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

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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