APPENDIX A

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

WILLIAM TYRONE CUNNINGHAM,
Petitioner

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent

2022-2088

Petition for review of the Merit Systems Protection Board in No. DC-315H-17-0167-I-1.

Decided: January 13, 2023

WILLIAM TYRONE CUNNINGHAM, Washington, DC, pro se.

ELIZABETH W. FLETCHER, Office of General Counsel, United States Merit Systems Protection Board, Washington, DC, for respondent. Also represented by ALLISON JANE BOYLE, KATHERINE MICHELLE SMITH.

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

PER CURIAM.

William Cunningham, after applying for a particular position at the Department of Labor's Bureau of Labor Statistics, received a letter from the Bureau dated November 19, 2015, "confirm[ing] [his] appointment" to the position but noting that his appointment was "contingent upon . . . receipt of all documents required for appointment." Appx. 21. A Standard Form 50 (SF 50) notice of personnel action, executed on December 13, 2015, stated that the appointment was "subject to [the] completion of [a] one year initial probationary period beginning" that day. SAppx. 34 (box 45). Within that probationary period, the Bureau terminated Mr. Cunningham's employment. Mr. Cunningham appealed his termination to the Merit Systems Protection Board, which dismissed the appeal for lack of jurisdiction, and then petitioned this court for review. We affirm.

I

Mr. Cunningham, a veteran who was employed at the U.S. Postal Service from 1993 to 2000, SAppx. 4, 27, 34, applied to be an information technology specialist in the Bureau, Appx. 37. On November 19, 2015, the acting chief of the Bureau's Branch of Workforce Staffing and Recruitment wrote Mr. Cunningham a letter "confirm[ing] [his] appointment" as an information technology specialist. Appx. 21. The letter stated that the appointment was "contingent upon . . . receipt of all documents required for appointment." Appx. 21.

An SF 50 for the appointment was executed on December 13, 2015. SAppx. 34.[1] The SF 50 stated that the appointment was "subject to [the] completion of [a] one year

[1] A second SF 50 was executed on December 18, 2015, Reply Br. Appx. 7, to make the pay increases required by the generally applicable Executive Order 13715, issued the same day. 80 Fed. Reg. 80,195 (Dec. 18, 2015).

initial probationary period beginning" that day. SAppx. 34 (box 45). There has been no showing that Mr. Cunningham started working in the job by carrying out the duties of the position before December 13, 2015.

On December 1, 2016, the Bureau terminated Mr. Cunningham's employment effective December 9, 2016, within the one-year probationary period. SAppx. 35. The notice of termination stated that Mr. Cunningham's supervisor "determined that [Mr. Cunningham] failed to demonstrate [his] fitness for continued employment" as a result of "[his] conduct during [his] probationary period." *Id.* According to Mr. Cunningham, he was told that he was terminated "because of conduct issues relating to the reporting of [his] time." SAppx. 32. Mr. Cunningham appealed his termination to the Board on December 6, 2016, SAppx. 23, within the 30 days allowed by 5 C.F.R. § 1201.22(b)(1). On the appeal form, Mr. Cunningham checked a box answering "yes" to a question asking whether he was "serving a probationary . . . period at the time of" his termination. SAppx. 27 (box 11).

The administrative judge assigned to the matter dismissed Mr. Cunningham's appeal for lack of jurisdiction in an initial decision on March 31, 2017, concluding that Mr. Cunningham was not an "employee" with appeal rights to the Board under 5 U.S.C. §§ 7511(a)(1)(A) and 7513(d) and that he failed to make allegations that would bring him within the narrow scope of Board jurisdiction (under 5 C.F.R. § 315.806) to hear a probationary employee's appeal of a termination. *Cunningham v. Department of Labor*, No. DC-315H-17-0167-I-1, 2017 WL 1209598 (M.S.P.B. Mar. 31, 2017); Appx. 1–5. Mr. Cunningham timely petitioned the Board to review the initial decision on April 25, 2017, SAppx. 26, and the Board (after acquiring a quorum needed to act) denied the petition on July 27, 2022. *Cunningham v. Department of Labor*, No. DC-315H-17-0167-I-1, 2022 WL 2976331 ¶ 1 (M.S.P.B. July 27, 2022); Appx. 11–12.

The denial made the initial decision the Board's final decision on the same day. 5 C.F.R. § 1201.113(b).

Mr. Cunningham timely petitioned this court for review on August 1, 2022, Dkt. 1, within the 60 days allowed by 5 U.S.C. § 7703(b)(1)(A). We have jurisdiction under 5 U.S.C. § 7703(b)(1)(A) and 28 U.S.C. § 1295(a)(9).

II

We decide de novo whether the Board properly dismissed Mr. Cunningham's appeal for lack of jurisdiction. *See Mouton-Miller v. MSPB*, 985 F.3d 864, 868–69 (Fed. Cir. 2021). "The Board does not have plenary appellate jurisdiction over personnel actions." *Id.* at 869 Rather, for the Board to have jurisdiction, the underlying personnel action must be "appealable to the Board under [a] law, rule, or regulation." 5 U.S.C. § 7701(a). Mr. Cunningham, as the plaintiff, bears the burden of establishing the Board's jurisdiction by a preponderance of the evidence. *Mouton-Miller*, 985 F.3d at 869.

Of relevance here, 5 U.S.C. § 7513(d) permits an "employee" against whom a qualifying personnel action—including termination, *see id.* § 7512(1)—is taken to appeal that action to the Board. In this context, an "'employee' means an individual in the competitive service who is not serving a probationary or trial period under an initial appointment" or "who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less." *Id.* § 7511(a)(1)(A) (indentation and punctuation altered). Probationary employees have only the more limited appeal rights conferred by 5 C.F.R. § 315.806. *See Mastriano v. Federal Aviation Administration*, 714 F.2d 1152, 1155 (Fed. Cir. 1983) ("The only cognizable right of appeal by a probationary employee to the [Board] is . . . 5 C.F.R. § 315.806."). That section permits a probationary employee to appeal a termination to the Board if the probationary employee alleges that the termination "was based on partisan political reasons or marital

status" or "was not effected in accordance with the procedural requirements of [5 C.F.R. § 315.805]." 5 C.F.R. § 315.806.

We conclude that, because Mr. Cunningham was a probationary employee at the time of his termination—and not an employee under 5 U.S.C. § 7511(a)(1)(A)—he could not appeal his termination to the Board under 5 U.S.C. § 7513(d). We also conclude that, because Mr. Cunningham did not allege discrimination based on partisan affiliation or marital status, or that his termination was not effected in accordance with the procedural requirements of 5 C.F.R. § 315.805, he could not appeal his termination to the Board under 5 C.F.R. § 315.806. We therefore hold that the Board lacked jurisdiction and correctly dismissed Mr. Cunningham's appeal.

A

Mr. Cunningham was not an employee under 5 U.S.C. § 7511(a)(1)(A) because, at the time of his termination, he was "serving a probationary . . . period under an initial appointment." § 7511(a)(1)(A)(i). The information technology specialist position at issue—a competitive service position, SAppx. 34 (box 34); Reply Br. Appx. 7 (box 34)—required the successful applicant to undergo a one-year probationary period, 5 C.F.R. § 315.801(a)(1) (stating that the first year of service is probationary for successful applicants to competitive service positions). Mr. Cunningham does not dispute that the position required a one-year probationary period. *See* SAppx. 27 (box 7 of Mr. Cunningham's appeal form showing a checkmark next to "competitive" under the heading "type of appointment").[2] Rather, Mr. Cunningham

[2] Before the Board, Mr. Cunningham argued that the position did not require a one-year probationary period because the Bureau did not notify him that the position required such a period. *Cunningham*, 2017 WL 1209598;

argues that he was "effectively" appointed to the position on November 20, 2015, Mr. Cunningham's Opening Br. at 4, the day after the November 19, 2015 letter. Thus, Mr. Cunningham continues, he was an employee under § 7511(a)(1)(A) on the date of his termination because he had completed his one-year probationary period by then, indeed before the Bureau issued the notice of termination on December 1, 2016 (effective December 9, 2016). Mr. Cunningham's Opening Br. at 12.

Mr. Cunningham is incorrect. "[A]ppointment is a single, discrete act," *Skalafuris v. United States*, 683 F.2d 383, 386 (Ct. Cl. 1982), that occurs "when the last act, required from the person possessing the power [of appointment], has been performed," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 157 (1803). Normally, the last act is the execution of an SF 50 or the administration of the oath of office. *See Skalafuris*, 683 F.2d at 387 ("We have in past cases emphasized the importance of the SF-52, SF-50, and oath of office in determining the date or existence of an appointment . . . ."); *Vukonich v. Civil Service Commission*, 589 F.2d 494, 496 (10th Cir. 1978) ("[A]n appointment becomes effective only after a Standard Form 50, 'Notice of Personnel Action,' has been completed."); *Costner v. United States*, 665 F.2d 1016, 1023 (Ct. Cl. 1981) ("[T]he lack of any evidence that

---

Appx. 3. To the extent that Mr. Cunningham raises this argument before us, it is incorrect. The Bureau's job posting stated that the position "[r]equires a probationary period," Reply Br. Appx. 14, and Mr. Cunningham's SF 50 stated that the position was "subject to [the] completion of [a] one year initial probationary period," SAppx. 34 (box 45). Mr. Cunningham also has not shown why lack of notice would entitle him to have his position treated as not having a probationary one-year period when, aside from any notice issue, it did have such a period.

[appellant] took an oath of office . . . rebut[s] his claim [of appointment].").

Here, Mr. Cunningham's SF 50 was completed by the Bureau's director of human resources on December 13, 2015. SAppx. 34 (box 49). Mr. Cunningham was therefore appointed to the position no earlier than December 13, 2015. *See Skalafuris*, 683 F.2d at 387; *Vukonich*, 589 F.2d at 496. To the extent that the author of the November 19, 2015 letter had the power of appointment, that letter itself makes clear that Mr. Cunningham's appointment was "contingent upon . . . receipt of all documents required for appointment," Appx. 21, including the SF 50, *Vukonich*, 589 F.2d at 496. And there is no basis for viewing the November 19, 2015 letter "as the 'last act' [of appointment] defined in" *Marbury*. *Skalafuris*, 683 F.2d at 388 (quoting *Marbury*, 5 U.S. (1 Cranch) at 156). Further, Mr. Cunningham has not alleged, much less shown, that he carried out any duties of the information-technology-specialist position before December 13, 2015; accordingly, we have no occasion to consider the scope of our precedent indicating that a successful applicant's work carrying out duties of a position before the completion of the last act of appointment generally does not entitle the applicant to an appointment date earlier than the date of the last act of appointment. *See id.* at 385, 388–89 (holding that the plaintiff was appointed on March 5, 1974—the date on which the standard form 50 was executed—even though the plaintiff "was actively engaged in his new duties throughout February [1974]"). Thus, Mr. Cunningham was not appointed before December 13, 2015, so he was still in his one-year probationary period when his employment was terminated.

Mr. Cunningham next argues that his employment at the U.S. Postal Service from 1993 to 2000 should count toward (and satisfy) his one-year probationary period at the Bureau. Mr. Cunningham's Opening Br. at 13. But for "[p]rior [f]ederal civilian service" to "count[] toward

completion of probation," the prior service must be "in the same agency"; "in the same line of work (determined by the employee's actual duties and responsibilities)"; and "[c]ontain[] or [be] followed by no more than a single break in service that does not exceed 30 calendar days." 5 C.F.R. § 315.802(b). Here, Mr. Cunningham has not established that his work for the Postal Service was work in the "same agency" as the Bureau (or Department of Labor), *see Pervez v. Department of the Navy*, 193 F.3d 1371, 1373 (Fed. Cir. 1999) (holding that the Army and the Navy are not the "same agency" for purposes of section 315.802(b)), or that his duties at the Postal Service were "in the same line of work" as his duties at the Bureau.

For these reasons, when terminated, Mr. Cunningham was a probationary employee, not an employee under 5 U.S.C. § 7511(a)(1)(A), and therefore could not appeal his termination to the Board under 5 U.S.C. § 7513(d).

B

As a probationary employee, Mr. Cunningham had only the more limited appeal rights conferred by 5 C.F.R. § 315.806. *See Mastriano*, 714 F.2d at 1155. To come within that section, Mr. Cunningham had to adequately allege that his termination "was based on partisan political reasons or marital status" or "was not effected in accordance with the procedural requirements of [5 C.F.R. § 315.805]." 5 C.F.R. § 315.806. We see no basis for jurisdiction on this ground.

On his appeal form to the Board, Mr. Cunningham alleged that he was terminated "because of conduct issues relating to the reporting of [his] time," SAppx. 32, not because of "partisan political reasons or marital status," § 315.806(b). Later, when he petitioned the full Board for review, he argued that his termination was because he was considering becoming a union member. *Cunningham*, 2022 WL 2976331 ¶¶ 4–5; Appx. 14. But the Board properly deemed the argument untimely. The Board also properly

concluded that, in any event, the allegations would not suffice to establish jurisdiction under section 315.806(b) because our court has held that termination "based on union affiliation" is not termination for a "partisan political reason[]." *Mastriano*, 714 F.2d at 1156; *Cunningham*, 2022 WL 2976331 ¶ 5; Appx. 14. Finally, Mr. Cunningham has not presented an adequate allegation that the Bureau effected his termination without observing the procedural requirements of section 315.805, which requires, among other things, that the Bureau provide advance written notice stating the reasons for a proposed termination, § 315.805(a), a notice that the Bureau provided, SAppx. 35.

Mr. Cunningham therefore did not allege the facts necessary to appeal his termination to the Board under 5 C.F.R. § 315.806. And because he could not have appealed his termination to the Board under 5 U.S.C. § 7513(d), as we have concluded, the Board lacked jurisdiction and correctly dismissed his appeal.

III

Mr. Cunningham finally argues that the Board's administrative judge "was in cahoots with the conspiracy to keep [him] from being employed." Mr. Cunningham's Opening Br. at 8; *see also* Mr. Cunningham's Reply Br. at 9 ("[I am] absolutely flabbergasted by the continued efforts of the [Board] and the Department of Labor . . . to conspire against [me].").

"The requirements of due process, of course, apply to administrative proceedings." *Bieber v. Department of the Army*, 287 F.3d 1358, 1361 (Fed. Cir. 2002) (citing *Utica Packing Co. v. Block*, 781 F.2d 71, 77 (6th Cir. 1986)). And "due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities." *Schweiker v. McClure*, 456 U.S. 188, 195 (1982). To overcome "the presumption that the hearing officers . . . are unbiased," *id.*, Mr. Cunningham must show that the administrative judge harbored "a deep-seated favoritism or antagonism

that would make fair judgment impossible," *Bieber*, 287 F.3d at 1362 (quoting and extending the standard announced in *Liteky v. United States*, 510 U.S. 540, 555 (1994), which involved a motion to recuse a district judge under 28 U.S.C. § 455, to bias claims under 5 U.S.C. § 556(b) and to due process claims); *see also Smolinski v. MSPB*, 23 F.4th 1345, 1353 (Fed. Cir. 2022) (applying the *Liteky* standard to a request that the case be assigned on remand to a different MSPB administrative judge).

Here, Mr. Cunningham alleges generally that the administrative judge was biased against him. Mr. Cunningham's Opening Br. at 8; Mr. Cunningham's Reply Br. at 9. But Mr. Cunningham does not allege specific facts or point to evidence that suggests bias from the administrative judge or from the Board. "Conclusory statements are of no effect. Nor are . . . unsupported beliefs and assumptions." *Maier v. Orr*, 758 F.2d 1578, 1583 (Fed. Cir. 1985); *see also Ahuruonye v. Department of the Interior*, 690 F. App'x 670, 680 (Fed. Cir. 2017) ("To establish bias, an appellant must show more than mere disagreement with the judge's substantive rulings." (citing *Chianelli v. EPA*, 8 F. App'x 971, 979–81 (Fed. Cir. 2001))). Mr. Cunningham has therefore not established that the administrative judge harbored personal bias sufficient to meet the *Liteky* standard.

IV

We have considered Mr. Cunningham's other arguments and find them unpersuasive. For the foregoing reasons, we affirm the Board's dismissal of Mr. Cunningham's appeal for lack of jurisdiction.

The parties shall bear their own costs.

AFFIRMED

APPENDIX B

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

WILLIAM TYRONE CUNNINGHAM,
Petitioner

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent

2022-2088

Petition for review of the Merit Systems Protection Board in No. DC-315H-17-0167-I-1.

ON PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Before MOORE, *Chief Judge*, NEWMAN, LOURIE, DYK, PROST, REYNA, TARANTO, CHEN, HUGHES, STOLL, CUNNINGHAM, and STARK, *Circuit Judges*.

PER CURIAM.

O R D E R

William Tyrone Cunningham filed a combined petition for panel rehearing and rehearing en banc. The petition was referred to the panel that heard the appeal, and

thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

FOR THE COURT

February 27, 2023
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

APPENDIX K

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

WILLIAM TYRONE CUNNINGHAM, Appellant,	DOCKET NUMBER DC-315H-17-0167-I-1
v.	
DEPARTMENT OF LABOR, Agency.	DATE: July 27, 2022

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

William Tyrone Cunningham, Fort Washington, Maryland, pro se.

Elizabeth L. Beason and Katrina Liu, Washington, D.C., for the agency.

BEFORE

Cathy A. Harris, Vice Chairman
Raymond A. Limon, Member
Tristan L. Leavitt, Member

FINAL ORDER

¶1 The appellant has filed a petition for review of the initial decision, which dismissed his appeal of his probationary termination for lack of jurisdiction. Generally, we grant petitions such as this one only in the following circumstances: the initial decision contains erroneous findings of material fact;

[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. *See* 5 C.F.R. § 1201.117(c).

the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the administrative judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115). After fully considering the filings in this appeal, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review and AFFIRM the initial decision, which is now the Board's final decision. 5 C.F.R. § 1201.113(b).

¶2 In his petition for review, the appellant argues that he thought he was being reinstated and, per his rights as a former Postal Service employee, he was not required to serve a probationary period and/or the agency never told him he would be required to do so. Petition for Review (PFR) File, Tab 1 at 7, 11; Initial Appeal File (IAF), Tab 30, 33-34. As a general matter, a person who is "given a career or career-conditional appointment" must complete a 1-year probationary period. *See* 5 C.F.R. § 315.801(a). Here, the administrative judge correctly found that the appellant's prior Federal service did not accord him the status of an "employee" under 5 U.S.C. § 7511(a)(1)(A). That statute provides that, to qualify as an "employee" with appeal rights under 5 U.S.C. chapter 75, a competitive-service employee must show that he either was not serving a probationary period or, with an exception not relevant here, had completed 1 year of current continuous service under an appointment other than a temporary one limited to a year or less. The administrative judge properly concluded that the appellant failed to show that his prior service could be counted toward the probationary period because the prior service would have to be: (1) rendered immediately preceding the probationary period; (2) performed in the same

agency; (3) performed in the same line of work; and (4) completed with no more than one break in service of less than 30 days. 5 C.F.R. § 315.802(b); *see Hurston v. Department of the Army*, 113 M.S.P.R. 34, ¶ 9 (2010); *see also Vannoy v. Department of the Air Force*, 73 F.3d 380 (Fed. Cir. 1995) (per curiam).[2]

¶3 The administrative judge determined that the appellant in this case was employed by the U.S. Postal Service from 1993 to 2000. IAF, Tab 41, Initial Decision (ID) at 4; IAF, Tab 21 at 112-13. Under 5 C.F.R. § 315.802(b), though, such prior service could not be tacked on toward completing a probationary period in any agency other than in the same agency (the U.S. Postal Service). *See Baggan v. Department of State*, 109 M.S.P.R. 572, ¶ 7 (2008). In addition, the administrative judge correctly found that the appellant was on notice that he was subject to a probationary period when he was appointed. ID at 4-5. The agency's vacancy announcement clearly stated that selectees would be required to serve a 1-year probationary term of employment if they were not already tenured Federal employees. IAF, Tab 21 at 99. The administrative judge also properly found that, even if the agency failed to notify the appellant that, if selected, he would need to serve a probationary term of employment, that alleged failure would still not confer appeal rights on the appellant. ID at 5 (citing *Cunningham v. Department of the Army*, 119 M.S.P.R. 147, ¶ 5 (2013); *cf. Williams v. Merit Systems Protection Board*, 892 F.3d 1156, 1162-63 (Fed. Cir. 2018) (recognizing that an agency's failure to advise an employee that he would lose his Board appeal rights if he voluntarily transferred to a different position did not create appeal rights), *cert. denied*, 139 S. Ct. 1472 (2019). Further, as to the appellant's argument that he thought he was being reinstated, the Board lacks jurisdiction over an agency's decision not to reinstate an employee pursuant to 5 C.F.R.

[2] The Board may rely on unpublished decisions of the U.S. Court of Appeals for the Federal Circuit if, as here, it finds the reasoning persuasive. *Vores v. Department of the Army*, 109 M.S.P.R. 191, ¶ 21 (2008), *aff'd*, 324 F. App'x 883 (Fed. Cir. 2009).

§ 315.401. *See Hicks v. Department of the Navy*, 33 M.S.P.R. 511, 512-13 (1987) (holding that the Board lacks jurisdiction over an agency's alleged denial of an employee's reinstatement rights).

¶4 The appellant also argues for the first time that he was terminated for partisan political and/or preappointment reasons. PFR File, Tab 1. The Board generally will not consider an argument raised for the first time in a petition for review absent a showing that it is based on new and material evidence not previously available despite the party's due diligence. *Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980); 5 C.F.R. § 1201.115(d). The appellant has not made such a sufficient showing here. The appellant also submits two emails and argues the documents were unavailable due to being on a USB drive he had given to his daughter; however, the information itself was not new and will not be considered. PFR File, Tab 1 at 14-15; *see* 5 C.F.R. § 1201.115(d); *see also Grassell v. Department of Transportation*, 40 M.S.P.R. 554, 564 (1989) (holding that the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed). Regardless, even if we were to consider the appellant's arguments or documents on review, it would not provide the Board with jurisdiction.

¶5 The appellant asserts that, because he was considering becoming a union shop steward, the agency discriminated against him for partisan political reasons. PFR File, Tab 1 at 2, 5, 8. In furtherance of this argument, he submits a narrative description of his interactions with the union and his supervisor and emails with the union regarding his core duty hours at the agency. *Id.* at 14-18. However, even if we were to consider the appellant's argument that his termination was due to his affiliation with the union, it would not provide the Board with jurisdiction. *See Mastriano v. Federal Aviation Administration*, 714 F.2d 1152, 1156 (holding that allegations of discrimination based on union affiliation do not state a cause of action within the Board's jurisdiction under 5 C.F.R. § 315.806(b)).

¶6 The appellant also argues that he was terminated for a preappointment reason based on the agency's failure to hire him under the vacancy announcement for applicants under the Veterans Employment Opportunity Act. PFR File, Tab 1 at 5; IAF, Tab 13 at 4. However, the appellant's arguments do not suggest that the agency terminated him because of the hiring appointment authority. Rather, it is undisputed that the appellant was terminated for attendance issues and misrepresentations made about his work hours as reported on his daily timesheets. IAF, Tabs 9-12, Tab 21 at 6, 21-92, Tabs 23-25. Therefore, we find that the appellant has not raised a nonfrivolous allegation that he was terminated for a preappointment reason.

¶7 Finally, the appellant argues that the agency willfully obstructed his employment by not allowing him to change his shift, not allowing him to come into work early, and not giving him any verbal or written warnings before his termination, as required by the collective bargaining agreement. PFR File, Tab 1 at 8. However, the Board cannot review these claims as they do not relate to the issue of the Board's jurisdiction over an appeal by a probationary employee. *Mastriano*, 714 F.2d at 1156. Moreover, these claims do not provide an independent source of Board jurisdiction absent an otherwise appealable action. *Penna v. U.S. Postal Service*, 118 M.S.P.R. 355, ¶ 13 (2012) (finding that absent an otherwise appealable action, the Board lacks jurisdiction over a claim of harmful error, discrimination, or other prohibited personnel practice); *Burnett v. U.S. Postal Service*, 104 M.S.P.R. 308, ¶ 15 (2006) (making the same finding in *Penna* as to a due process claim).

¶8 Accordingly, we find the administrative judge correctly dismissed the appeal for lack of jurisdiction.

NOTICE OF APPEAL RIGHTS[3]

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

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

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

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

[3] Since the issuance of the initial decision in this matter, the Board may have updated the notice of review rights included in final decisions. As indicated in the notice, the Board cannot advise which option is most appropriate in any matter.

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

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

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

(2) Judicial or EEOC review of cases involving a claim of discrimination. This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days** after you receive this decision. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. ____ , 137 S. Ct. 1975 (2017). If you have a representative in this case, and your representative receives this decision before you do, then you must file with the district court no later than **30 calendar days** after your representative receives this decision. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and

to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

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

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

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. 5 U.S.C. § 7702(b)(1). You must file any such request with the EEOC's Office of Federal Operations within **30 calendar days** after you receive this decision. 5 U.S.C. § 7702(b)(1). If you have a representative in this case, and your representative receives this decision before you do, then you must file with the EEOC no later than **30 calendar days** after your representative receives this decision.

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

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

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

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

(3) **Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012**. This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and your judicial petition for review "raises no challenge to the Board's

disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D)," then you may file a petition for judicial review either with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction.[4] The court of appeals must receive your petition for review within **60 days** of the date of issuance of this decision. 5 U.S.C. § 7703(b)(1)(B).

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

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

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

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

---

[4] The original statutory provision that provided for judicial review of certain whistleblower claims by any court of appeals of competent jurisdiction expired on December 27, 2017. The All Circuit Review Act, signed into law by the President on July 7, 2018, permanently allows appellants to file petitions for judicial review of MSPB decisions in certain whistleblower reprisal cases with the U.S. Court of Appeals for the Federal Circuit or any other circuit court of appeals of competent jurisdiction. The All Circuit Review Act is retroactive to November 26, 2017. Pub. L. No. 115-195, 132 Stat. 1510.

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

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

FOR THE BOARD:

/s/ for

Jennifer Everling
Acting Clerk of the Board

Washington, D.C.