

NO. 2022-1788

COMBINED BRIEF AND SUPPLEMENTAL APPENDIX FOR
RESPONDENT MERIT SYSTEMS PROTECTION BOARD

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

KEVIN D. JONES,
Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent.

PETITION FOR REVIEW OF A DECISION OF THE
MERIT SYSTEMS PROTECTION BOARD IN NO. DC-0752-21-0375-I-1

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STATEMENT OF RELATED CASES

Counsel for Respondent, the Merit Systems Protection Board (“MSPB” or “Board”) is unaware of any other appeal in or from the same proceeding below that has previously been before this or any other appellate court. Further, counsel knows of no pending case in this or any other court that will directly affect or be directly affected by this Court’s decision in the instant appeal.

JURISDICTIONAL STATEMENT

The Court lacks jurisdiction over this appeal because it is a “mixed case” that can only be filed in district court under 5 U.S.C. § 7703(b)(2) and *Perry v. Merit Systems Protection Board*, 137 S. Ct. 1975 (2017).

NO. 2022-1788

BRIEF FOR RESPONDENT MERIT SYSTEMS PROTECTION BOARD

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

KEVIN D. JONES,
Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent.

PETITION FOR REVIEW OF A DECISION OF THE
MERIT SYSTEMS PROTECTION BOARD IN NO. DC-0752-21-0375-I-1

STATEMENT OF THE ISSUES

1. Whether the Court can exercise jurisdiction over this appeal, where Petitioner Kevin D. Jones alleged discrimination before the MSPB and has declined to waive his discrimination claims before this Court.

2. In the alternative, whether the MSPB correctly dismissed Mr. Jones's administrative appeal for lack of jurisdiction where Mr. Jones failed to prove by preponderant evidence, for purposes of MSPB jurisdiction under 5 U.S.C. § 7511(a)(1)(B)(i), that his prior position as an Attorney-Advisor at the UDSA, where his duties consisted of advising agency employees

regarding discrimination complaints and representing the agency before the EEOC, was similar to his subsequent position as an Attorney-Advisor at the ATF, where his duties consisted of advising the agency regarding employee discipline and practicing procurement law.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

Mr. Jones has appealed the MSPB’s final decision in *Kevin D. Jones v. Department of Justice*, MSPB case number DC-0752-21-0375-I-1 (Feb. 10, 2022), which dismissed his administrative appeal for lack of jurisdiction because Mr. Jones did not prove by preponderant evidence that he was an “employee” within the meaning of 5 U.S.C. § 7511(a)(1)(B).¹

II. STATEMENT OF FACTS AND DISPOSITION BELOW

On April 15, 2018, Mr. Jones was appointed to a term position as an Attorney Advisor (General), GS-0905-14, with the U.S. Department of Agriculture (“USDA”). Appx2. Mr. Jones’s responsibilities at the USDA primarily consisted of providing advice and counsel to senior management regarding discrimination complaints filed against the agency under Title VII of the Civil Rights Act of 1964 and related discrimination statutes, and

¹ The administrative judge also held that Mr. Jones did not establish that he had a limited regulatory appeal right available to competitive service probationary employees because, regardless of whether he was serving a probationary period, his appointment was in the excepted service rather than the competitive service. Appx12–14. On appeal, Mr. Jones does not challenge this holding, and therefore has waived this argument. *See, e.g., SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319 (Fed. Cir. 2006) (“Our law is well established that arguments not raised in the opening brief are waived.”).

litigating ensuing discrimination claims before the Equal Employment Opportunity Commission (“EEOC”). Appx8; SAppx32–34. This area of practice is governed by federal antidiscrimination statutes, related case law, and the implementing regulations of the EEOC. *See, e.g.*, 42 U.S.C. § 2000e-16; 29 C.F.R. 1601.101, *et seq.*

On August 4, 2019, Mr. Jones transferred without a break in service to an excepted-service appointment as an Attorney-Advisor (Management Division), GS-0905-14, with the U.S. Department of Justice’s Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF” or “agency”). Appx2. As further discussed below, Mr. Jones resigned from his position effective December 21, 2019—approximately four and a half months into his employment with the ATF. Appx3.

Mr. Jones’s direct supervisor at the ATF, Sherryl Williams, testified that Mr. Jones had two principal responsibilities at the ATF: first, to advise the agency’s disciplinary body, known as the Professional Review Board (“PRB”), in its handling of employee misconduct; and second, to serve as the agency’s “‘alternate’ contracts attorney.” Appx6.

Regarding the PRB, Mr. Jones’s duties were to review investigation reports, to discuss appropriate charges with the PRB Chair and Deputy Chair, and to advise PRB members during meetings in which they voted whether to

propose disciplinary action. Appx7. If the PRB proposed discipline for an employee, then Mr. Jones would review the employee's written response to the PRB's proposal and sit in on the employee's oral reply so that he could advise the final decisionmaker, the Bureau Decision Official ("BDO"). Appx7. The discipline and advisory scheme is governed by the ATF's internal directives, the ATF Table of Offenses and Penalties, the MSPB's case law, and judicial precedents reviewing the MSPB's decisions. SAppx3-4, SAppx34.

Mr. Jones's contracts-related duties were to review the agency's proposed contracts and to represent the agency in matters such as bid protests. Appx7; SAppx4, SAppx40. Contracts law is governed by, inter alia, federal procurement statutes, the Federal Acquisition Regulation, 48 C.F.R. § 1, *et seq.*, and the Federal Circuit's case law. SAppx40. Mr. Jones testified that during the weeks preceding his resignation, he exchanged emails and met with several ATF contracting officers and was preparing to review several contracts. SAppx40-41. However, Mr. Jones did not complete a contract review or otherwise perform substantial work on contracting matters because, as explained below, he was not assigned contract work in his initial three months of employment and resigned shortly after he began taking over matters from the agency's primary contracts attorney. Appx2-3, Appx7.

Mr. Jones's employment at the ATF proceeded without major incident from August 2019, until November 2019, when the agency's primary contracts attorney, Hillary Martinson, announced that she was leaving the agency. Appx2; SAppx18. Mr. Jones's supervisor directed him, as the alternate contracts attorney, to meet with Ms. Martinson before her departure so that she could transfer her procurement matters to him in an orderly fashion. Appx2. After some delay, Mr. Jones and Ms. Martinson met to work on the transition. SAppx25–28. During the meeting, it became apparent to Ms. Martinson that Mr. Jones "did not have a[n] understanding of contracts law," and she communicated her concern to the Deputy Associate Chief Counsel of the Management Division, who conveyed that information to Ms. Williams in turn. SAppx27.

The agency's discovery that Mr. Jones did not, in fact, have prior experience with government contracting raised concerns within the Management Division about Mr. Jones's character and candor, as Ms. Williams and others believed he had misrepresented his procurement law experience during the hiring process. SAppx14–16. They also believed he had failed to correct their apparent misunderstanding after he began working at the ATF, despite having multiple opportunities to do so. SAppx15–16, SAppx19–20, SAppx29. On December 18, 2019, the Chief Counsel informed

Mr. Jones that the agency planned to initiate the removal process and that as a probationary employee, Mr. Jones would have no Board appeal rights.² Appx3. The Chief Counsel offered Mr. Jones the opportunity to resign in lieu of termination, and Mr. Jones resigned effective December 21, 2019. Appx3.

On March 19, 2020, Mr. Jones filed an Equal Employment Opportunity (“EEO”) complaint alleging the agency coerced him to resign because of his race, sex, age, disability, and participation in activity protected

² Mr. Jones contends that prior to this discussion, the agency never informed him that his appointment was subject to a probationary period. Regardless, his probationary status is irrelevant to the dispositive legal issue respecting the Board’s jurisdiction: whether, as of the date of his resignation, Mr. Jones had 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). MSPB jurisdiction under this provision is not affected by probationary status (in contrast to jurisdiction under sections 7511(a)(1)(A) and 7511(a)(1)(C)). Therefore, even if the agency incorrectly informed Mr. Jones that he was serving a probationary period, or incorrectly informed him that such probationary period would preclude MSPB appeal rights, these errors have no bearing on the question of whether Mr. Jones established that he served one year of current continuous service.

Likewise, Mr. Jones cannot establish an appeal right by claiming that his resignation was induced by agency misinformation regarding his probationary status because any such error or misinformation pertained solely to the issue of whether his appeal right turned on his probationary status, which it did not. *See Council v. Merit Sys. Prot. Bd.*, 355 F. App’x 398, 400 (Fed. Cir. 2009) (nonprecedential) (finding no need to reach argument that demotion was involuntary where failure to meet the statutory definition of “employee” under section 7511(a)(1)(B) precluded Board jurisdiction over demotion directly or as an involuntary action).

by antidiscrimination law. Appx3. On March 30, 2021, the agency issued a Final Agency Decision (“FAD”) finding no evidence of discrimination. Appx3. Mr. Jones timely appealed from the FAD to the MSPB on April 26, 2021. Appx3.

Because Mr. Jones’s Board appeal raised multiple potential jurisdictional issues, the MSPB administrative judge (“AJ”) issued a show-cause order informing Mr. Jones of the pertinent jurisdictional requirements, specifically, those pertaining to employees with statutory Board appeal rights.³ Appx4. The parties submitted evidence and argument on the jurisdictional issues. The AJ found Mr. Jones had nonfrivolously alleged that he satisfied the requirement that he had performed one year of current continuous service in the same or similar position and scheduled a jurisdictional hearing to take additional evidence to resolve this question. Appx5. The AJ held a jurisdictional hearing on December 10, 2021, at which

³ The administrative judge also informed Mr. Jones of the jurisdictional requirements pertaining to probationary employees with limited regulatory appeal rights and to involuntary resignations, but Mr. Jones has not pursued either theory on judicial appeal, and as explained above in footnote 2, both claims are irrelevant to the dispositive jurisdictional issue.

Mr. Jones was represented by counsel, and heard the testimony of several witnesses, including Mr. Jones and his former supervisor Ms. Williams. Appx5.

On February 10, 2022, the AJ issued an Initial Decision dismissing the appeal for lack of jurisdiction. Appx1. The AJ first considered whether Mr. Jones had proven that he was an “employee” with statutory appeal rights as defined in 5 U.S.C. § 7511(A)(1)(B), meaning a person who has served at least one year of current continuous service in the same or similar positions.⁴ Appx5. Since Mr. Jones had served a little over four months at the ATF and therefore could not satisfy the required one year of service through his ATF employment, the AJ noted that he could only be an “employee” if he could satisfy the one-year requirement by adding his immediately prior USDA service. This required showing that his position at the ATF was “similar to” his position at the USDA. Appx5.

The AJ concluded that the two positions were not similar. While both positions had the same title, series, and grade, the AJ noted that this fact was not dispositive. Appx6. The AJ made factual findings regarding the job

⁴ The agency did not contest that Mr. Jones’s employment was governed by 5 U.S.C. § 7511(a)(1)(B), and so the AJ correctly considered and applied case law pertinent to that provision.

duties of both positions based on Mr. Jones's and Ms. Williams's testimony, the position descriptions, vacancy announcements, and performance plans; carefully compared the two roles; and found significant differences between them. Appx6–12. The AJ found that the two positions involved duties in distinct legal areas, namely, for the USDA position, civil rights and discrimination-related employment law under the EEOC's jurisdiction, and for the ATF position, federal disciplinary law under the MSPB's jurisdiction and procurement duties. Appx7, Appx9.

The AJ further observed that the nature of the legal representation Mr. Jones provided differed in both roles, as Mr. Jones was primarily a litigator at the USDA and exclusively an advisor at the ATF. Appx8–9. The AJ also found that the complexity and difficulty of Mr. Jones's tasks at the two agencies differed, as his USDA position called upon him to advocate before EEOC administrative judges and to write legal pleadings and emails containing case analysis, advice on EEOC case processing, and settlement, while his ATF position required him to discuss with the PRB, BDO, and his supervisor disciplinary matters potentially falling under MSPB jurisdiction, to write shorter legal opinions and documents, and to perform contract analysis and other procurement duties. Appx8–9. Accordingly, notwithstanding that both of Mr. Jones's positions were legal positions, the

AJ found them to be dissimilar because of the differences in the knowledge, skills, and abilities required to perform in each role. Appx11–12.

Upon finding that Mr. Jones was not an employee with statutory appeal rights, the AJ then considered whether Mr. Jones was a probationary employee with regulatory appeal rights. Appx12. The AJ ruled that he did not have such rights because both this Court and the Board have held that employees in excepted service positions do not have a regulatory right of appeal to the Board. Appx12–13. Mr. Jones does not challenge this holding on appeal. Thus, the AJ concluded that the Board could not exercise jurisdiction over Mr. Jones’s appeal. Appx14.

The initial decision became final by operation of law on March 17, 2022, because neither party filed an administrative petition for review by that date with the full Board. *See* Appx15 (stating date on which initial decision became final); Appx102–104 (certified list reflecting absence of administrative petition for review). On May 12, 2022, within 60 days of the date the initial decision became final, Mr. Jones filed a petition for judicial review in this Court. ECF No. 1.

SUMMARY OF ARGUMENT

At the outset, this Court lacks subject matter jurisdiction over this appeal because it is a “mixed case,” and Mr. Jones has not waived his

discrimination claims so that the Court may exercise jurisdiction over it. Accordingly, the Court cannot consider the merits of this appeal and should transfer it to the U.S. District Court for the District of Columbia for further proceedings.

In the alternative, the AJ correctly dismissed Mr. Jones's administrative appeal for lack of jurisdiction because he failed to prove by preponderant evidence that he was an "employee" as that term is defined in 5 U.S.C. § 7511(a)(1)(B). The AJ correctly ruled that Mr. Jones was not an "employee" because he had not completed one year of continuous service in "similar positions" at the time of his involuntary resignation, as Mr. Jones did not establish that his prior position of Attorney Advisor (General) in the USDA was similar to his subsequent position of Attorney Advisor (Management Division) in the ATF.

Substantial evidence supports the finding that the two positions were not similar. The record, including testimony carefully considered by the AJ, establishes that the knowledge, skills, and abilities needed to perform in each position were different, as the two positions required knowledge of different substantive fields of law, had distinct duties, and required different skills.

ARGUMENT

I. STANDARD OF REVIEW

“The scope of [this Court’s] review of a decision of the Board is limited.” *Rickel v. Dep’t of Navy*, 31 F.4th 1358, 1363 (Fed. Cir. 2022). By statute, the Court must affirm a decision of the Board unless it is “(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence.” 5 U.S.C. § 7703(c).

While the Court reviews the Board’s jurisdictional conclusions de novo, the Court is bound by the factual findings underpinning the Board’s conclusions unless the findings are not supported by substantial evidence. *Parrott v. Merit Sys. Prot. Bd.*, 519 F.3d 1328, 1334 (Fed. Cir. 2008); *Bolton v. Merit Sys. Prot. Bd.*, 154 F.3d 1313, 1316 (Fed. Cir. 1998). Accordingly, “[t]his Court ‘will not overturn an agency decision if it is supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’” *McMillan v. Dep’t of Justice*, 812 F.3d 1364, 1371 (Fed. Cir.

2016) (quoting *Hogan v. Dep't of Navy*, 218 F.3d 1361, 1364 (Fed. Cir. 2000)).

II. THE COURT LACKS SUBJECT MATTER JURISDICTION OVER THIS APPEAL BECAUSE IT IS A MIXED CASE—AND MR. JONES HAS DECLINED TO WAIVE HIS DISCRIMINATION CLAIMS.

“A mixed case is one in which a federal employee (1) complains of having suffered a serious adverse personnel action appealable to the MSPB and (2) attributes the adverse action, in whole or in part, to bias prohibited by federal antidiscrimination laws.” *Harris v. Sec. & Exch. Comm'n*, 972 F.3d 1307, 1317 (Fed. Cir. 2020); *see also* 5 U.S.C. § 7702(a)(1) (providing statutory definition for mixed case). Congress has decreed that the exclusive forum for judicial review of a final decision in a mixed case is a United States district court, regardless of whether the MSPB decided the case on the merits or on jurisdictional or procedural grounds. 5 U.S.C. § 7703(b)(2), (c); *Perry v. Merit Sys. Prot. Bd.*, 137 S. Ct. 1975, 1983–85 (2017). This Court therefore lacks subject matter jurisdiction over a mixed case appeal unless the appellant affirms that “any claim of discrimination . . . raised before the Board has been abandoned and will not be raised or continued in this or any other court.” *Diggs v. Dep't of Hous. & Urban Dev.*, 670 F.3d 1353, 1355 n.2 (Fed. Cir. 2011), *quoted in Harris*, 972 F.3d at 1318 (omission in original).

A. The Instant Appeal Is a Mixed Case.

In this case, Mr. Jones has alleged that his resignation was involuntary. Appx1. An involuntary resignation is an action appealable to the MSPB because it is tantamount to a constructive removal. *Cruz v. Dep't of Navy*, 934 F.2d 1240, 1244 (Fed. Cir. 1991) (en banc). Mr. Jones attributes his involuntary resignation to discrimination or retaliation prohibited by Title VII of the Civil Rights Act of 1964, as amended. See ECF No. 4 at 2 (describing discrimination claims Mr. Jones raised before MSPB). Accordingly, this is a mixed case. Thus, notwithstanding that the issue in this appeal (i.e., whether Mr. Jones has statutory appeal rights) is not intertwined with his discrimination claims, the only way that the Court could hear Mr. Jones's appeal would be if he waived his discrimination claims. However, he has failed to do so.

B. Mr. Jones Has Not Waived His Discrimination Claims.

In order for this Court to exercise jurisdiction over Mr. Jones's appeal, he would have had to abandon his discrimination claims. Since he has not abandoned them, this Court does not have jurisdiction.

A waiver of a claim of discrimination must be "explicit," *Davidson v. U.S. Postal Serv.*, 24 F.3d 223, 224 (Fed. Cir. 1994), meaning "[e]xpressed without ambiguity or vagueness; leaving no doubt." Black's Law Dictionary

(11th ed. 2019). Further, the waiver must be actual, not merely asserted. *See McCoy v. U.S. Postal Serv.*, 309 F. App'x 420, 421 (Fed. Cir. 2009) (nonprecedential) (dismissing appeal for lack of jurisdiction where appellant notated waiver on Fed. Cir. R. 15(c) Statement but then argued his removal was motivated by discrimination).

While Mr. Jones checked the box on the Fed. Cir. R. 15(c) Statement Concerning Discrimination purporting to waive his discrimination claims, *see* ECF No. 4 at 3, he also attached an addendum to the form affirming that he is not, in fact, abandoning them. *See* ECF No. 4 at 4. Indeed, Mr. Jones states:

Petitioner's discrimination claim has not yet been adjudicated by the MSPB because the only matter before the Board was the matter of jurisdiction. If Petitioner prevails on his appeal and this matter is remanded to the Board, Petitioner intends to pursue his discrimination claim at that time.

ECF No. 4 at 4. Thus, instead of waiving the claims, Mr. Jones is explicitly preserving them for a potential remand, apparently on the theory that his case is not mixed for purposes of this judicial appeal because the administrative judge dismissed his MSPB appeal on jurisdictional grounds and thus did not address his discrimination claims on the merits. This is precisely what *Perry* forbids. *See Perry*, 137 S. Ct. at 1983–88 (holding that district court is the proper forum for judicial review when MSPB dismisses mixed case for lack

of jurisdiction). Accordingly, this Court lacks jurisdiction over the appeal, and the Court must either dismiss or transfer this matter to an appropriate United States district court. *See Green-Doyle v. Dep't of Homeland Sec.*, 817 F. App'x 983, 986 (Fed. Cir. 2020) (nonprecedential) (dismissing mixed case appeal where appellant advised Court by letter that she “has not stated that she wants to discontinue any part of her discrimination claims”) (alterations and quotation marks omitted); 28 U.S.C. § 1631 (authorizing court lacking jurisdiction to transfer petition for review of administrative action to appropriate court “if it is in the interest of justice”).

C. This Court Should Transfer This Appeal to the United States District Court for the District of Columbia and Recaption the Case to Name the Attorney General of the Department of Justice as the Respondent.

Since Mr. Jones continues to maintain that his former employer discriminated against him, the Board respectfully requests that the Court transfer Mr. Jones’s appeal to an appropriate United States District Court pursuant to 28 U.S.C. § 1631. The proper venue is the District Court for the District of Columbia because Mr. Jones’s former duty station is in Washington, D.C., and the events surrounding Mr. Jones’s alleged involuntary resignation occurred there. *See Appx27* (stating location of Mr. Jones’s former duty station); *see also* 5 U.S.C. § 7703(b)(2) (stating mixed cases are to be filed pursuant to 42 U.S.C. § 2000e-16(c)); 42 U.S.C. §

2000e-16(c) (stating aggrieved employee may file civil action as provided in 42 U.S.C. § 2000e-5); *id.* § 2000e-5(f)(3) (providing that Title VII “action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice”).

Further, if the case is transferred, then the head of the employing agency should be substituted for the MSPB as the respondent. *See id.* § 2000e-16(c) (providing that proper respondent in mixed case is “head of the department, agency, or unit”). The current head of the Department of Justice is Merrick B. Garland, Attorney General.

III. IN THE ALTERNATIVE, THE BOARD CORRECTLY DISMISSED MR. JONES’S APPEAL FOR LACK OF JURISDICTION BECAUSE HE FAILED TO PROVE HE WAS AN “EMPLOYEE” WITHIN THE MEANING OF THE CIVIL SERVICE REFORM ACT OF 1978.

The AJ correctly concluded that Mr. Jones could not be considered an “employee” with Board appeal rights because he failed to prove that his positions with the USDA and ATF were similar, as Mr. Jones focused on substantively different areas of law in the two positions, and the two positions had distinct duties that required different skills.

“Under the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. § 1101 *et seq.*, certain Federal employees may obtain administrative and judicial review of specified adverse employment actions.” *Elgin v. Dep’t of Treasury*, 567 U.S. 1, 5 (2012). The CSRA provides that “[a]n employee against whom” certain adverse personnel actions—including certain involuntary actions, *see Cruz*, 943 F.2d at 1244—are taken “is entitled to appeal to the Merit Systems Protection Board under [5 U.S.C. § 7701].” 5 U.S.C. § 7513(d).

Not all persons employed by the federal government, however, are “employees” entitled to file a Board appeal pursuant to the CSRA. Pertinent to this appeal, employees in preference-eligible excepted-service positions have appeal rights to the Board only upon completing one year of “current continuous service in the same or similar positions . . . in an Executive agency.” 5 U.S.C. § 7511(a)(1)(B). “Notably, for a preference eligible in the excepted service, the absence or completion of a probationary or trial period is not determinative of ‘employee’ status.” *Maibaum v. Dep’t of Veterans Affairs*, 116 M.S.P.R. 234, 238 (2011). “Rather, the dispositive issue is whether [an] appellant satisfie[s] the 1-year current continuous service requirement at the time of his separation.” *Id.*

In this case, it is undisputed that Mr. Jones is a preference eligible and that his service was “continuous” because he transferred from the USDA to

the ATF without a break in service. *See* 5 C.F.R. § 752.402 (defining “current continuous employment”⁵ as “a period of employment or service immediately preceding an adverse action without a break in Federal civilian employment of a workday.”). Thus, the sole issue in dispute regarding whether Mr. Jones was an employee with Board appeal rights is whether he proved that his position at the ATF was “similar” to his position at the USDA within the meaning of § 7511(a)(1)(B).

This Court should affirm the AJ’s finding that Mr. Jones did not meet his burden of proving the Board’s jurisdiction. As explained below, the AJ applied the correct legal standards to the relevant evidence, after holding a jurisdictional hearing at which Mr. Jones and agency officials testified regarding his job duties, and properly concluded that Mr. Jones had not established that his previous role as a USDA Attorney-Advisor defending the agency against discrimination claims provided him with the knowledge, skills, and abilities required to perform the work of the ATF Attorney-Advisor

⁵ The regulation’s reference to “employment” rather than “service” is a relic of a prior version of the statute; the statute was amended, but the reference in the regulation was not changed. This Court has held that the difference in terminology is of no legal import in this context. *See Wilder v. Merit Sys. Prot. Bd.*, 675 F.3d 1319, 1323 n.1 (Fed. Cir. 2012) (“There is no suggestion . . . that the regulatory definition does not apply to the statutory phrase ‘current continuous service.’”).

position, where his duties were to counsel the agency in disciplinary actions and to represent the agency in procurement matters. The AJ correctly concluded that this disparity in knowledge, skills, and abilities prevented Mr. Jones from establishing that his USDA employment and ATF employment were “similar” within the meaning of § 7511(a)(1)(B).

A. Substantial Evidence Supports the AJ’s Finding that Mr. Jones’s Experience at the USDA Did Not Demonstrate the Knowledge, Skills, and Abilities Needed to Perform His Job at the ATF.

The regulations implementing 5 U.S.C. chapter 75 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. Further, both this Court and the Board have interpreted § 7511(a)(1)(B) to provide that positions are similar “if experience in a position demonstrates the knowledge, skills, and abilities required to perform the work of the other job.” *See, e.g., Coradeschi v. Dep’t of Homeland Sec.*, 439 F.3d 1329, 1333 (Fed. Cir. 2006) (quoting *Shobe*, 5 M.S.P.R. at 471); *Maibaum*, 116 M.S.P.R. at 241 (same).

In analyzing whether two positions are similar, the Board must consider the nature and character of the employee’s actual duties in each position.

Shobe, 5 M.S.P.R. at 471 (stating that determination of whether jobs are similar “needs to be based on careful job analyses of the two positions in question”). Indeed, “[t]he nature and character of the duties being performed controls over intent or job titles.” *Aizin v. Dep’t of Defense*, 52 M.S.P.R. 146, 150 (1991).⁶

⁶ In assessing the “similar” requirement of section 7511(a)(1)(B), the Court and the Board have frequently relied on or interpreted case law and OPM regulations relating to tacking prior service under section 7511(a)(1)(A). Specifically, both Court and Board case law interchangeably define “similar” service for § 7511(a)(1)(B) using both the definitions found in 5 C.F.R. § 752.402 (expressly defining “similar”) and the explanation in 5 C.F.R. § 315.802(b) that completion of a probationary period under section 7511(a)(1)(A) may be demonstrated by showing that positions were “in the same line of work (determined by the employee’s actual duties and responsibilities).” *E.g.*, *Mueller v. Merit Sys. Prot. Bd.*, 991 F.2d 811 (Table), at *2 (Fed. Cir. 1993) (nonprecedential) (noting that the Court had construed the two statutory provisions as “comparable”); *Mathis v. U.S. Postal Serv.*, 856 F.2d 232, 234–35 (Fed. Cir. 1988) (explaining that “similar” definition relates back to original definition in pre-CSRA civil service regulations of “current continuous service,” which had alternate definitions, and thus the “same line of work” interpretations are applicable); *Branstetter v. Dep’t of Interior*, 2022 WL 1310825, at *2 (M.S.P.B. Apr. 27, 2022) (nonprecedential) (noting that the definition of “similar” in *Mathis*, a section 7511(a)(1)(B) case, applied to section 7511(a)(1)(A)); *Martinez v. Dep’t of Homeland Sec.*, 118 M.S.P.R. 154, 157 (2012) (“same or similar” and “same line of work” definitions are “governed by the same standards and case law”); *Pagan v. U.S. Postal Serv.*, 111 M.S.P.R. 212, 214 (2009) (similar holding).

1. The Positions Were Not Similar Because the ATF Position Was an Advice and Counsel Position that Required Knowledge of Procurement Law and the Substantive Law Governing Discipline of Federal Employees, Whereas the USDA Position Was an Advice and Litigation Position Solely Focused on EEO Law.

The Board has recognized that “even positions requiring some similar skills may be dissimilar where . . . the work is performed in substantively different fields.” *Clarke v. Dep’t of Commerce*, 2015 WL 853318, at ¶ 13 (M.S.P.B. Feb. 27, 2015) (nonprecedential) (holding that Attorney-Advisor positions in Social Security Administration and Department of Commerce were not similar because the first position required knowledge of disability claims processing while the second required knowledge of trademark and intellectual property law); *see also Amend v. Dep’t of Justice*, 102 M.S.P.R. 614 (2006) (finding inspector positions dissimilar because “while the position descriptions do indicate that both positions require investigatory skills, the work is performed in substantively different fields . . .”), *aff’d sub nom. Amend v. Merit Sys. Prot. Bd.*, 221 F. App’x 983 (Fed. Cir. 2007) (per curiam) (nonprecedential).

The AJ’s finding that Mr. Jones’s role at the USDA was in a substantively different field from his ATF position is supported by substantial evidence. The AJ analyzed the documentary evidence and Mr. Jones’s and Ms. Williams’s testimony and found that Mr. Jones’s responsibilities at the

USDA “primarily consisted of providing advice and counsel to senior managers regarding EEO matters and litigating those matters before the [EEOC].” Appx8. By contrast, his duties at the ATF were to advise and assist the PRB and BDO with reviewing investigation reports “from either the Internal Affairs division, and/or the Office of the Inspector General,” SAppx30–31, and imposing appropriate disciplinary charges and actions—matters that do not fall under EEO law. Appx6–8.

The AJ ruled there was no significant overlap between the discrimination cases Mr. Jones defended and provided legal advice about at the USDA and the disciplinary proceedings he advised on at the ATF. Specifically, the AJ found that “[t]he appellant was . . . advising on different types of employment situations appealable in different forums, with different procedural requirements, burdens of proof, and relevant legal principles.” Appx10. Indeed, at the jurisdictional hearing, Mr. Jones himself described his work at the USDA and the ATF as involving two distinct legal areas: “the EEOC arena” and “the ATF disciplinary case arena.” SAppx33. Thus, although both positions involved generally advising on federal employment-related issues, the focus was substantively different in each position as one concerned employee discipline (not related to discrimination),

and the other focused on EEO and discrimination issues, and knowledge of one area of law does not imply knowledge of the other.

The AJ also credited the testimony of Mr. Jones's former supervisor Ms. Williams that at the ATF, Mr. Jones "was designated as the 'alternate' contracts attorney, and would be expected to perform duties related to the agency's contract matters, such as bid protests, in that role." Appx7. While Mr. Jones contends that his procurement duties are irrelevant to the analysis because they represented "anticipated job duties . . . rather than the work he actually performed," ECF No. 29 at 28–29 (emphasis omitted), what is material is that his "actual duties" included procurement work, not whether he discharged those duties. *See* 5 C.F.R. § 315.802(b)(2) (stating that whether two positions are in "same line of work" is "determined by the employee's actual duties and responsibilities").

Moreover, the credible testimony of Ms. Williams and Mr. Jones himself shows that contracts duties were required of the position and that he did, in fact, begin to perform those duties. First, it is undisputed that Mr. Jones met with the outgoing primary contracts attorney to take over her cases, as directed by his supervisor. Appx2. Further, Mr. Jones testified that he "[t]echnically" did "take over" contracting work before he resigned, as he "met" and corresponded with ATF acquisitions personnel and obtained "five

or six contracts” that he intended to review shortly before his resignation. SAppx43–44. While there is no evidence that he “actually perform[ed]” his contracting duties in the sense of producing a deliverable, *see* Appx7 (finding that appellant “did not actually perform any such [contracts] duties during his ATF tenure”), the evidence of record establishes that he had begun to perform those duties before his resignation and would have performed more had the agency not moved to terminate him. SAppx43–44. Thus, Mr. Jones’s contracts duties were actual, not hypothetical.

Mr. Jones presented no evidence that his experience at the USDA demonstrated that he had the knowledge, skills, and abilities to practice MSPB disciplinary law or, especially, procurement law at the ATF, which is the standard for similarity between two positions. *See, e.g., Coradeschi*, 439 F.3d at 1333 (observing that positions are similar “if experience in a position demonstrates the knowledge, skills, and abilities required to perform the work of the other job”). Further, the AJ credited Ms. Williams’s testimony that Mr. Jones’s USDA experience was “in the area of . . . discrimination cases as opposed to the [MSPB],” and that he had used “personal funds to get training to help him with MSPB, to purchase a book on MSPB charging,” reflecting his lack of knowledge and experience with the subject area. Appx9; SAppx13, SAppx16. The AJ also credited Ms. Williams’s testimony that Mr.

Jones was not familiar with the PRB or the “PRB process” when he began at the ATF. Appx9; SAppx10–11, SAppx13.

Likewise, there was no evidence that Mr. Jones’s experience at the USDA provided him with the knowledge, skills, and abilities to practice contracts law. To the contrary, Mr. Jones testified that he had “never represented that I ever worked as a contracts law attorney,” SAppx40–41, and that he only “felt I could assist in th[at] area[] if the need arose” based on his earlier “military experience, education, and training,” SAppx40, not based on his experience at the USDA. *Cf. Clarke*, 2015 WL 853318, at ¶ 18 (holding that appellant’s prior experience with trademark law acquired in private-sector employment and law school was irrelevant to whether Attorney-Advisor positions were similar because the inquiry is what duties two positions entail, not the individual’s personal qualifications acquired outside of the positions at issue). Since Mr. Jones did not gain the knowledge, skills, and abilities to perform the work of the ATF position during his employment at the USDA, and the USDA duties did not include disciplinary or contracts work, the two positions were not similar.

2. The Positions Were Not Similar Because They Had Distinct Duties and Required Different Skills.

“The determination [of whether two positions are similar] may [also] be made by considering whether one position: (1) requires greater knowledge

or more specialized skills and abilities; [or] (2) has significant additional duties and responsibilities.” *Bray v. Dep’t of Transp.*, 19 F.3d 40 (Table), at *3 (Fed. Cir. 1994) (per curiam) (nonprecedential); *see also Holloman v. Merit Sys. Prot. Bd.*, 102 F. App’x 688, 690 (Fed. Cir. 2004) (per curiam) (nonprecedential) (holding that Amtrak police officer and federal air marshal positions were not similar because, inter alia, federal air marshals require higher firearms skill and special law enforcement techniques not used elsewhere).; *Yancey v. Dep’t of Army*, 32 M.S.P.R. 606, 609–10 (1987) (finding Exhibit Specialist and Museum Technician positions to be in different lines of work where the Museum Technician was expected to exercise more independence and had duties Exhibit Specialist did not); *Haning v. U.S. Marine Corps*, 31 M.S.P.R. 252, 254 (1986) (finding that differently-graded Mechanic positions were not in same line of work because one position had additional duties, performed more difficult repairs, and required “greater skill and knowledge” than the other); *Shobe*, 5 M.S.P.R. at 471 (“[T]he fact that two positions may be in the same series does not necessarily establish that they are in the same line of work for purposes of determining completion of a probationary period if, in addition to the basic qualifications, one of the positions requires specialized knowledge, skill and ability . . .”).

Substantial evidence supports the AJ's finding that although the positions at issue had the same title and grade, they required not only different knowledge, but also involved different duties and required legal skills that differed in terms of complexity and difficulty. Thus, the two positions were not "interchangeable" with one another. *See Longo v. U.S. Postal Serv.*, 889 F.2d 1100 (Table), at *2 (Fed. Cir. 1989) (nonprecedential) (affirming Board's finding of no jurisdiction where record showed "the two jobs were not interchangeable"); *Paulhamus v. U.S. Postal Serv.*, 14 M.S.P.R. 376, 377 (1987) (finding jobs dissimilar where they were not "interchangeable").

As discussed above, the AJ found that the USDA position was primarily litigation-oriented with some advisory functions, while the ATF position consisted of advisory functions and some non-litigation contracts duties. Appx6–8. While Mr. Jones described his tasks at an extremely broad level (e.g., "engaged in oral advocacy" and "conducted legal review and analysis"), the AJ examined the nature and character of his job duties, based on the testimony of Mr. Jones and Ms. Williams, and found that they were qualitatively different due to the requirements of the two positions. Appx8–9. For instance, the AJ found that the legal writing Mr. Jones performed at USDA, which consisted of legal pleadings and emails containing case analysis, advice on EEOC case processing, and settlement negotiations, was

fundamentally different and more complex than his legal writing at the ATF, which consisted “mainly of his emailing advice and counsel to the PRB chair regarding the misconduct investigation reports, and perhaps some correspondence with the BDO.” Appx8–9. Without question, legal pleadings are generally formal, complex, and persuasive documents, and thus require different skills from, say, an internal email analyzing a report from a neutral perspective.

In the same vein, while Mr. Jones characterized both positions as involving generic “oral advocacy,” *see* Appx9, his USDA role required him to advocate for the agency before the EEOC, while the ATF position simply required him to discuss disciplinary matters with his clients (the PRB and BDO) and his direct supervisor. Appx9. Again, common sense and experience instruct that advocating on behalf of a client to a neutral decisionmaker is a complex attorney function that requires different preparation and skills than advising one’s client or colleagues. Finally, regarding Mr. Jones’s advisory functions in both positions, the AJ correctly found that providing advice after a disciplinary complaint is filed—when the events at issue have already occurred and the focus is on developing a litigation strategy and limiting the client’s liability—is inherently different from advising a client prospectively, in a non-adversarial setting, on how to

craft a decision that can withstand a potential legal challenge. *See* Appx10. Since Mr. Jones’s two positions had distinct responsibilities and required different degrees of legal skill, they were not similar for jurisdictional purposes.

B. The AJ’s Decision Was in Accordance with Law Because the AJ Interpreted and Applied the Law Correctly and Did Not Rely on Any Improper Factors.

Contrary to Mr. Jones’s assertions, *see* ECF No. 29 at 16–22, the AJ in this case performed the “similar positions” analysis properly and in a manner consistent with judicial and Board precedent. Further, each of the cases on which Mr. Jones relies is distinguishable from his own circumstances.

1. The Dispositive Facts in *Mathis* Are Distinguishable from This Case.

Mr. Jones is incorrect that this Court’s decision in *Mathis v. U.S. Postal Service*, 865 F.2d 232 (Fed. Cir. 1988), supports a finding of similarity in his case. *See* ECF No. 29 at 17–19. In *Mathis*, this Court held that the appellant had established MSPB jurisdiction where he argued that his jobs as a Postal Service special delivery messenger and distribution clerk were similar positions under § 7511(a)(1)(B). 865 F.2d at 235. The Court explained that “[t]he duties of each position involved the handling of the mail, and the skills required to perform the work were closely related.” *Id.* The Court also emphasized that “[t]here is no indication that [the appellant] was unable to

perform the duties of a distribution clerk.” *Id.* The Court stated that the AJ had erred by placing too much significance on the differences in the physical locations of the appellant’s work and the fact that his work occurred at different steps of the mail distribution process.

The *Mathis* case is distinguishable from Mr. Jones’s circumstances. First, as discussed at length above, the differences between Mr. Jones’s duties at the USDA and the ATF were not superficial. Unlike the appellant in *Mathis*, Mr. Jones’s duties were not performed at different stages of a single process. Rather, his job duties involved entirely different processes—the federal EEO process and the ATF’s internal disciplinary process, as well as procurement—which are governed by separate laws, regulations, and judicial and administrative precedents. Mr. Jones presented no evidence that his duties at the ATF involved analyzing EEO claims or that his duties at the USDA involved analyzing contracts law or the substantive law governing disciplinary actions. Finally, there was substantial evidence of record that Mr. Jones, unlike the appellant in *Mathis*, was unable to perform significant duties of his ATF Attorney-Advisor position because he “did not have a[n] understanding” of contracts law and was unprepared to serve as the agency’s contracts attorney. SAppx27.

Rather, the facts of Mr. Jones's case and his arguments that his two positions are similar merely because they both broadly relate to "employment law" makes his case analogous to *Shafford v. U.S. Postal Service*, 293 F. App'x 760 (Fed. Cir. 2008) (per curiam) (nonprecedential). In that case, the appellant argued that his positions as a mail processing clerk and a networks specialist were similar because "in both, an employee may respond to inquiries from contract carriers" and both positions shared the "basic fu[n]ction" of "the efficient movement of the mail." *Id.* at 763. This Court upheld the MSPB's finding that the two positions were not similar because "simply having a common basic function . . . does not indicate that two positions are 'similar,'" and the overlap between the duties of the two positions was "minor." *Id.* For Mr. Jones, as for Mr. Shafford, the "common basic function" of practicing law does not render the positions "similar" because the overlap between the duties of each position was "minor," given the substantive differences between the legal work required in each position.

2. This Case Is Distinguishable from the *Davis* Decision.

Mr. Jones's case is also distinguishable from *Davis v. Merit Systems Protection Board*, 340 F. App'x 660 (Fed. Cir. 2009) (nonprecedential). In *Davis*, this Court held that the appellant's positions as a statistical assistant and a mathematical statistician in the same agency component were similar

because the appellant “performed the same basic duties in both of her positions: managing unit data, analyzing data, and fulfilling requests,” albeit in different proportions of her time. *Id.* at 664. The Court held that the Board had erred by focusing on the differences between the written position descriptions instead of the witnesses’ testimony that both positions had the same three duties in common. *See id.* at 662, 664. By contrast, in Mr. Jones’s case, his USDA position and ATF position had little overlap in terms of the substantive law, and the ATF position included an entire area (contracts law) that the USDA position did not require. Further, the USDA position required Mr. Jones to represent the agency in litigation, while his ATF position had no litigation-related duties. Thus, *Davis* does not affect the outcome of this case.

3. The AJ Properly Considered Mr. Jones’s Self-Directed Training and Study as Some Evidence that EEO Law and the Substantive Law of Federal Discipline Are Different Subject Areas.

The AJ in this case found that Mr. Jones took it upon himself to purchase reference books on disciplinary case law and to register for a week-long subject seminar. Appx9. The AJ noted that Mr. Jones found the materials and training “useful” and “necessary for his performance,” Appx9, and later remarked that “the appellant’s self-directed efforts to obtain training and reference materials at the start of his ATF tenure” were “consistent” with her finding that Mr. Jones’s duties were not similar because he was “advising

on different types of employment situations appealable in different forums, with different procedural requirements, burdens of proof, and relevant legal principles.” Appx10.

Mr. Jones places significant emphasis on the AJ’s reference to his self-directed studies and contends that his “‘self-initiated’, non-mandatory, and not required training . . . cannot possibly render his DOJ position dissimilar from his USDA position.” ECF No. 29 at 24. While “[i]t is well-established that an [AJ] may properly consider training requirements at the beginning of an appointment when evaluating whether two positions are the same and similar,” *Clarke*, 2015 WL 853318, at ¶ 16, it does not follow that an AJ is therefore precluded from considering voluntary job training and self-study as some evidence that two positions are different. Further, looking at the totality of the AJ’s findings in the context of the initial decision, it is apparent that the AJ considered this detail merely to corroborate her finding that Mr. Jones’s duties in the two positions were not similar, which was based primarily on the AJ’s consideration of the documentary evidence and the witnesses’ testimony. *See* Appx9 (“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.”).

4. The AJ Properly Cited *Amend* for the Proposition that Positions that Require Some Similar Skills May Nonetheless Be Dissimilar Where the Work Is Performed in Substantively Different Fields.

Mr. Jones contends that the AJ's initial decision was "arbitrary and capricious" and "not supported by substantial evidence" due to the AJ's purported "reliance upon *Amend* [*v. Department of Justice*, 221 F. App'x 983 (Fed. Cir. 2007) (nonprecedential)] to justify the . . . outcome in this case." ECF No. 29 at 27. However, at no time did the AJ suggest that *Amend* was on all fours with the facts of the instant case or that the outcome of that case was determinative of the outcome in this one. *See* Appx11. Rather, the AJ cited *Amend* to provide support by analogy for her finding that "[t]he important distinctions between the duties performed in his USDA and ATF positions support a finding that the positions are not 'similar,'" and included a brief explanatory parenthetical that accurately summarized *Amend*'s holding. *See* Appx11. Accurately citing case law is not arbitrary or capricious and in no way undermines the substantial evidence of record that supports the AJ's finding that Mr. Jones's two positions were not similar.

CONCLUSION

For the reasons set forth above, the Court should transfer or dismiss this case for lack of jurisdiction. In the alternative, the Court should affirm the decision of the Merit Systems Protection Board dismissing the appeal for lack of jurisdiction.

Respectfully submitted,

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DATE: October 25, 2022

CERTIFICATE OF SERVICE

I certify that on this date, service of the COMBINED BRIEF AND SUPPLEMENTAL APPENDIX FOR RESPONDENT MERIT SYSTEMS PROTECTION BOARD was made upon all parties via CM/ECF.

DATE: October 25, 2022

/s/ Talethia Owens-Wand
TALETHIA OWENS-WAND
Paralegal

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g)(1) of the Federal Rules of Appellate Procedure, I hereby certify that the text of the electronic version of the foregoing brief is identical to the paper copies, has been scanned by Symantec Endpoint Version 12.1 and found to be virus-free, and that the textual portion of the brief, exclusive of the tables of contents and authorities, certificates of service and compliance, and statement of related cases, but including headings, footnotes, and quotations, contains 8,073 words as determined by the word counting feature of Microsoft Word 2010, and therefore complies with Rule 32(a)(7)(B).

/s/ Elizabeth W. Fletcher
ELIZABETH W. FLETCHER

SUPPLEMENTAL APPENDIX TO RESPONDENT'S BRIEF

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KEVIN D. JONES v. DEPARTMENT OF JUSTICE
Docket # DC-0752-21-0375-I-1
APPELLANT'S RESPONSE TO JURISDICTIONAL ORDER
Summary Page

Case Title : KEVIN D. JONES v. DEPARTMENT OF JUSTICE

Docket Number : DC-0752-21-0375-I-1

Pleading Title : APPELLANT'S RESPONSE TO JURISDICTIONAL ORDER

Filer's Name : Avni J. Amin

Filer's Pleading Role : Private Attorney

Details about the supporting documentation

| # | Title/ Description | Mode of Delivery |
|---|---|------------------|
| 1 | Exs. in Support of Jurisdictional Response Part I | Uploaded |

SAppx1

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Counsel Williams, that ATF was preparing the memorandum. Chief Counsel Roessner made the changes reflected in the redline version of the draft, which he provided to Associate Chief Counsel Williams, Deputy Chief Counsel Hicks and Deputy Associate Chief Counsel Williams on or about December 16, 2019 for their review. No one in OARM reviewed, assisted with, or received the “Recommendation for Removal of ATF Probationary Attorney Kevin D. Jones.” The document was never sent to anyone in OARM. Once Appellant resigned from the Agency, there was no longer any need for the document, and it was never finalized or executed. *See* ROI at 369.

9. Describe Appellant’s job duties and responsibilities while employed as Attorney Adviser by the Agency. Include in your response an estimate as to how much time Appellant spent in each of the duties and responsibilities identified.

RESPONSE: *See* General Objections 3, 7, and 8 above. ATF also objects to this Interrogatory seeking “how much time Appellant spent in each of the duties and responsibilities” as overbroad, unduly burdensome, and seeking information not relevant to Appellant’s claims, and therefore is not reasonably calculated to lead to the discovery of admissible evidence.

Notwithstanding and without waiving the General and Specific Objections, the Agency states that as the Attorney Adviser to the Professional Review Board (PRB) and the Bureau Deciding Official (BDO), it was Appellant’s responsibility to familiarize himself with the PRB procedures so that he could properly advise the PRB. He was also responsible for attending and advising the PRB during monthly meetings, familiarizing himself with BDO procedures so that he could properly advise the BDO and participate in the BDO’s oral replies. Appellant was responsible for reviewing Internal Affairs Division (IAD) investigations so that he could understand the role of IAD in the PRB and BDO process.

Appellant was required to prepare PRB and BDO documents, familiarize himself with ATF directives and the ATF Table of Offenses and Penalties, track the status of PRB and BDO case, and learn to use the Office of Chief Counsel's ProLaw case management system.

In addition, Appellant was also hired to serve as the alternate attorney for contracts and ethics. This was described in Vacancy Announcement 19-EXC-14-038-KRM: "The incumbent may also practice in the areas of ethics, contracts and fiscal law, and may advise on other issues assigned to the Management Division." *See* ROI at 248. As the alternate contracts attorney, Appellant would have been expected to work with the Acquisitions Office by independently reviewing contracts, assist the primary contracts attorney with bid protests, and independently work bid protests. As the alternate ethics attorney, Appellant would have been expected to assist in advising ATF employees on a number of issues, ranging from conflicts of interests, receipt of gifts, post-government employment, Office of Government Ethics Forms 278 and 450, Hatch Act regulations, and other issues. If the contracts or ethics attorneys were unavailable, it would have been Appellant's responsibility to fill in during their absence. If the contracts or ethics attorney needed assistance with workload, it would have been Appellant's responsibility to assist with the work.

While Appellant performed the primary duties of his position with respect to advising the PRB and BDO, he did not perform all of the secondary duties and responsibilities of his position prior to submitting his resignation from ATF. Appellant was supposed to serve as the alternate contracts law attorney after the primary attorney transferred from ATF. However, Appellant lacked experience reviewing contracts and defending agencies in bid protests. Based on former Deputy Associate Chief Counsel Angela R. Williams's personal observations and her communications with former Contracts Attorney Hilary L. Martinson

while Ms. Martinson was conducting a turnover of responsibilities with Appellant, Appellant did not have an understanding of how to review contracts or how to represent agencies in bid protests.

The Agency is unaware of how much time Appellant spent performing each of those duties while employed at the Agency. The Agency also refers Appellant to ROI at 123-27, 248-55, 303-04, 336-39; *see also* ATF-103-05.

10. Describe Appellant’s job duties and responsibilities while employed as an Attorney Adviser by the U.S. Department of Agriculture (“USDA”). Include in your response an estimate as to how much time Appellant spent in each of the duties and responsibilities identified.

RESPONSE: *See* General Objections 2, 3, 4, 5, 7, 8, and 13 above. ATF also objects to this Interrogatory seeking “how much time Appellant spent in each of the duties and responsibilities” as overbroad, unduly burdensome, and seeking information not relevant to Appellant’s claims, and therefore is not reasonably calculated to lead to the discovery of admissible evidence. In addition, ATF objects to this Interrogatory to the extent it seeks information that is obtainable from other sources that are more convenient, less burdensome, and/or less expensive, or have been previously made available by Appellant to ATF or by ATF to Appellant and production would be unduly burdensome and redundant.

Notwithstanding and without waiving the General and Specific Objections, the Agency states that Appellant was employed as an Attorney Advisor with the U.S Department of Agriculture (USDA) in a temporary appointment limited to two years or less. His duties, as represented to the Agency by Appellant, involved litigating employment law cases in the civil rights area and representing the USDA in labor relations matters and litigation. The Agency is unaware of how much time Appellant spent on each of those duties while employed at USDA. *See* ROI at 128-42, 404-64, 509; Supplemental ROI at 77-85.

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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

KEVIN D. JONES,

Plaintiff/Appellant,

v.

Case No.

DEPARTMENT OF JUSTICE,

DC-0752-21-0375-I-1

Defendant.

HEARING

DATE: Thursday December 9, 2021

TIME: 8:30 a.m.

BEFORE: Honorable Monique Binswanger

LOCATION: Zoom for Government

Zoom Hearing

Arlington, VA 22202

REPORTED BY: Lattice Flanders, Notary Public

JOB No.: 4973615

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A P P E A R A N C E S

ON BEHALF OF PLAINTIFF/APPELLANT:

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1 agencies do not, we have the ability to send employees
2 to training so that they can reach that point of where
3 we would like them to be, so to speak.

4 Q Let's talk about the two positions Mr. Jones
5 held at USDA and ATF. Neither position was
6 supervisory in nature, correct?

7 A That is true.

8 Q DOJ did not require that Mr. Jones take any
9 training prior to starting?

10 A That is true.

11 Q And there was no required training after he
12 started in that role. Correct?

13 A That is not true.

14 Q Was there any mandatory training that he was
15 required to attend after he took the position?

16 A Yes, there was.

17 Q What was that training?

18 A On-the-job training, which was crucial and
19 critical because, as I said, even though Kevin had
20 litigation experience when it came to civil rights
21 matters in terms of the Merit Systems Protection Board
22 which is where our -- for purposes of background, the

1 attorney advisor to the PRB and the BDO, those are
2 employees that have engaged in some form of misconduct
3 and as a result might be disciplined for that
4 misconduct. And those cases would and are often
5 appealed to the Merit Systems Protection Board, so as
6 a result, that was the area that we knew Kevin would
7 need to be followed. And that's also the area that
8 Kevin, himself felt, he took it upon himself, and
9 again hats off to Kevin for doing this.

10 He took it upon himself to pay out of pocket to
11 attend the Federal Dispute Resolution course, and
12 right after he onboarded, he and I made that
13 arrangement in concert with the Chief Counsel and
14 Deputy Chief Counsel, so that when he started even
15 though he paid for it, we granted him the
16 administrative leave to do that. The other thing he
17 did, again, to his credit was he purchased a book on
18 MSTD charging. And so, even though he did that
19 without asking, I would have gladly had the office pay
20 for that.

21 But let me add one thing, though, to be
22 clear, the only reason Kevin paid for the FER training

1 was because at the time of his onboarding we had
2 already given that FER slot, those slots we had to
3 other attorney's already onboarded, so he would not
4 have been able to attend at that time, and I had
5 communicated that with him. We were trying to make
6 that happen, and so he said, you know what? I'll pay
7 for it. And again, like I said kudos to him for doing
8 that. Then the OJT piece is very important as I
9 mentioned earlier because of the fact, again, he
10 doesn't know the PRB/BDO process, he does not know the
11 database that's associated with that position, and how
12 to use it.

13 He is unfamiliar with the attorney advisor
14 for the PRB/BDO as to engage with our internal affairs
15 division and understand the dynamics of that
16 relationship. He wasn't familiar with the
17 Professional Review Board, the PRB process, so it was
18 incumbent upon me and other attorneys that I
19 designated to walk him through that process and have
20 him observe that process. He was not familiar with
21 the process involving the bureau deciding official.
22 So, again, it was incumbent upon me and other

1 attorneys I supervise that I asked to walk Kevin
2 through that process, have him observe that process so
3 that he could come up to speed. So, that's the OJT
4 piece that is mandatory, because without that he would
5 not have been able to perform his duties.

6 Q And the acronym OJT that you're using, what
7 does that stand for?

8 A On-the-job training.

9 Q Would you agree that most attorneys engage
10 in some on-the-job training when start with ATF?

11 A Yes.

12 Q Have you ever had an attorney start with ATF
13 that engaged in no on-the-job training?

14 A I can tell you that -- let me think here --
15 there are two attorneys that recently started who
16 literally the only information they needed was simply
17 how to access the computer piece. We need access to
18 our computers, either clients were just the overview
19 of the agency in general, but they had the skillset to
20 come in and immediately hit the ground running. So, I
21 would say everybody needs a little but Kevin because
22 of the position with the PRB/BDO attorney advisor and

1 the mechanics and everything associated with that
2 which was something that -- I can't say it's unique to
3 ATF, but I know as a Fed, and having worked in three
4 federal agencies now, I had never seen or heard of a
5 PRB/BDO attorney advisor or any familiarity with that
6 process.

7 Q You were Mr. Jones' rating official.
8 Correct?

9 A Yes.

10 Q What did you rate him prior to his
11 involuntary resignation?

12 A He was rated as an XC which is one level
13 below outstanding.

14 Q Do you recall mentioning in his evaluation
15 that Kevin hit the ground running?

16 A Yes, I did.

17 Q You also recall mentioning in his evaluation
18 that he works with substantial independence?

19 A Hmm. If you're saying that that's there,
20 then yes. However, what I will say is maybe I do need
21 to elaborate. He hit the ground running, and in terms
22 of working with substantial independence I'm a little

1 bit surprised that that part is there, only because,
2 again, if I wrote it I wrote it, I know the level of
3 engagement that was necessary when Kevin started for
4 him to be able to understand the process, and the
5 familiarity with the process. Kevin is a great person
6 in terms of his interpersonal skills, and he quickly
7 made -- created a great relationship with the BDO and
8 the PRB chair and others that he had to work with.

9 In terms of in November if I'm saying that Kevin
10 works with substantial independence, then from the
11 time period of August to November he had made great
12 strides. But from when he arrived that was not the
13 case.

14 Q Do you agree, and I think you alluded to
15 this earlier that he was practicing employment law at
16 USDA?

17 A He was practicing in the area of civil right
18 employment law which, I believe, was primarily
19 associated with discrimination cases as opposed to the
20 Merit Systems Protection Board. I'm sorry.

21 Q No, go ahead.

22 A But they were also working of the area of

1 Q And at some point you made a determination
2 that Mr. Jones had overstated his contracts law
3 experience during the interview process. Correct?

4 A Yes, and also while at -- and during his
5 tenure at ATF primarily.

6 Q But you agree it is your position that he
7 misrepresented or overstated his contract law
8 experience during the interview?

9 A Yes, but it didn't come to light and it was
10 not an issue until after he started. So, we had no
11 reason to not believe him at the time, it was later
12 when everything came out, if you will, that after his
13 employment when he had an opportunity to correct the
14 situation and let us know, and he chose not to, that
15 it became an issue. He had multiple opportunities to
16 inform me after he started that he lacked contracts
17 law experience and he did not do that. So, even
18 though we interviewed him, and he discussed that, the
19 ax occurred once he started and failed to inform us by
20 his own admission that he lacked the contracts law
21 experience.

22 Q You decided that termination was warranted

1 based on his misrepresentations of his contract law
2 experience. Correct?

3 A That determination was made in concert with
4 the Chief Counsel, and after the meeting that Angel
5 Williams and I had with him, and after looking back
6 and seeing that the welcome email that I sent out for
7 Kevin, and the other attorney that started with him at
8 the same time to him and everyone in the Office of
9 Chief Counsel on notice that he was going to practice
10 in the area of contracts law, as the alternate
11 contracts law attorney. Kevin never came to me after
12 that welcome announcement within the first week or so
13 of his employment to say hey Sheryl there's an error
14 here; I'm not equipped to serve as the backup
15 contracts law attorney.

16 And then after Kevin and the attorney who
17 started working with him the same day, I put out a
18 revised, what I call a management division point of
19 contact list, which identifies each attorney, their
20 phone number, their office number, and it specifically
21 lists their practice areas. And when that was revised
22 and sent out to Kevin and the other attorney who

1 started with him at the same time, it specifically
2 mentioned Kevin as being the alternat contracts law
3 attorney, and ethics.

4 He never mentioned to me, hey, Sheryl,
5 there's an error here, or, hey, Sheryl, I need some
6 training here, I don't really know this contracts law
7 stuff and he had me list it. So, he had opportunity
8 from the very beginning when he started with ATF to
9 say there is a problem here, I do not have contracts
10 law experience. That's really at the heart of this
11 and what makes it so unfortunate that he had so many
12 opportunities once he started to come forward and let
13 us know that he needed that training.

14 But instead, Kevin chose to use his personal
15 funds to get training to help him with MSPB, to
16 purchase a book on MSPB charging to use his personal
17 funds to attend a judge advocate training, I can't
18 remember exactly what it was, but not once did he ask
19 to have training in contracts law to help bring him up
20 to speed.

21 Q Did the determination have to be made once
22 there was a decision to terminate Mr. Jones as to

1 getting at, advising other attorneys or subordinates
2 this issue arises regarding whether someone is
3 probationary or not, that they're encouraged to
4 consult HR.

5 THE COURT: Okay.

6 BY MS. AMIN:

7 A Yes, and again those are not attorneys yet.
8 As a matter of fact, if I may one of the issues we
9 have is that oftentimes HR will contact us without
10 attempting to conduct the analysis themselves first.
11 And so, one of the things, in light of your question
12 that comes to mind for me is that I tell the attorneys
13 yes, we work with HR, we assist them in that process,
14 but we need them to at least start the analysis first,
15 and then come to us. So, I just wanna clarify that.

16 Q At the point in which you were contemplating
17 terminating Mr. Jones either in November or early
18 December of 2019, did Mr. Jones have any performance
19 issues?

20 A There were no performance issues for Kevin.

21 Q Did he have any misconduct issues, aside
22 from what you've already testified to regarding his

1 contract law experience.

2 A No, Kevin didn't have any conduct issues.

3 Q Had you received any complaints from anyone
4 in the office including ATF acquisitions about his
5 performance?

6 A There were no complaints from anyone in the
7 office regarding Kevin's performance. There was an
8 incident I became aware of that occurred at a PRB
9 meeting, where one of the members, let's just say was
10 not very cordial to Kevin, and when news of that came
11 back to me, I immediately made arrangements to talk
12 with the chair of the PRB to ensure we didn't have
13 something of that nature occur again. In terms of the
14 acquisitions office, Kevin didn't conduct any
15 contracts law reviews that the acquisitions office
16 would have had any issues with, and he didn't
17 participate in a big protest that the acquisitions
18 office would have had any concerns about.

19 Again, Kevin, to his credit, is an individual
20 that is able to make good relationships with
21 individuals very easily.

22 Q Do you recall meeting with Mr. Jones and Mr.

1 because he could help us with the contracts as a
2 backup, and we knew we could bring him up to speed and
3 he could be our PRB/BDO attorney. Yes. Definitely to
4 your question, yes.

5 Q Did Mr. Jones tell you that his experience
6 with contract law was really more in a supervisory
7 role or supervisory nature.

8 A Unfortunately, yes Kevin did share that with
9 me, and he shared that only during the meeting with
10 Angel Williams and I in December. And my thought was,
11 and still is I don't need someone to supervise
12 contracts law attorneys that's what I do. So, had
13 that been something that was said that would not have
14 made an impact on me, and again, I do not believe we
15 would be here today.

16 Q Do you have any reason to believe that the
17 duties and responsibilities and qualifications he's
18 outlined in his resume, or application were false in
19 any way?

20 A I'll put it this way because I thought of
21 this last evening as I was preparing for today.
22 Oftentimes the information and how its worded in

1 resumes may paint a different picture than what is
2 reality. There are also certain ways of phrasing
3 things that could be interpreted in different ways,
4 and so it's the interview process, it's the you have
5 to hope that the information you're getting from both
6 the resume and references, during the interview that
7 it's all going to add up and be correct. But
8 unfortunately, in this situation after Kevin started,
9 and he had the opportunity to let me know the welcome
10 announcement Sheryl there's something wrong with it.
11 The point of contact list that shows that I'm the
12 backup, that's something wrong with that.

13 Oh, and by the way I'm doing all this other
14 training, but I'd also like to take some contracts law
15 training, great Kevin, we'll line you up, we'll get
16 you that contracts law training. That's the issue.
17 Once he came onboard he did not let me know, I would
18 have been fine, I would have been disappointed, but I
19 would have been fine saying, okay Kevin, we will get
20 you that training so you can come up to speed. But
21 when he finally asked for contracts law training was
22 in December, I think, or maybe late November, the 11th

1 hour, there's nothing at that point. We thought you
2 already had this, so unfortunately it's again -- it's
3 just a very unfortunate situation, all around.

4 Q There has been no allegation, and you are
5 not alleging the specific duties he's outlined in his
6 resume and application are false. Correct?

7 A The duties in his resume may very well be
8 true. The issue is once he came onboard and started
9 working with us, his representations or lack thereof
10 are at issue, and were at issue. He was not truthful
11 with us, and as he said during his meeting with Angel
12 Williams and I, he failed to let us know that he did
13 not have the contracts law experience.

14 MS. AMIN: I'm wrapping Your Honor.

15 THE COURT: Sorry, I'm gonna ask just a
16 follow-up question here. So, you had mentioned once
17 or twice misrepresentations during his tenure with
18 you, and then you just said here representations or
19 lack thereof. Did he make any particular
20 representations regarding his contracts law experience
21 during his tenure after he onboarded, or are you only
22 referring to the opportunities that he had to clarify

1 that he failed to do.

2 MS. WILLIAMS: The opportunities that
3 he had to clarify.

4 THE COURT: Okay, thank you. Go ahead,
5 Ms. Amin.

6 MS. AMIN: I just need a moment to look
7 at my notes, I'm nearly done Judge. I have no further
8 questions at this time.

9 THE COURT: All right. Mr. Hand cross-
10 examination?

11 MR. HAND: Yes, Your Honor, thank you.

12 CROSS EXAMINATION

13 BY MR. HAND:

14 Q Ms. Williams let's go back to the discussion
15 we had about the vacancy announcement for Mr. Jones'
16 position. And I believe we can find that at -- let me
17 share my screen here, IAF Tab 28, Exhibit I.

18 THE COURT: Give me a page number on
19 that exhibit.

20 BY MR. HAND:

21 Q Yes, Your Honor, just one second, page 146,
22 sorry. All right.

1 Q Okay. And now on Page 27, this looks like
2 the first one on Page 26 was in August 2019th
3 directory, and then you did another one in October of
4 2019 which appears on the next page, Page 27.
5 Correct?

6 A Yes.

7 Q Okay. And again, Mr. Jones, here is listed
8 with the ethics and contracts alternate. In October
9 when this announcement went around, did Mr. Jones ever
10 reach out to you and say that's not correct, or I have
11 a problem with that, or anything like that?

12 A No, he did not.

13 Q Okay. Now, you had mentioned that Mr. Jones
14 had a number of opportunities to bring to your
15 attention a misunderstanding of his contracts law
16 experience, but he failed to. Is that correct?

17 A Yes, that is correct.

18 Q Okay. And we obviously spoke about the
19 email, and about the directories. What were some of
20 the other ones? What other instances where Mr. Jones
21 had an opportunity but did not bring it to your
22 attention?

1 A Some of the other instances were when --
2 before the announcement went out with regard to
3 needing someone to maybe serve on a detail knowing
4 that Hilary was going to be leaving, and the comment
5 that he made to me with regard to not having an
6 interest in going on a detail. And then the comment
7 with regard to sending out to DOJ-wide to see if the -
8 - and I remember thinking, he's really interested in
9 this going to somebody other than him. But again, I
10 didn't have enough information at the time, I didn't
11 know what was going on.

12 And then after that is when we had an off-
13 site, I plan off-sites for the division attorneys, and
14 one of them was located at the National Law
15 Enforcement Museum, and we had taken the metro there
16 as a group, and I remember walking with Kevin, and he
17 had made a comment with regard to -- because again, he
18 knew that Hilary would be leaving, he had made a
19 comment with regard to having an army buddy who had a
20 lot of contracts law experience, and that person would
21 probably apply if we advertise the position.

22 I remember thinking okay, great, but again I

1 didn't think anything of it, but it was the emphasis
2 he placed on it that made it stay with me. And then,
3 of course we -- letting him know that I needed him to
4 conduct the (inaudible) with Hilary. We -- our
5 credibility as an office, not just the division that I
6 head up, but as the Office of Chief Counsel, it's
7 contingent upon us providing accurate, timely advice.
8 And so, knowing Hilary was going to be leaving, and
9 not wanting to have any gaps in the advice and
10 assistance we provide to the acquisitions office, I
11 wanted to ensure that Kevin had adequate time to
12 conduct a thorough turnover with Hilary.

13 And I thought nothing of it, once I told him
14 that's what I wanted to do, I didn't think anything of
15 it, and I let Hilary know as well. And then, I don't
16 know how it came up, but I recall enquiring in terms
17 of the turn over and being told that that hadn't
18 started yet, and I'm thinking, hold on a minute,
19 Hilary's gonna be leaving, if you haven't started a
20 turn over that's going to be detrimental to the Office
21 of Chief Counsel, and all of the procurement actions
22 that this agency is relying on us to review so that

1 they can move forward.

2 And then after that it became -- once he
3 finally did meet with Hilary, and Hilary's concern
4 about Kevin having no contracts law experience such
5 that he could step in and review the contracts, and
6 Angel relaying that to me, I thought, oh, my goodness,
7 you've got to be kidding me. Not once has he said
8 anything about this -- about being deficient in this
9 area. So, yeah, it was those other incidents as well.

10 Q When you found out about this delay in the
11 turn over from Ms. Martinson to Mr. Jones, what did
12 you do?

13 A I met with Kevin and asked him had he turned
14 over? I can't remember if I spoke with Hilary, I
15 cannot recall, and I know that I spoke with Angel to
16 express my concern that he had not yet started the
17 turnover process, but I guess my follow-on
18 communication with him is what led to them eventually
19 meeting. So --

20 Q Yeah, go ahead.

21 A I wanted to make sure that it occurred, that
22 was my goal at the time, just conduct the turnover so

1 that we can have a continuity of operations.

2 Q Do you recall Mr. Jones talking to you about
3 a fellow retired Army lawyer that he knew for the
4 contracts law position?

5 A That conversation might have occurred
6 between the time when I asked him to conduct the
7 turnover, and when he did finally meet with Hilary,
8 because, again, that conversation occurred as we were
9 walking to the National Law Enforcement Museum.

10 Q Got it.

11 A And I believe that may have also been a
12 reason why that jumped out at me at that time as well.

13 Q Okay. At some point did you go to Mr.
14 Roessner, as Chief Counsel?

15 A After -- after Angel reported that Hilary
16 told her that Kevin had -- did not have a
17 understanding of contracts law, that's when I said
18 okay, I think I have all the pieces of the puzzle are
19 finally connected, and I need to now elevate this.

20 Q Okay. And what did Mr. Roessner say?

21 A I do not remember specifically, but I do
22 know that one of the outcomes was for Angel and I to

1 meet with Kevin so that he could provide input and
2 respond to my concerns, and Angel and I did just that.

3 Q Okay. I'm gonna show you, I'm gonna share
4 my screen --

5 A Yeah.

6 Q Maybe I'm not. This is IAF Tab 17, Page 5.
7 And Ms. Williams, hopefully you can see this.

8 A Yeah.

9 Q Do you recognize what this is and if you do
10 so, could you let us know what it is.

11 A Yes. It's the notes from the meeting that
12 Angel and I had with Kevin. Angel took the notes
13 while I was talking to Kevin. She may have also asked
14 some questions of Kevin, but Angel took the notes, and
15 then she prepared this document that was then provided
16 to Joel.

17 Q Okay. And these are your notes that were
18 written up right after the meeting, is that correct?

19 A No. Angel Williams took the notes during
20 the meeting, and then afterwards she prepared this
21 document.

22 Q Okay. Tell me about that meeting on

1 December 9th, as much as you can remember.

2 A Yeah, it was just asking Kevin if he could
3 come in and meet with us, letting him know I had some
4 concerns with the fact that he didn't have the
5 contract experience that I thought he had, that I had
6 represented to the Office of Chief Counsel and to
7 others in ATF outside of Chief Counsel, and that I had
8 some questions and wanted to know why he had not let
9 me know that he lacked that experience. And then
10 talking with him about the various opportunities he
11 had to provide that information to me. And then
12 letting him know that I believe during that meeting I
13 shared with him that was one of the things his
14 contracts law experience was what, for me, put him
15 over the edge in terms of him being the one selected
16 for the position.

17 And giving him, obviously and opportunity to
18 respond to my concern.

19 Q And did he respond?

20 A He did. And one of the things he said, hold
21 on a second I'm seeing it here in the middle of your
22 page, but you scrolled up

1 agency and/or department that I was working for. In
2 both positions I would be responsible for reviewing
3 reports of investigation, not just looking at legal
4 sufficiency, but also making recommendations to those
5 decisionmakers on appropriate dispositions and whether
6 those reports of investigation either needed to be
7 supplemented, or if they needed -- or if they
8 supported the action that agency or department was
9 looking to execute or impose.

10 A So, let's break that down a little bit. You
11 mentioned --

12 THE COURT: One second. I just have a
13 clarifying question, when you say report to
14 investigation you're not referring to EEO or
15 otherwise? Correct? This is just the report to
16 investigation of the disciplinary division within ATF?
17 Is that accurate?

18 MR. JONES: No, Judge. I'm talking
19 about both, in both instances, yes, I'm reviewing at
20 USDA I am reviewing EEO reports of investigation, at
21 ATF I'm reviewing reports of investigation from either
22 the Internal Affairs Division, and/or the Office of

1 the Inspector General that have been referred over for
2 appropriate disciplinary action.

3 THE COURT: Okay. Now I understand, I
4 just wanted to make sure you weren't referring to
5 reports in the EEO content with respect to the ATF.
6 All right. Go ahead, Ms. Amin.

7 BY MS. AMIN:

8 Q Let's break that down a little bit, Mr.
9 Jones. You mentioned legal writing and analysis, ell
10 me was there any similarities between the writing that
11 you were doing including research, let's focus on the
12 writing first that you were doing at ATF, and at USDA.

13 A At USDA as the representative and/or if I'm
14 providing reports to my higher within agriculture, or
15 if I'm dealing with the senior managers that I was
16 supporting, I might send them an email of my analysis
17 and/or review of the report of investigation to advise
18 them on what I thought might be an appropriate way to
19 proceed in that particular complaint; whether we
20 should settle it, or whether it should go forward to
21 hearing or what have you. And so, that was the type
22 of legal writing, including the pleadings that I would

1 be preparing within agriculture.

2 At ATF I'm doing mostly through email, I'm
3 doing some advice in counsel to the PRB chair after
4 reviewing the reports of investigations, or once we
5 decided on what would be an appropriate decision or
6 whatever, I might be corresponding with the Bureau of
7 Deciding official. And at ATF, I'm preparing
8 documents for signature by either the PRB chair or the
9 BDO that would then be issued to the subjects. But in
10 doing that, I'm doing the same kind of abilities and
11 skills of doing that analysis that what we are doing
12 is gonna withstand any type of third-party review, so
13 I have to actually utilize my legal skills and
14 abilities to do the research, to do the research of
15 the facts, the larger regulations that might apply to
16 both actions and then advise those decisionmakers on
17 what would be an appropriate course of action, or an
18 appropriate decision.

19 Q Tell me about the legal research and
20 analysis you were engaged in, and whether there was
21 any similarities with respective research and
22 analysis, statutes, regulations and precedent in both

1 positions.

2 A Again, I guess in terms of similarities,
3 doing the research such that what we were doing
4 complied with the applicable law, regulation and/or
5 policies so that what we end up doing with that
6 particular case be it in the EEOC arena, or in the ATF
7 disciplinary case arena that 1) it's consistent with
8 similar like cases, 2) that what we are doing won't be
9 overturned by a third-party, perhaps external to the
10 agency, if the employee wants to challenge it. So,
11 I'm doing legal research such that it can withstand
12 any third-party review, new eyes, and the skills
13 knowledge and experience that I have in doing that
14 type of work which, I've been doing similar work like
15 that for over 20 years where I'm involved in advising
16 decisionmakers after doing the review of the report of
17 investigation and/or what action they're proposing to
18 take.

19 Q Did you use legal research databases in
20 those positions?

21 A Yes, in both positions -- I'm sorry. In
22 both positions because it did involve employment law,

1 I was given a Cyber Feds account that I would utilize
2 if I wanted to research something in the area of
3 employment law. On those occasions where I needed to
4 do some significant caselaw research, I also had a
5 Westlaw account, but I didn't use the Westlaw account
6 that much, and both positions sometimes I would go to
7 the EEOC, and/or MSPB websites to research their case
8 laws, case dispositions, and for ATF would also
9 sometimes look at the federal circuit case decisions
10 potentially (inaudible) action going through MSPB and
11 up to the federal circuit.

12 At USDA, I would look at some federal
13 circuit cases but not as much. Mostly focused there
14 on using Cyber Feds, and/or Westlaw, or the EEOC
15 database case files.

16 Q Did you engage in any oral advocacy in
17 either position?

18 A In the terms of oral advocacy, at USDA I
19 would certainly use my advocacy skills, external to
20 the EEOC judges, but we really didn't have that many
21 hearings in the time that I was there. So, I would do
22 more oral advocacy internal either with my chain of

1 supervision on particular cases, or more often it was
2 with senior managers. For example, at USDA my
3 principle clients were the director and deputy
4 director of the National Finance Center, and the
5 leadership within the headquarters for the office of
6 the Chief Financial Officer.

7 So, often I was either briefing them, or
8 advising them and counseling them on the status of
9 different cases, and/or what I thought were
10 appropriate dispositions of different cases. Or if,
11 for example, we needed to invest in further
12 investigation, that the case needed to be returned, or
13 we needed to do more investigation before we could
14 take whatever action they were looking at taking. And
15 at ATF, the oral advocacy came in the context of my
16 principle clients were the Chair of the Professional
17 Responsibility Board and the Bureau Deciding Official.
18 And I would meet, I guess, every other week with the
19 chair (inaudible) and sometimes I would correspond
20 with them through email, excuse me, it's oral, respond
21 to the question.

22 And meetings with them, or by telephone more

1 often than not with the BDO, because the BDO wasn't
2 located with the -- in fact he might have been in
3 California at one point. We would correspond, or
4 converse by phone, and/or email. And my oral advocacy
5 with them was -- that's where I would use my oral
6 advocacy skills would be with the PRB and the BDO, and
7 on some lunar occasions with Sheryl Williams, if the
8 case warranted it, but that was rare. In most cases I
9 was directly serving as the legal advisor to the chair
10 of the PRB, and the BDO.

11 I would add that I did attend the PRB
12 meetings, and in some instances I would have to speak
13 up in terms of what were either appropriate
14 considerations for the board, or I would have to speak
15 up in terms of given our penalties and what have you.
16 What was an appropriate range of penalties given the
17 type of charge that the subject, the employee, usually
18 a special agent was being cited for.

19 Q Thank you for that response. And I'm just
20 gonna note, Mr. Jones, there's some occasions where
21 your audio came in a little muffled, and so, I don't
22 know if it's because you're moving, you might be

1 hitting on the speaker, but just be mindful of that so
2 the transcript is clear, or the audio is clear. Okay.
3 Do you have a sense if you think about the work that
4 you were engaged in in both positions, what a -- if
5 there was overlap in a (inaudible), for example I
6 spent X amount of time doing this task in both
7 positions. Was there any overlap?

8 A Yes. I would say, because in both positions
9 I had what I would consider a heavy caseload. At USDA
10 at any time, I might have 30 to 40 cases that I'm
11 managing through the EEO system. And at that level
12 I'm taking them on after the investigation is
13 "complete" and the person has requested a hearing.
14 So, I could be at the hearing stage, I could be at the
15 appeal stage, so 40 percent of my time can be spent of
16 working the cases at USDA. And I don't know if I'm
17 doing it in the right way.

18 Conversely or similarly at ATF 40 percent of
19 my time would be spent on handling the PRB and BDO
20 cases. I think to my recollection, even in short
21 four-month or so period that I had worked for ATF, I
22 had about 29 cases that I'd worked through the PRB,

1 and then I had maybe another 19 with the BDO. But the
2 point being, I would say 40 percent of my time was
3 handling caseload and helping the process those cases,
4 some type of conclusion; 10 percent was dealing with
5 database, databases, or case management systems in the
6 two agencies. At USDA of course we had a case
7 management system that the supervisory chain might
8 have access to and at ATF there was a PRB and a BDO
9 database system that maybe 10 percent of my time was
10 spent on that. And at some point, Sheryl Williams
11 decided that was more of an administration detail, so
12 she assigned to work with me to keep those input data
13 into those databases the offices (inaudible) division
14 paralegal.

15 I would say 30 percent of my time at USDA
16 and at ATF was spent on dealing with the
17 decisionmakers, the senior management who were
18 principally my clients. And at USDA I would include
19 that the responding management officials for the
20 various complaints that I was working. I would be
21 dealing with them as well as the director and the
22 deputy director for the National Finance Center, and

1 if it involved the Office of the Chief Financial
2 Officer person, I might be dealing with his or her
3 supervisor as a responding management official.

4 And so, that's what I would do with on the
5 USDA side. On the ATF side, again, it's a lot more
6 contact and working with the Chair of the PRB, the
7 Deputy Chair of the Professional Responsibility Board,
8 and the Bureau Deciding officials. I was dealing with
9 them on nearly a weekly regular basis at ATF, where I
10 would be talking to them about cases and the various
11 processes and also talking about the documents that I
12 was assisting them with preparing and issuing to the
13 subjects of the investigations.

14 MS. AMIN: Hold on a sec. We have to
15 try to figure out this audio situation. So, you're
16 moving around a lot so I'm not sure if that's doing
17 it. Where exactly is your microphone?

18 MR. JONES: I don't know.

19 MS. AMIN: Is it in your computer or is
20 it an external --?

21 MR. JONES: It's in my computer. It's
22 in the computer.

1 question about my contracts law background.

2 Q And you heard testimony from Ms. Williams,
3 in particular, about what you said, or what
4 representations you made about your background and
5 experience. Do you have any rebuttal or response to
6 any of the particular allegations she mentioned?

7 A Yes. During the interview, as I recall,
8 Deputy Associate Chief Counsel Angel Williams did
9 describe the position and in that description she said
10 the attorney may also be called upon to practice in
11 the areas ethics, fiscal, and contracts law. To my
12 recollection, I said something to the effect that
13 based on my military experience, education, and
14 training consistent with the evaluation factors in the
15 job announcement that I felt I could assist in those
16 areas if the need arose.

17 And I would add that maybe the ethics, if
18 you look at my resume, I've got over 20 years'
19 experience as an ethics counselor and I do acknowledge
20 in my resume it does speak to some fiscal law actions
21 that I worked during my military career. But no where
22 in my resume, nor would I ever represent that I ever

1 worked as a contract law attorney. Do I have training
2 in contracts, yes. I think I alluded to, I've taken
3 the contract attorney's course twice, so if you ask me
4 can I assist in those areas, yes I feel I can assist
5 in those areas, but I have never represented that I
6 ever worked as a contract law attorney.

7 And in fact, in my talking points for the
8 interview one of my examples of an action I worked on,
9 I actually talked about having worked an action in
10 coordination with my contract law attorney. So, my
11 response was that I would never have represented that
12 I had prior experience as a contract law attorney.
13 What I believe is happening is they are transferring
14 the word of experience and/or the fact that I talked
15 about my ethics experience with contracts. But no one
16 that I know of, nor would I have said that I ever had
17 experience as a contract law attorney.

18 Q During the interview did you express
19 interest in serving as the contracts attorney?

20 A No, I did not do that during the interview.
21 (Inaudible).

22 Q Did Ms. Williams or any of the interview

1 expected that I would be called upon to be the primary
2 contract law attorney for ATF. Consistent with what I
3 said, I can assist in that area, I could assist Ms.
4 Martinson at the time if there was some contract work
5 that had to be done. So, that's my answer.

6 Q Okay. You saw in Ms. Williams' testimony
7 she reviewed with Attorney Hand, the email she sent
8 out after you started that you would serve as the
9 back-up and some organizational charts. What was your
10 thought process? What did you think when you saw
11 those documents?

12 A My thought process was as the alternate,
13 again I might be called upon to assist, but that I
14 never expected of reading those documents that ATF
15 would be looking to me to replace Ms. Martinson. My
16 thought concept was if the workload gets heavy and she
17 needs some assistance with contracts, she or the
18 office would turn to me to assist with that workload.
19 And in that regard, in my mind LLM, acquisition law, I
20 think it's in the record, my transcript all the
21 courses that I've taken that you have to take in order
22 to qualify for that specialty, plus with the contract

1 attorney's course, I've taken twice, and being able to
2 download real time the contract law two-volume book
3 which gives you step-by-step instructions with
4 appropriate references to the FAR on how to work any
5 particular contract action that you might get.

6 I felt that I could assist with contracts if
7 called upon to do it.

8 Q And you used an acronym just now, FAR, I
9 believe?

10 A The Federal Acquisition Regulation, the
11 Army's contract attorney's handbook, while it's
12 specific to DOD, it starts out with references to the
13 Federal Acquisition Regulation. And so, I would be
14 able to use that to do those actions if I needed to.

15 Q Did you, in fact, take over any of the
16 contract work before you involuntarily resigned?

17 A Technically, yes. I did, after having met
18 with some of the contracting officers I had a five or
19 six contracts in my office that I was planning to
20 review and then provide back to the contracting
21 officers after we got done with the PRB and the BDO
22 notices that we wanted to get out before the holiday

1 period.

2 Q Did you work with any of the personnel at
3 ATF acquisitions?

4 A I did. I had a couple of email
5 correspondence with a few, one or two people directly
6 that I was working with, but that was it really, just,
7 I think one or two contract actions, contract
8 personnel that I had some contact with in the December
9 timeframe between December 6th and the 18th, maybe I
10 had two contacts, and that was only by email.

11 Q Did anyone complain about your work from ATF
12 acquisitions?

13 A I am not aware of any complaints about the
14 legal services support and/or the responsiveness of my
15 actions in response to any request for assistance by
16 anyone in acquisitions.

17 Q At what point did you first learn you were
18 going to be processed for removal?

19 A I did not. In about 2:00 p.m. on December
20 18th, at the meeting with Sheryl Williams and Chief
21 Counsel Roessner. And I would just like to add to
22 clarify. It's upsetting. I was really, really upset