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

PETITIONER'S CORRECTED REPLY BRIEF

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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).

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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		

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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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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).

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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).

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TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 4

I. SUBSTANTIAL EVIDENCE SUPPORTS A FINDING THAT JONES' ATTORNEY ADVISER POSITIONS AT THE USDA AND DOJ WERE SIMILAR 4

A. Jones Handled Employment Law and Personnel Matters in Both Positions 5

B. The USDA Position Did Not Require Greater Knowledge or Skills Than the DOJ Position. 10

C. The AJ Ignored Legal Precedent in Finding Jones' Positions Were Not Similar. 14

D. Jones' Positions Had More in Common than Simply the Practice of Law 17

II. JONES INVOLUNTARILY RESIGNED FROM THE AGENCY AND DID NOT MISREPRESENT HIS CONTRACT LAW EXPERIENCE 19

CONCLUSION 20

CERTIFICATE OF COMPLIANCE 21

TABLE OF AUTHORITIES

Cases

Amend v. Merit Systems Protection Board, 221 F. App'x 983 (Fed. Cir. 2007). 3, 8, 15, 16, 17

Bray v. Department of Transportation,19 F.3d 40, 1994 WL 43318 (Fed. Cir. 1994).....10

Clarke v. Department of Commerce, 2015 WL 853318 (M.S.P.B. Feb. 27, 2015) .5, 6

Coradeschi v. Department of Homeland Security, 439 F.3d 1329 (Fed. Cir. 2006).3

Davis v. Merit Systems Protection Board, 340 F. App'x. 660 (Fed. Cir. 2009) 9, 16, 17

Holloman v. Merit Systems Protection Board, 102 F. App'x 688 (Fed. Cir. 2004) 10, 12, 13

Mathis v. U.S. Postal Service, 865 F.2d 232 (Fed. Cir. 1988) 3, 6, 9, 15, 17

Shafford v. U.S. Postal Service, 293 F. App'x 760 (Fed. Cir. 2008) 18, 19

Spillers v. U.S. Postal Service, 65 M.S.P.R. 22 (1994) 9

Wisconsin Department of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214 (1992).....8

Yancey v. Department of the Army, 32 M.S.P.R. 606 (1987)..... 10, 11

Statutes

5 C.F.R. § 752.402 4

5 U.S.C.§ 7511(a)(1)(B) 7

5 U.S.C.§ 7511(a)(1)(B)(i).....2, 8

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PETITIONER'S CORRECTED REPLY BRIEF

Petitioner Kevin Jones (Jones) replies to the Brief filed in this matter by Respondent Merit Systems Protection Board (MSPB or the Board).

INTRODUCTION

Jones, who had been an Attorney Adviser with the Department of Agriculture (USDA) for over one year, transferred to the Department of Justice (DOJ), where he served as an Attorney Adviser for nearly five months before he was terminated. The only issue before the Court is whether Jones was an "employee," entitled by law to notice and an opportunity to respond, because his

position with the DOJ was the "same or similar" to his prior position with the USDA. 5 U.S.C.§ 7511(a)(1)(B)(i).[1] In its Brief, the MSPB agrees Jones completed one year of continuous service without a break of service in the USDA and DOJ as an Attorney Adviser, GS-905-14, ECF No. 32, p. 12, but insists he was not entitled to due process.

The MSPB raises two key points in support of its argument that Jones' positions were not the "same or similar." First, the Board argues that Jones' positions were not similar because he litigated EEOC matters at the USDA but did not litigate at DOJ, and the positions required different skill sets. However, in drawing such a narrow distinction of the work Jones performed at each agency, the Board ignores the fact that the fundamental character of the work in both positions involved employment law and personnel matters. The Board also gives no weight to the fact Jones' two positions had the same title, grade, step, and series, and were in the same competitive category for reduction in force purposes. Appx36.

Second, the Board argues the Administrative Judge (AJ) properly relied on legal precedent in finding the two positions were not the "same or similar" and

[1] Under 5 U.S.C.§ 7511(a)(1)(B)(i), the definition of "employee" includes "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." The MSPB agrees that "it is undisputed that Mr. Jones is a preference eligible." Respondent's Br. at 19.

correctly considered the so-called training Jones received when he joined DOJ. The Board has failed, however, to demonstrate how the AJ's analysis of Jones' job duties in each position was consistent with well-settled Federal Circuit case law on the issue of "same or similar," including *Mathis v. U.S. Postal Service*, 865 F.2d 232, 234 (Fed. Cir. 1988). It has also failed to rebut Jones' contention that the AJ ignored well-settled case law on the relative unimportance of training on this issue. *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 failed to explain how the AJ's reliance on *Amend v. Merit Systems Protection Board*, 221 F. App'x 983, 984-86 (Fed. Cir. 2007) comports with the facts of this case.

Lastly, the Board argues this Court lacks subject matter jurisdiction over this case because it is a mixed case and Jones did not waive his discrimination claims. While the Board is correct that was is a mixed case, Jones explicitly and affirmatively waived his discrimination claims in his Form 10, Statement Concerning Discrimination. *See* ECF No. 4, p. 3 ("Although I did claim that I was discriminated against before the MSPB…I wish to abandon those discrimination claims and only pursue civil-service claims in the Federal Circuit, rather than pursuing discrimination claims and civil-service claims in district court."). Jones' addendum to this form notes that his discrimination claim has not yet been adjudicated by the MSPB, and that if he prevails on his appeal and the matter is

remanded to the Board, *the Board* may be required to adjudicate his discrimination claim at that time. In order to clarify the record and to leave no doubt in this Court's mind that Jones is waiving his discrimination claims, Jones has filed a new Form 10, with no such clarifying statement. ECF No. 33. Therefore, this issue is moot.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS A FINDING THAT JONES' ATTORNEY ADVISER POSITIONS AT THE USDA AND DOJ WERE SIMILAR

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. Here, Jones' positions were "the same or similar" because he utilized the same skill set in both positions to address complex employment law and personnel matters.

It is irrelevant that Jones litigated matters at the USDA, but not at DOJ, because, as noted below, the nature and character of the work he performed was substantially similar at both agencies. Moreover, his duties overlapped sufficiently in both positions such that DOJ did not require Jones undergo training prior to or at

the start of his position. Indeed, it was Jones' experience as an Attorney Adviser at the USDA that qualified him for the DOJ Attorney Advisor position. Appx66-68. The MSPB's claims that Jones engaged in contract work at DOJ as evidence his positions were not similar is also baseless. Therefore, the MSPB's arguments in support of upholding the AJ's finding that the two positions were not "the same or similar" must fail, and this matter should be remanded to the Board for further proceedings.

A. Jones Handled Employment Law and Personnel Matters in Both Positions.

While it is uncontested that the substance of Jones' positions at USDA and DOJ involved complex federal personnel and employment issues, the MSPB argues the positions were not "similar" because the work Jones performed at the USDA was in a substantively different field than the work he performed at DOJ. In support of this argument, the Board relies on its non-precedential decision in *Clarke v. Department of Commerce*, which involved an attorney who practiced disability law in one position and intellectual property law in the second position. 2015 WL 853318, at ¶ 13 (M.S.P.B. Feb. 27, 2015) (nonprecedential). The parallels the Board draws between the duties and responsibilities at issue in *Clarke* and this case simply defy logic.

First and foremost, Clarke's primary responsibility in her Attorney-Advisor (General) position with the Social Security Administration was to "process appeals

of administrative law judge decisions on disability claims arising under Title II and Title XVI of the Social Security Disability Act." *Clarke*, 2015 WL 853318, at ¶ 13. In contrast, at the Department of Commerce (DOC), Clarke "process[ed] and examine[d] applications for federal trademark protection under the Lanham Act." *Id.* at ¶ 11. The AJ in that case correctly found that the "fundamental nature" of the DOC, Attorney-Advisor (Trademark) position required knowledge, skills, and experience in trademark and intellectual property law that were not required in Clarke's position with the SSA, where she practiced disability law. *Id.* at ¶ 13. Critically, Clarke was required to undergo a 7-week training when she joined DOC, because she had to learn how to examine trademark applications and understand Federal trademark law, rules, and procedures. *Id.* at ¶ 15.

Whether positions are "substantially similar" will depend upon their "fundamental character." *Mathis v. U.S. Postal Serv.*, 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). The "fundamental character" of the work Jones performed at both the DOJ and USDA involved employment law and personnel matters. Both positions required Jones to provide legal advice and recommendations to senior agency officials regarding personnel issues, review and draft legal analyses, and make recommendations/provide assistance concerning legal processes involving employment matters. Appx49-52, Appx87-88. With

respect to the training issue, DOJ stipulated that Jones was not required to attend or complete any training prior to starting with the agency. Appx37. Because the "fundamental character" of Jones' work at both agencies involved personnel and employment issues, the positions were sufficiently "similar" for purposes of 5 U.S.C.§ 7511(a)(1)(B).

In attempting to distinguish Jones' positions at the USDA and DOJ, the MSPB also raises an argument in its Brief that the AJ did not find relevant, let alone dispositive. The MSPB claims that Jones's Attorney Adviser positions were not "the same or similar" because he had to perform contract work at the DOJ. ECF No. 32, p. 33. The AJ, however, specifically found that "appellant did not actually perform any [] [contract] duties during his ATF tenure." Appx7. While Jones was designated as the alternative contracts attorney during his employment with DOJ, the position for which he was hired did not in fact require any contracts experience, on the contrary it envisioned Jones would primarily advise on employment law issues. *See* Appx45 ("[A]pplicants must have five years as a practicing attorney; 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 exercising responsibility for the provision of *employment law advice*.) (emphasis added). The

position for which DOJ hired Jones was one involving employment law, not contract law.

The Board also argues Jones' "actual duties" at DOJ required performance of contract and procurement work, despite the fact that Jones did not engage in contract or procurement work during his employment with DOJ. While the MSPB argues Jones "had begun to perform [contract] duties before his resignation," the evidence shows that Jones was only *assigned* "five or six" contracts "that he was planning to review" towards the end of his employment with DOJ. ECF No. 32, p. 34. Jones explained that he had "a couple of email correspondence with…one or two people directly [at ATF acquisitions]." SAppx44. But Jones did not actually perform any contract work while he was at DOJ.

In order to determine whether Jones' positions were similar in nature for purposes of 5 U.S.C. §7511(a)(1)(B)(i), this Court should only consider the duties Jones actually performed or discharged, which must be more than de minimis in nature. *See, e.g.*, *Wis. Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231 (1992) ("[T]he venerable maxim *de minimis non curat lex* ('the law cares not for trifles') is part of the established background of legal principles against which all enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept."); *Amend*, 221 F. App'x at 986 ("actual work *performed* by an ATF Inspector is not similar to that performed by an Immigration Inspector.")

(emphasis added); *see also Davis v. Merit Sys. Prot. Bd.*, 340 F. App'x. 660 at 663 (Fed. Cir. 2009) (the "'same line of work'" language is akin to "'similar positions'" and required a comparison of the nature of the work "actually performed" in each job); *Mathis*, 865 F.2d at 235 (The proper evaluation of whether an employee is in the same line of work after a change in jobs is the employee's actual duties in the two positions and the actual skills required in the two positions). No reasonable factfinder could conclude Jones performed contract work during his time at DOJ merely because he sent de minimis email correspondence to personnel within ATF acquisitions.

The ATF vacancy announcement, which states that in addition to employment law work, the incumbent may also practice in the areas of ethics, contracts, and fiscal law, is also not outcome determinative. Appx44. *See, e.g.*, *Spillers v. U.S. Postal Serv*., 65 M.S.P.R. 22, 27 (1994) (Where a question is raised regarding the nature and character of the duties performed, references in an announcement to the position descriptions alone may be inadequate). If the vacancy announcement was outcome determinative, then the AJ should have also considered the portion of the DOJ position description which notes the incumbent may be expected to serve as an agency representative before Administrative Boards, *i.e.*, engage in litigation work. Appx87.

For these reasons, the work Jones actually performed at the DOJ was sufficiently similar to work he performed at the USDA to define him as an "employee" entitled to due process.

B. The USDA Position Did Not Require Greater Knowledge or Skills Than the DOJ Position.

The MSPB next argues the skill set Jones utilized at the USDA was more complex and specialized than the skill set required of him at DOJ because while at USDA he was drafting legal pleadings and engaged in oral advocacy before the EEOC. The Board's argument oversimplifies the work Jones performed at DOJ, and the cases the MSPB cites in its Brief are readily distinguishable from the present matter. *See Bray v. Dep't of Transp.*, 19 F.3d 40, 1994 WL 43318, at *3 (Fed. Cir. 1994) (per curiam); *Holloman v. Merit Sys. Prot. Bd.*, 102 F. App'x 688, 690 (Fed. Cir. 2004) (per curiam); and *Yancey v. Dep't of the Army*, 32 M.S.P.R. 606, 609-10 (1987).

In *Bray*, the Board found that appellant could not step into the Developmental Air Traffic Control Specialist position from his prior role as an Air Traffic Assistant, "'without significant interruption to the work program,'" in part, because he first had to pass training requirements for the Specialist position. 19 F.3d 40, at *2-3. In the present case, Jones was not required to attend any mandatory training at the start of his DOJ position. Appx37. The *voluntary* training Jones attended at the start of his employment with DOJ consisted of a four-day

training course on Federal Dispute Resolution. Appx93. Moreover, Jones testified he received "[m]aybe a couple of hours" of initial on-the-job training during no more than a two-to-three-week time span. Appx84. DOJ offered, and the MSPB cites, no evidence that Jones required more supervision than he did at the USDA. There is also no doubt that as Attorney Adviser at the GS-14 level, Jones required little direct supervision or oversight in either position.

Similarly, the facts in *Yancey* do not support the MSPB's argument that Jones' USDA position required a higher skill set than his DOJ position. The Board in *Yancey* found Yancy's positions were not similar because his duties and responsibilities in his second position -- as a Museum Technician, GS-7 -- "substantial[ly]" increased in comparison to his prior role as an Exhibit Specialist, GS-5. *Yancey*, 32 M.S.P.R. at 609. As an Exhibit Specialist, Yancy's responsibilities included "preparing and maintaining exhibits, conducting guided tours, accepting objects as gifts or loans subject to acceptance by the Acquisition Committee, and requisitioning supplies and equipment." *Id.* In contrast, after his promotion to a Museum Technician, Yancy was allowed to work "independently" and able to "plan[], design[], and prepar[e] the displays and exhibits." *Id.* In addition, as a Museum Technician, Yancy conducted research, prepared publicity materials, and he assisted the Curator in education and outreach programs. *Id.*

In this case, however, Jones' transfer to DOJ was seamless, in that he was still advising senior officials on complex employment and personnel matters, crafting legal arguments, conducting legal research, analyzing case law, and making recommendations to his client agency, with the same title and grade. Appx49-52, Appx75-76, Appx79-81, Appx87-88. Moreover, Jones' former first-line supervisor at DOJ testified that she believed Jones could effectively work with the Professional Review Board (PRB) and Bureau Deciding Official (BDO) when she hired him because of his "experience with litigating employment law matters." Appx105. Without question, DOJ's belief that Jones' litigation work at the USDA qualified him to handle PRB and BDO matters at DOJ, thus undercutting the MSPB's argument that his prior position was dissimilar to the work he performed at DOJ.

In *Hollomon*, this Court considered whether appellant's work as a federal air marshal was similar to his work as an Amtrak police officer. 102 F. App'x at 690. The Court found that a federal air marshal required the use of "law enforcement techniques not used elsewhere because of the confined structure and configuration of an airplane," and that air marshals face "distinct dangers while on duty in an aircraft." *Id.* Moreover, a federal air marshal receives training, including special firearm training, that other law enforcement officers do not need. *Id.* Here, the qualifications required of Jones were identical at the USDA

and DOJ: a J.D. degree and an active bar membership. Appx36. Moreover, the employment litigation Jones performed at the USDA simply does not represent the same contrast to the advisory work Jones performed on employee disciplinary matters at DOJ as was presented in the case of the federal air marshal in *Holloman*, who patrolled stations, concourses, and trains as an Amtrak officer, and then engaged in dangerous undercover work on airplanes, while bearing a special firearm. 102 F. App'x at 690. Notwithstanding that Jones litigated EEOC complaints against the agency while at the USDA, in both positions, 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 regarding employment law, with the same level of responsibility. Appx80-81.

Moreover, the drafts Jones prepared at the USDA were similar to the writing he engaged in at DOJ. In both positions, Jones was required to review and draft legal analyses for consideration and decision by senior managers. Appx49-52, Appx87-88. The legal analyses Jones engaged in at the USDA for EEOC adversarial hearings were akin to the legal analyses he provided to the ATF PRB chair and BDO regarding misconduct investigations: both analyses required that he spot issues, analyze the issue with supporting case law, and provide a recommendation. Appx49-52, Appx75-76, Appx79-81, Appx87-88. The MSPB's

arguments that legal pleadings are "generally" more "complex" than an "internal email analyzing a report," ECF No. 32, p. 38., oversimplifies the analyses Jones provided to the ATF's PRB and BDO on whether particular disciplinary actions should be taken and how that process should be performed so as to withstand potential legal review.

In terms of oral advocacy, while the target audience differed, the fundamental skills remained the same. At the USDA, Jones' job was to persuade administrative judges of his position, which entailed setting forth well-reasoned arguments, if adopted, that would insulate the judge from being overturned on appeal. At the DOJ, Jones' job was to convince PRB and the BDO whether particular disciplinary action should be taken or not, so as to withstand potential legal review. Appx10.

In sum, Jones' positions were similar because his USDA position did not require a greater skillset than his DOJ position. Both positions required similar knowledge, skills, and abilities a with little or no direct supervision.

C. The AJ Ignored Legal Precedent in Finding Jones' Positions Were Not Similar.

The Board understandably argues that the AJ properly relied on legal precedent and rightly considered Jones' voluntary training, which was a 4-day course Jones attended when he first joined DOJ, in finding the two positions were not similar. ECF No. 32, p. 43 However, the Board has simply ignored that the

AJ's analysis of Jones' job duties in each position and disregard for the "fundamental character" of the legal work that Mr. Jones engaged in—the practice of employment law—is flatly inconsistent with this Court's well-settled case law on the issue of "same or similar," including *Mathis v. U.S. Postal Service*, 865 F.2d 232, 234 (Fed. Cir. 1988). The Board also fails to explain how the AJ's reliance on *Amend v. Merit Systems Protection Board*, 221 F. App'x 983, 984-86 (Fed. Cir. 2007) comports with the facts of this instant matter.

Contrary to the Board's suggestion, *Mathis* is indistinguishable from this case because, as in *Mathis*, Jones handled administrative personnel processes in both positions, *i.e.*, the EEO process at the USDA and the PRB and BDO at DOJ. The skill set required to analyze and advise on disciplinary matters on the one hand, and to advise on and litigate discrimination cases on the other, are identical where Jones researched administrative case law, reviewed administrative regulations, and advised the agency on personnel issues. *Cf. Mathis*, 865 F.2d at 235 (The Board deemed it critical that the differences in the nature of the work performed by a special delivery messenger and a distribution clerk were not inconsistent with their being "similar positions" because in each position the critical fact was that the petitioner handled the mail.) As with the petitioner in *Mathis,* Jones' ability to perform the duties of his Attorney Adviser position with

DOJ without any training was based on his practice of employment law at the USDA.

Similarly, the Board's attempts to distinguish Jones' case from *Davis*, ECF No. 32, pp. 41-42, are not persuasive. Davis transitioned from spending the majority of her time managing unit data as a Statistical Assistant, to spending the majority of her time analyzing data and fulfilling requests as a Mathematical Statistician. This Court found the two positions sufficiently similar because the duties of her second position allowed Davis to use the same "knowledge[ ], skills, and abilities" she utilized in her first position. *Davis*, 340 F. App'x at 664. Just as in Davis, the overlap in the type of work Jones performed at both the USDA and DOJ, or the "substantive law," as the Board puts it, was significant. *See supra* Section I.A-B.

Lastly, the AJ's reliance on *Amend*, to support her finding that Jones' duties with the USDA and DOJ were not similar, was plain error. The Board argues the AJ simply relied on *Amend* as an analogous case. ECF No. 32, p. 44. The AJ did more than this. Amend was an Immigration Inspector with the Immigration and Customs Enforcement, Department of Homeland Security (DHS), who transferred to the excepted service as an Inspector for ATF. *Amend*, 221 F. App'x at 987-86. This Court found that Amend's two positions were not similar because the ATF position required different qualifications as well as a seven-week training course

and a two year internship. *Id.* Additionally, the knowledge and skill set differed greatly between the two positions, *e.g.*, knowledge of U.S. immigration, customs, and public health at ICE, versus knowledge of alcohol, tobacco, firearm, and explosive laws at ATF. *Id.* Given the clear differences in the two positions, the AJ's reliance upon *Amend* to justify the same outcome in this case is arbitrary and capricious and not supported by substantial evidence.

Accordingly, the AJ's disregard of *Mathis* and *Davis*, and instead her reliance on *Amend* to support a finding that Jones' Attorney Adviser positions with the USDA and DOJ were not the "same or similar" was in error, and the Board's decision should be overturned.

D. Jones' Positions Had More in Common than Simply the Practice of Law.

Jones' positions at the DOJ and USDA both involved complex employment law and personnel matters and an overlap of duties and responsibilities that were not "minor" in nature, as the MSPB suggests. ECF No. 32, p. 33. 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 complaint process. Appx80. Similarly, at the USDA Jones spent 30 percent of his time advising decision makers and senior management officials, *e.g.*, the Director of the National Finance Center, regarding the strengths

and weaknesses of employee EEO complaints, while at DOJ he spent 30 percent of his time advising senior management officials, *e.g.*, the Chair of the PRB and Bureau Deciding Official, regarding the strengths and weaknesses of possible employee discipline. Appx80-81.

In support of its argument that Jones' positions were only similar because he engaged in the practice of law, the MSPB cites *Shafford v. U.S. Postal Service*, 293 F. App'x 760 (Fed. Cir. 2008) (per curiam), as analogous to facts in this instant matter. ECF No. 32, p. 41. In *Shafford*, the AJ considered whether a Mail Processing Clerk position (PS-05) and a Networks Specialist position (EAS-15) "involve[]d significantly different responsibilities and duties." 293 F. App'x at 763. As a Mail Processing Clerk, Shafford physically processed, sorted, and distributed the mail; in the Networks Specialist position, which was deemed a "higher-level position," he was required to coordinate activities between contract carriers and postal supervisors and the administration of network changes. *Id.* The AJ found the two positions to be dissimilar, on the ground it was not enough that the two positions shared a "common basic function" of "'the efficient movement of mail.'" *Id.*

The facts of this case are readily distinguishable from *Shafford*. Jones has never argued that he simply engaged in the practice of law in both Attorney Adviser positions; rather, he set forth a detailed list of the work he performed in

both positions, including providing legal advice to senior agency officials, mastering statutes, regulations, and precedents related to agency program areas, and utilizing legal search engines for EEOC and MSPB decisions in order to draft pleadings and other documents, and make appropriate recommendations to senior agency officials. *See* ECF No. 29, p. 19.

Shafford does not control the outcome of this case: Jones' Attorney Adviser positions were similar in nature, and the Board's decision should be overturned.

II. JONES INVOLUNTARILY RESIGNED FROM DOJ AND DID NOT MISREPRESENT HIS CONTRACT LAW EXPERIENCE

Other arguments raised by the MSPB in its Brief, including the Board's claim that Jones' resignation was not involuntary and that Jones misstated his contract law experience, have no bearing on the issues before this Court.[2] Record evidence shows Jones was never questioned about his contract law experience during the selection process, Appx97-99, Appx108-110, nor did the position require contract law experience. Appx44-47. In fact, the attorney hired to replace Jones lacked *any* contract law experience or education. Appx106-107.

[2] The AJ noted that whether Jones misrepresented his contract law experience is not material to the jurisdictional issues before her. Appx3. Moreover, the Final Agency Decision (FAD) noted that there was a lack of evidence to sustain the allegations of misrepresentation by Jones regarding his contract law experience, *i.e.*, overstating his qualifications, during his interview panel or otherwise. Appx34.

Additionally, Jones resigned only after his second-line supervisor told him he was planning to remove him as a "probationary employee." Appx37-38. His supervisor gave him less than 24 hours to resign. *Id.*

The circumstances surrounding Jones' resignation, *i.e.*, the threat of termination as a probationary employee and the short timeframe to decide whether to resign, are sufficient to render his resignation involuntary. Again, these issues have no bearing on the issue of jurisdiction, and may be revisited only on remand to the Board should the Court find the Board had jurisdiction over Jones' appeal.

CONCLUSION

For the foregoing reasons and those stated in his Brief, Jones respectfully requests that the Administrative Judge's Initial Decision rejecting jurisdiction over his appeal be reversed and the appeal be remanded to the Board for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Rule 32(g)(1), Microsoft Word reports that this Brief contains 4,476 words, using Times New Roman, 14-point type.

/s/ Aaron H. Szot
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