the Board. *Id.* Williams explained that the PRB serves as the "proposing official" for disciplinary actions against ATF employees following investigations of misconduct by the agency's Internal Affairs Division (IAD). *Id.* Williams credibly testified that the appellant's role was to coordinate with and review

IAD's investigation reports and discuss appropriate charges with the PRB Chair and Deputy Chair. *Id.* The appellant also advised the PRB members during PRB meetings where the investigation and potential charges are discussed and a vote taken to determine the proper proposed disciplinary action, if any. *Id.* Where the PRB votes to propose disciplinary action, the appellant then advises the deciding official, referred to as the BDO, on determining whether to uphold the disciplinary action. *Id.* In that context, the appellant reviewed with the BDO the employee's written response to the proposed disciplinary action and sat in on the employee's oral reply thereto so as to advise the BDO on his or her decision. *Id.*

Williams further testified that the appellant was designated as the "alternate" contracts attorney, and would be expected to perform duties related to the agency's contracts matters, such as bid protests, in that role. AF, Tab 38 (HCD). However, it is undisputed that the appellant did not actually perform any such duties during his ATF tenure. *Id.*

I find Williams' testimony credible and reliable. *Hillen v. Department of the Army,* 35 M.S.P.R. 453, 458-62 (1987). She was the appellant's direct supervisor and therefore well informed of the tasks required of him. *Id.; see also* AF, Tab 38 (HCD). Her testimony is corroborated by the vacancy announcement for the ATF position,[3] which states, in relevant part:

> The incumbent primarily provides legal advice and recommendations to ATF officials in the area of employment law. Specifically, the incumbent provides advice to the ATF Professional Review Board Chair and the ATF Bureau Deciding Official on misconduct matters that have been referred to the ATF Internal Affairs Division for Investigation. The incumbent may also practice in the areas of ethics,

[3] I find the vacancy announcement most directly addresses the appellant's duties in the ATF position. Both the position description and performance plan for the ATF position are general in nature and appear to apply to all Attorney-Advisors in the Management Division rather than specifically applying to the appellant's position. *See generally*, AF, Tab 13 at 49 and Tab 28 at 178.

> contracts and fiscal law, and may advise on other issues assigned to the Management Division.

AF, Tab 13 at 52. The appellant did not provide any evidence disputing Williams's description of those responsibilities or that of the vacancy announcement. AF, Tab 38 (HCD). Rather, he testified in corroboration that he spent the majority of his time advising the PRB Chair and BDO in connection with potential and proposed disciplinary actions. *Id.* He testified that his role was to advise these entities through the disciplinary process following the IAD investigation results, to ensure that any action taken would withstand legal review. *Id*.

By contrast, the appellant testified that his USDA responsibilities primarily consisted of providing advice and counsel to senior managers regarding EEO matters and litigating those matters before the Equal Employment Opportunity Commission (EEOC). AF, Tab 38 (HCD). The appellant argued that he used the same skills and abilities in both positions despite the differences in the subject matter. *Id.* In particular, the appellant testified that he conducted legal review and analysis, provided advice and counsel to decisionmakers, engaged in oral advocacy, performed legal research, and drafted legal documents in both the USDA and ATF positions. *Id.* He argued that he therefore performed essentially the same services for both agencies. *Id.*

The appellant also, however, testified to several distinctions between the actual tasks he performed for both agencies under the broad labels of these responsibilities. AF, Tab 38 (HCD). Regarding legal writing and research, the appellant testified that his USDA role required him to send emails with his case analysis, advice on EEOC case processing, and settlement. *Id.* He further testified that he also drafted legal pleadings in connection with the EEOC litigation. *Id.* By contrast, he testified that his legal writing at ATF consisted mainly of his emailing advice and counsel to the PRB chair regarding the misconduct investigation reports, and perhaps some correspondence with the

BDO. *Id.* He testified that his legal opinions with ATF were shorter and not as extensive as what was required of him in his USDA position. *Id.* He further testified he drafted documents for signature by the PRB and BDO in connection with proposed disciplinary actions. *Id.* Regarding oral advocacy, the appellant testified that his USDA position required him to advocate before EEOC administrative judges. By contrast, at ATF, he discussed matters with the PRB Chair and BDO as their legal advisor. *Id.* He further testified he occasionally engaged in "oral advocacy" with Sheryl Williams when necessary, but did not elaborate on the nature of that advocacy. *Id.*

The parties also testified to the training the appellant received in starting the ATF position. AF, Tab 38 (HCD). Williams testified that she hired the appellant knowing he would need to be brought up to speed on the law and procedures applicable to the disciplinary cases he would be working on, as he had not worked in that area of law before. *Id.* She testified that the Division was unable to get the appellant into a week-long subject matter seminar at the start of his employment because the spots had already been assigned prior to his arrival. *Id.* However, both she and the appellant testified that the appellant paid for the conference fee with personal funds and that the agency provided the appellant with paid administrative leave for him to attend. *Id.* Williams also testified that the appellant purchased reference books on disciplinary case law so that he could better perform those duties. *Id.* The appellant alleges that the training and reference materials were self-initiated and not "required" by the agency in order to do his job. *Id.* He did not, however, dispute that the training and materials were either useful or necessary for his performance. *Id.*

I find based on the testimony and documents of record that the appellant's ATF position was different from his USDA position given the distinct nature of the tasks he performed. Though the appellant's work in both positions fell under the broad "employment law" umbrella, the evidence establishes that at USDA he handled primarily employment discrimination litigation cases and did not handle

disciplinary or Board-appealable actions in an advisory capacity. Rather, the appellant advised on the course of EEOC litigation and settlement options after particular events occurred and a complaint had been filed. I find this type of advice distinct from the advice he provided to the PRB and BDO regarding potential disciplinary action, where he advised prospectively on whether particular disciplinary actions should be taken and how that process should be performed so as to withstand potential legal review. The appellant was thus advising on different types of employment situations appealable in different forums, with different procedural requirements, burdens of proof, and relevant legal principles. This is consistent with the undisputed testimony of the appellant's self-directed efforts to obtain training and reference materials at the start of his ATF tenure. Finally, the appellant served in a defendant, advocacy role in his USDA position whereas he served as a non-adversarial advisor in his ATF role. The legal research and writing he engaged in was likewise largely distinct given those roles, as described by the appellant's own testimony.

The appellant's testimony of these distinctions is further evidenced by the USDA position description. AF, Tab 13 at 37; *see also Enocencio v. Department of Veterans Affairs*, 79 M.S.P.R. 130, ¶6 (1998) (Both testimony and positions descriptions are relevant evidence in determining whether positions are "similar"). The document sets forth broad requirements, such as "Mastery of statutes, regulations, and precedents related to major USDA program areas or relevant subject matter expertise;" and "Mastery of the principles and techniques of legal analysis and practice" in order to prepare litigation-related documents. *Id.* However, in its most explanatory section, the position description states:

> Represents the Department and its agencies in administrative and judicial proceedings in matters involving major programs or mission areas. Prepares pleadings, motions, briefs, litigation reports, and related documents in connection with suits by and against the Government. Determines the nature of actions or defenses, the legal issues involved, the most effective courses of action, and the most advantageous legal strategies and tactics to be employed.

> Recommends disposition of litigation reaching the appellate stage. Assists the Department of Justice and U.S. Attorneys in connection with all litigation, at both trial and appellate levels, pending in Federal and State courts. Recommends modifications to litigation policies, legislation, program regulations, and offers legal opinions concerning basic authorities and operations of a major mission area of the Department or its agencies. Prepares and reviews legal documents, including draft legislation.

Id. at 39. I find, therefore, that even this more general document corroborates the witness testimony that the appellant's position was heavily litigation-focused in the performance of the broader advisory tasks. *Hillen,* 35 M.S.P.R. at 458-62. The USDA performance plan further corroborates this finding, stating the appellant is expected to draft pleadings, negotiate and draft settlement agreements after obtaining the proper authority, administer litigation holds, and prepare for and defend the agency in administrative adversarial proceedings. AF, Tab 28 at 172. The plan also includes more general expectations, such as "Reasonably anticipates significant foreseeable consequences of recommended advice and actions to ensure that recommendations and decisions are practical, effective, legally sound, and supportable;" and "Provides oral and written advice that is concise, timely, responsive, professionally delivered, clear, and appropriately documented." *Id.* However, I find these broader expectations refer to the appellant specific litigation-related duties rather than any separate or additional duties he was required to perform.

The important distinctions between the duties performed in his USDA and ATF positions support a finding that the positions are not "similar" for the purposes of establishing current, continuous service. *See, e.g., Amend v. Merit Systems Protection Board*, 221 F. App'x 983, 985-86 (Fed. Cir. 2007) (Immigration Inspector and ATF Inspector positions were not similar because the actual inspection-related work performed for each position was different and required different training). Certainly, advising senior management on legal issues and litigation risks requires a particular skill set regardless of substantive

topic. This would be true of nearly any legal advisor position. However, in these circumstances, those similarities do not render the positions sufficiently similar for the purposes of this analysis. Accordingly, I find the appellant failed to establish that he had one year of current, continuous service and that the Board lacks substantive jurisdiction over his alleged involuntary resignation.

The Board does not have jurisdiction over the appellant's resignation during his probationary period[4]

The appellant alleges that the Board regardless has jurisdiction over his appeal as a probationary employee because he was subject to an involuntary resignation based on preemployment circumstances without the benefit of the procedures required by 5 C.F.R. § 315.805. The appellant has failed to establish Board jurisdiction over this claim.

A terminated probationary employee has no statutory right of appeal to the Board. 5 U.S.C. § 7511(a)(1)(A); *Mastriano v. Federal Aviation Administration*, 714 F.2d 1152, 1155 (Fed. Cir. 1983). A limited regulatory right of appeal has been provided for probationary employees in the competitive service terminated for post-appointment reasons who make a nonfrivolous allegation that the agency's action was based on partisan political reasons or marital status discrimination, pursuant to 5 C.F.R. § 315.805, or terminated for pre-appointment reasons who make a nonfrivolous allegation that the agency did not follow regulatory procedures, pursuant to 5 C.F.R. § 315.804. *See* 5 C.F.R. §315.806; *see also Ellis v. Department of the Treasury*, 81 M.S.P.R. 6, ¶ 6 (1999); *McCloud v. Department of the Navy*, 33 M.S.P.R. 643, 646 (1987).

The Federal Circuit and the Board have repeatedly held that this regulatory right to appeal is not available to employees serving in excepted service positions

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[4] During the prehearing conference I incorrectly informed the parties that, pursuant to 5 C.F.R. § 316.304(b), the Board has jurisdiction over the appellant's claim that the agency violated 5 C.F.R. § 315.805. AF, Tab 34.

at the time of their terminations. *See De Santis v. Merit Systems Protection Board,* 826 F.3d 1369, 1376 (Fed. Cir. 2016); *Ramirez-Evans v. Department of Veterans Affairs*, 113 M.S.P.R. 297, ¶ 10 (2010); *see also* 5 C.F.R. § 210.101(b).

The appellant alleges that he was a term employee in the excepted service and that 5 C.F.R. § 316.304(b) extends the procedural requirements of 5 C.F.R. §§ 315.804 and 315.805 to all term employees regardless of whether the employee is in the competitive or excepted service. AF, Tab 13 at 33. The regulation states:

> (a) The first year of service of a term employee is a trial period regardless of the method of appointment. Prior Federal civilian service is credited toward completion of the required trial period in the same manner as prescribed by § 315.802 of this chapter.
> (b) The agency may terminate a term employee at any time during the trial period. The employee is entitled to the procedures set forth in § 315.804 or § 315.805 of this chapter as appropriate.

5 C.F.R. § 316.304. The appellant alleges that the reference to the "method of appointment" in Section 316.304(a) refers to whether the appellant is placed in the competitive or excepted service and, therefore, the application of Sections 315.804 and 315.805 apply to employees in both services as well.

I find the regulatory construction does not support that interpretation. Rather, the manner of appointment refers to the appointment authority under which the term appointment was made, as listed in Section 316.302. *See* 5 C.F.R. §§ 316.304 and 316.302. Furthermore, Section 316.304(b) explicitly limits the application of Sections 315.804 and 315.805 "as appropriate." I find that proviso is a direct reference to the long-standing limitation of these regulatory procedures to probationary employees in the competitive service (*see, e.g., Ramirez-Evans, McCrary*) as well as other applicable regulations. 5 C.F.R. § 210.101(b) states:

> Parts 315 through 339 of this chapter apply to all positions in the competitive service and to all incumbents of those positions; and, except as specified by or in an individual part, these parts do not apply to positions in the excepted service or to incumbents of those positions.

I find Section 316.304(b) does not clearly specify that it operates as an exception to this broad statement of applicability and decline to apply it as such.

The appellant argues that *Gamble v. Department of the Army*, 111 M.S.P.R. 529 (2009), supports a finding of Board jurisdiction over his claim. I note that, unlike *Ramirez-Evans, McCrary* and similar cases, *Gamble* addresses the circumstances of an employee serving a term position terminated for pre-employment reasons, and is therefore directly analogous to the circumstances of this appeal. However, the Board in *Gamble* specifically noted that the administrative judge assumed for the purposes of her jurisdictional decision that the appellant was appointed to a term position in the *competitive service*. *Gamble,* 111 M.S.P.R. 529 at ¶ 5. The Board remanded the appeal for additional evidence to be taken regarding the appellant's appointment and the authority for his termination, to include whether the appellant had been serving in a competitive or excepted service appointment at the time of his termination. *Id.* at ¶ 23. I find this remand order consistent with longstanding precedent that the probationary termination procedures required by Sections 315.804 and 315.805 are applicable only to competitive service employees.

As the appellant was a preference-eligible, term employee in the excepted service and did not have at least one year of current continuous service, I find the Board lacks jurisdiction over his appeal.

DECISION

The appeal is DISMISSED for lack of jurisdiction.

FOR THE BOARD: /S/
Monique Binswanger
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **March 17, 2022**, unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with one of the authorities discussed in the "Notice of Appeal Rights" section, below. The paragraphs that follow tell you how and when to file with the Board or one of those authorities. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review.

If the other party has already filed a timely petition for review, you may file a cross petition for review. Your petition or cross petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file it with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.
Washington, DC 20419

A petition or cross petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

NOTICE OF LACK OF QUORUM

The Merit Systems Protection Board ordinarily is composed of three members, 5 U.S.C. § 1201, but currently there are no members in place. Because a majority vote of the Board is required to decide a case, *see* 5 C.F.R. § 1200.3(a), (e), the Board is unable to issue decisions on petitions for review filed with it at this time. *See* 5 U.S.C. § 1203. Thus, while parties may continue to file petitions for review during this period, no decisions will be issued until at least two members are appointed by the President and confirmed by the Senate. The lack of a quorum does not serve to extend the time limit for filing a petition or cross petition. Any party who files such a petition must comply with the time limits specified herein.

For alternative review options, please consult the section below titled "Notice of Appeal Rights," which sets forth other review options.

Criteria for Granting a Petition or Cross Petition for Review

Pursuant to 5 C.F.R. § 1201.115, the Board normally will consider only issues raised in a timely filed petition or cross petition for review. Situations in which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that:

(a) The initial decision contains erroneous findings of material fact. (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific

evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

(b) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The petitioner must explain how the error affected the outcome of the case.

(c) The judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case.

(d) New and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed.

As stated in 5 C.F.R. § 1201.114(h), a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to

submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

If you file a petition or cross petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. A petition for review must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

A cross petition for review must be filed within 25 days after the date of service of the petition for review.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

NOTICE OF APPEAL RIGHTS

You may obtain review of this initial decision only after it becomes final, as explained in the "Notice to Appellant" section above. 5 U.S.C. § 7703(a)(1). By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. 5 U.S.C. § 7703(b). Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this decision when it becomes final, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

Please read carefully each of the three main possible choices of review below to decide which one applies to your particular case. If you have questions about whether a particular forum is the appropriate one to review your case, you should contact that forum for more information.

(1) Judicial review in general. As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court within **60 calendar days** of the date this decision becomes final. 5 U.S.C. § 7703(b)(1)(A).

If you submit a petition for review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit 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, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

(2) Judicial or EEOC review of cases involving a claim of discrimination. This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days** after this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. ____ , 137 S. Ct. 1975 (2017). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

Contact information for U.S. district courts can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. 5 U.S.C. § 7702(b)(1). You must file any such request with the EEOC's Office of Federal Operations within **30 calendar days** after this decision becomes final as explained above. 5 U.S.C. § 7702(b)(1).

If you submit a request for review to the EEOC by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit a request for review to the EEOC via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, N.E.
Suite 5SW12G
Washington, D.C. 20507

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012. This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and your judicial petition for review "raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8) or 2302(b)(9)(A)(i), (B), (C), or (D)," then you may file a petition for judicial review with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. The court of appeals must receive your petition for review within

60 days of the date this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(1)(B).

If you submit a petition for judicial review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit 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, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

Contact information for the courts of appeals can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx

CERTIFICATE OF COMPLIANCE

I hereby certify that Microsoft Word reports that this Brief contains 5,056 words, using Times New Roman 14 pt type.

/s/ Avni J. Amin
Avni J. Amin