

**United States Court of Appeals
for the Federal Circuit**

SANFA SWARAY CONTEH,
Petitioner.

v.

DEPARTMENT OF COMMERCE,
Respondent

2022-1693

Petition for review of the Merit Systems Protection Board in No. DC-0752-21-0012-I-1.

JUDGMENT

THIS CAUSE having been considered, it is

ORDERED AND ADJUDGED:

AFFIRMED

FOR THE COURT

October 12, 2022
Date

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

NOTE: This disposition is nonprecedential.

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for the Federal Circuit**

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Petitioner

v.

DEPARTMENT OF COMMERCE,
Respondent

2022-1693

Petition for review of the Merit Systems Protection
Board in No. DC-0752-21-0012-I-1.

Decided: October 12, 2022

SANFA SWARAY CONTEH, Rosharon, TX, pro se.

SARAH E. KRAMER, Commercial Litigation Branch,
Civil Division, United States Department of Justice, Wash-
ington, DC, for respondent. Also represented by BRIAN M.
BOYNTON, DEBORAH ANN BYNUM, PATRICIA M. MCCARTHY.

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

PER CURIAM.

Sanfa Conteh appeals from the decision of the Merit Systems Protection Board (“the Board”) affirming the Department of Commerce’s National Oceanic and Atmospheric Administration’s (“NOAA’s”) action of removing Mr. Conteh from the position of Second Assistant Engineer and from the Federal Service. *We affirm.*

BACKGROUND

On July 18, 2016, Mr. Conteh was selected for the position of Second Assistant Engineer in the Marine Operations Center (MOC), a division of the Office of Marine and Aviation Operations within the NOAA. The MOC Crew is a relief pool of Wage Marine employees who are assigned to work on vessels on an as-needed basis. As set forth by the Marine Operations Relief Pool Tours of Duty Agreement, as a relief pool employee, Mr. Conteh was required to “work a minimum of 120 days” each calendar year. S.A. 7.¹ The Relief Pool Agreement, which Mr. Conteh signed on July 19, 2018, notes that “[f]ailure to uphold the terms of the . . . Marine Operations Relief Pool Tours of Duty Agreement . . . could result in disciplinary action, up to and including removal from Federal service.” *Id.* at 9.

On December 19, 2019, Mr. Conteh was notified that, having completed only 95 days of work on assignment, he failed to meet the 120-day requirement. S.A. 26. In response, he noted that 2019 was the first year since he had been working for NOAA that he did not clearly fulfill the 120-day requirement. In previous years, Mr. Conteh completed over 180 working days. *Id.* Mr. Conteh also asserted that a government shutdown, which lasted through January 25, 2019, adversely affected his work schedule. For example, due to the government shutdown, a 28-day

¹ “S.A.” refers to the Supplemental Appendix filed with Respondent’s brief.

assignment that Mr. Conteh had accepted was cancelled. *Id.* Mr. Conteh also asserted that he called his supervisor several times asking for work in the beginning of the year but was told that no work was available. *Id.* Mr. Conteh also asserted that the government shutdown subsequently required him to supplement his income and find work elsewhere in order to provide for his family. *Id.*

On January 30, 2020, Mr. Conteh received a letter from Lieutenant Commander Lecia Salerno, informing him that she was proposing to remove him from the position of Second Assistant Engineer for failure to meet the 120-day condition of employment. S.A. 27. In her letter, Lieutenant Commander Salerno noted that over the course of his three year and six-month employment, Mr. Conteh's performance had generally been satisfactory. *Id.* at 30. She also stated that she appreciated that the government shutdown may have had an effect on Mr. Conteh's income during the month of January. *Id.* at 29. But Mr. Conteh had declined three assignments offered to him later in 2019, any one of which would have been sufficient for meeting the 120-day requirement. *Id.* Lieutenant Commander Salerno also noted that, in making her decision, she considered that Mr. Conteh received a seven-day suspension in November, 2019, for negligence in the performance of his duties and failure to follow instructions. *Id.* at 30. Lieutenant Commander Salerno concluded by stating that the "seriousness of [Mr. Conteh's] misconduct outweigh[ed] the mitigating factors and justify[ed] his removal from Federal service." *Id.*

On February 2, 2020, Mr. Conteh emailed Captain Daniel Simon, raising the issue higher in the chain of command, asserting that he met the 120-day condition of employment for 2019 if the 25 days he spent on furlough during the government shutdown were counted along with his 95 days of active service. S.A. 33. For support, Mr. Conteh pointed to an agency bulletin titled Timekeeping Guidance for Excepted Employees for End of Lapse in

Appropriations, dated January 25, 2019, which notes that “any leave scheduled during the furlough period should be deleted and entered as TC code 01 (Regular Base Pay),” and that “[n]o furlough time should be recorded on your time card.” A. 40.²

On March 5, 2020, Mr. Conteh received a letter from Captain Simon informing him that he had decided to remove Mr. Conteh from his position of Second Assistant Engineer and the Federal service effective March 11, 2020 based on the failure to meet a condition of employment. S.A. 38. While he considered Mr. Conteh’s arguments about furlough “to be a mitigating factor,” Captain Simon wrote that Mr. Conteh “d[id] not dispute . . . that [he] failed to work a minimum of 120 days in 2019 as required.” *Id.* at 38–39. Captain Simon also wrote that the clarity with which Mr. Conteh was aware of the 120-day requirement and its importance rendered its violation grounds for removal. *Id.*

On October 7, 2020, Mr. Conteh filed an appeal to the Board challenging: (1) whether the agency proved by a preponderance of the evidence that the appellant engaged in the misconduct as charged; (2) whether the agency proved by a preponderance of the evidence that there is a nexus between the charged misconduct and the efficiency of the service; and (3) whether the agency proved that it properly considered the aggravating and mitigating circumstances relating to the penalty and, if so, whether the penalty exceeded the bounds of reasonableness. Dec., 5.³

² “A.” refers to the Appendix filed with Appellant’s brief.

³ “Dec.” refers to the June 2, 2021 MSPB Decision in *Conteh v. Commerce*, DC-0751-21-0012-I-1, which was made final on April 12, 2022.

On April 29, 2022, the Board's Administrative Judge issued a decision upholding Mr. Conteh's removal, finding that the "unrefuted evidence . . . proves that he worked only 95 days in 2019," that there was a nexus between Mr. Conteh's failure to meet the 120-day requirement and the efficiency of the service, and that the agency properly considered the relevant circumstances in deciding to remove Mr. Conteh from Federal service. Dec., 7-17.

Mr. Conteh appealed the Administrative Judge's decision affirming the agency's removal action, asserting that the Administrative Judge erred in weighing the evidence in sustaining the charge. On April 2, 2022, the Board found that Mr. Conteh had not established any basis for granting his petition for review under 5 C.F.R. § 1201.115. The Board thus denied the petition for review and affirmed the initial decision, making the Administrative Judge's decision the final decision of the Board.

Mr. Conteh then appealed to this court. We have jurisdiction pursuant to 5 U.S.C. § 7703(b)(1)(A) and 28 U.S.C. § 1295(a)(9).

DISCUSSION

We review the Board's legal determinations *de novo* and its underlying findings of fact for substantial evidence. *See, e.g., Welshans v. United States Postal Serv.*, 550 F.3d 1100, 1102 (Fed. Cir. 2008). A court will not overturn an agency decision if it is not contrary to law and was supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. Nat'l Lab. Rel. Bd.*, 305 U.S. 197, 229 (1938). "[T]he standard is not what the court would decide in a *de novo* appraisal, but whether the administrative determination is supported by substantial evidence on the record as a whole." *Parker v. United States Postal Serv.*, 819 F.2d 1113, 1115 (Fed. Cir. 1987).

On appeal, Mr. Conteh argues that the Board failed to consider: (1) that he was paid for 121 days of work (including the furlough); (2) that he accepted thirty days of work that the agency cancelled due to the government shutdown; and (3) that he fulfilled a separate requirement of working 90 days during the field season, which runs from May 1 to October 31. He further contends that (4) the Board misapplied the Government Employee Fair Treatment Act of 2019. We address these arguments in turn.

First, Mr. Conteh argues that the Board failed to consider that he was paid for 121 days of work, and that such payment establishes that he met the 120-day work requirement. However, the record is clear that the Board did consider this assertion. Dec., 11. The Board held that “[a]lthough the record establishes that the appellant did in fact receive back pay for the shutdown period, there is nothing in the record to support or even suggest that the appellant’s receipt of back pay under the circumstances qualifies towards the requisite 120 ‘work’ day requirement described in the Marine Operations Agreement and/or the Relief Pool Agreement.” *Id.* The Board held that, “[t]o the contrary, the relevant Agreements specifically require that the employee ‘**work** a minimum of 120 days during the calendar year’ on ‘tour.’” *Id.* (emphasis original). The Board supported this interpretation by noting that Lieutenant Commander Salerno testified without contradiction that paid days on leave do not count towards the 120-workday requirement because the employee is not on assignment during those days. *Id.*

Second, Mr. Conteh asserts that the Board did not consider that he accepted thirty days of work that the agency cancelled due to the government shutdown, referencing an assignment Mr. Conteh accepted in late January 2019 to work on the NOAA ship *Nancy Foster*. On the contrary, the Board expressly addressed that “appellant appears to suggest that the agency’s cancellation of one of the assignments that he accepted in early 2019 should excuse his

failure to meet his condition of employment.” Dec., 12. The Board found that “although the appellant could have theoretically satisfied his 120-workday obligation if he had been able to complete the *Nancy Foster* assignment, such was not the case due to the cancellation and the appellant had a contractual obligation to remain flexible and to satisfy his 120-workday requirement.” *Id.* The Board concluded that there was nothing in the record to support or suggest that the agency had any obligation to alter or reduce Mr. Conteh’s workday requirements under these circumstances. *Id.*

Third, Mr. Conteh asserts that the Board failed to consider that he fulfilled a separate requirement requiring him to work 90 days during the field season, which ran from May 1 to October 31. Mr. Conteh is again mistaken. The Board noted that Relief Tour employees were required to work each calendar year, “includ[ing] 90 days availability during peak [field] season between May 1 and October 31.” Dec., 3. The Board then found that “the unrefuted evidence proves that [Mr. Conteh] worked aboard the *Ferdinand Hassler* for 58 days from May 18 to July 14, 2019, and aboard the *Oregon II* for 37 days from August 11 to September 16, 2019.” *Id.* at 7. There does not appear to be any dispute that these 95 days on assignment between May 18, 2019 and September 16, 2019 fulfilled the 90-day field season requirement. We note, however, that NOAA never asserted that Mr. Conteh failed to meet this requirement. Thus, the fact that Mr. Conteh worked 95 days during the field season is irrelevant to his dismissal for failure to meet the separate 120-day requirement.

Finally, Mr. Conteh asserts that the Board misapplied the Government Employee Fair Treatment Act of 2019. We begin by noting that Mr. Conteh did not raise an argument involving the Government Employee Fair Treatment Act before the Board. The argument is thus considered forfeited. *Cecil v. Dep’t of Transp., F.A.A.*, 767 F.2d 892, 894 (Fed. Cir. 1985) (“[P]etitioner is precluded from raising an

issue in this court which could have been raised below but was not.”); *Rockwell v. Dep’t of Transp., F.A.A.*, 789 F.2d 908, 913 (Fed. Cir. 1986) (“Our precedent clearly establishes the impropriety of seeking a reversal of the board’s decision on the basis of assertions never presented to the presiding official or to the board.”). Still, we note that the relevant portion of the Government Employee Fair Treatment Act provides only that “[e]ach employee of the United States Government or of a District of Columbia public employer furloughed as a result of a covered lapse in appropriations shall be paid for the period of the lapse in appropriations, and each excepted employee who is required to perform work during a covered lapse in appropriations shall be paid for such work, at the employee’s standard rate of pay, at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates.” Government Employee Fair Treatment Act of 2019, Pub. L. No. 116-1, 133 Stat 3 (Jan. 16, 2019). This language does not state that days spent furloughed should count as working days for fulfillment of the MOC Crew’s 120-day requirement, and thus it does not support Mr. Conteh’s assertion that he met this requirement.

CONCLUSION

We have considered Mr. Conteh’s remaining arguments but find them unpersuasive. For the foregoing reasons, the decision of the Board is *affirmed*.

AFFIRMED

COSTS

No costs.

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

SANFA SWARAY CONTEH,
Appellant,

DOCKET NUMBER
DC-0752-21-0012-I-1

v.

DEPARTMENT OF COMMERCE,
Agency.

DATE: April 12, 2022

THIS FINAL ORDER IS NONPRECEDENTIAL¹

James Stafford, III, Esquire, Dallas, Texas, for the appellant.

Alexis Anderson, Esquire, Washington, D.C., for the agency.

BEFORE

Raymond A. Limon, Vice Chair
Tristan L. Leavitt, Member

FINAL ORDER

¶1 The appellant has filed a petition for review of the initial decision, which affirmed the agency's removal action based on his failure to meet a condition of employment. The appellant argues that the administrative judge misweighed the evidence in sustaining the charge. Petition for Review (PFR) File, Tab 1. Specifically, he asserts that the charge should not be sustained

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).

because he was paid for 120 days of work in 2019 including the period of the partial Government shutdown due to lapse in appropriations in December 2018 and January 2019. PFR File, Tab 1 at 3, Tab 4 at 4-5. The appellant additionally repeats his argument that he accepted a 30-day work assignment that was subsequently canceled, which would have put him over the 120-day requirement. PFR File, Tab 1 at 3, Tab 4 at 4-5.

¶2 Generally, we grant petitions such as this one only in the following circumstances: the initial decision contains erroneous findings of material fact; 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,² 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).

NOTICE OF APPEAL RIGHTS³

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

² The information contained in the documents attached to the appellant's reply is neither new nor of sufficient weight to change the outcome of this appeal. PFR File, Tab 4 at 6-23; *see* 5 C.F.R. § 1201.115(d).

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.

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:

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

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

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.

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.