APPENDIX A

FED CKT DECISIONS

United States Court of Appeals for the Federal Circuit

CHRISTOPHER R. CHIN-YOUNG,
Petitioner

v.

DEPARTMENT OF THE ARMY,
Respondent

2023-1510

Petition for review of the Merit Systems Protection Board in No. DC-0752-15-1030-l-1.

MANDATE

In accordance with the judgment of this Court, entered September 20, 2023, and pursuant to Rule 41 of the Federal Rules of Appellate Procedure, the formal mandate is hereby issued.

FOR THE COURT

November 15, 2023
Date

/s/ Jarrett B. Perlow
Jarrett B. Perlow
Clerk of Court

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

CHRISTOPHER R. CHIN-YOUNG,
Petitioner

v.

DEPARTMENT OF THE ARMY,
Respondent

2023-1510

Petition for review of the Merit Systems Protection Board in No. DC-0752-15-1030-I-1.

ON PETITION FOR REHEARING EN BANC

Before MOORE, *Chief Judge*, LOURIE, DYK, PROST, REYNA, TARANTO, CHEN, HUGHES, STOLL, CUNNINGHAM, and STARK, *Circuit Judges*.[1]

PER CURIAM.

O R D E R

On October 4, 2023 Christopher R. Chin-Young filed a document entitled "Motion to Alter or Amend & for Relief

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[1] Circuit Judge Newman did not participate.

from Judgement" which the construes as a petition for rehearing en banc [ECF No. 41]. The petition was first referred as a petition to the panel that heard the appeal, and thereafter the petition 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.

The mandate of the court will issue November 15, 2023.

FOR THE COURT

November 8, 2023
Date

Jarrett B. Perlow
Clerk of Court

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

CHRISTOPHER R. CHIN-YOUNG,
Petitioner

v.

DEPARTMENT OF THE ARMY,
Respondent

2023-1510

Petition for review of the Merit Systems Protection Board in No. DC-0752-15-1030-I-1.

Decided: September 20, 2023

CHRISTOPHER CHIN-YOUNG, Tallahassee, FL, pro se.

YARIV S. PIERCE, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for respondent. Also represented by BRIAN M. BOYNTON, PATRICIA M. MCCARTHY, DOUGLAS K. MICKLE.

Before PROST, HUGHES, AND STOLL, *Circuit Judges*.

PER CURIAM.

Mr. Christopher Chin-Young appeals a decision of the Merit Systems Protection Board (Board) denying his petition for review of the administrative judge's decision to sustain his removal. Because the Board correctly found it did not have jurisdiction to decide the merits of Mr. Chin-Young's detail to another directorate preceding his removal, and because the Board did not err in denying Mr. Chin-Young's claims of whistleblower retaliation, return rights, or harmful procedural error, we affirm.

I

In 2013, Mr. Chin-Young was employed as the Deputy Director (Supervisory Program Analyst) for the Chief Integration Office (CXO) Directorate in the Office of the Army Chief Information Officer (Agency). In 2014, the Agency "began plans to reorganize and dissolve the CXO Directorate." S.A. 2.[1] At this point, Mr. Chin-Young was detailed to work in the Cyber Security Directorate instead.

In April 2014, Mr. Chin-Young left his detail and prepared for deployment to Afghanistan, where he was to serve in a civilian capacity for a one-year tour through the Ministry of Defense Advisors (MoDA) program. He arrived in Afghanistan around July 3, 2014. Soon after his arrival, Mr. Chin-Young submitted a complaint to the Special Inspector General for Afghanistan Reconstruction (SIGAR) reporting allegations of fraud, waste, and abuse of funds. After Mr. Chin-Young had served only six weeks abroad, the Senior Telecommunications Advisor working with Mr. Chin-Young in Afghanistan recommended that Mr. Chin-Young be immediately redeployed because he had "demonstrated an inability to adjust . . .[,] caused Senior Leaders to question his ability . . ., and [was] a negative influence to other team members." S.A. 119.

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[1] "S.A." refers to the supplemental appendix the government filed with its responsive brief.

Due to this recommendation, roughly two months after arriving in Afghanistan, Mr. Chin-Young returned to the United States. On September 8, 2014, he sent an email to his former supervisor in the Cyber Security Directorate informing him that he was returning from his MoDA position in Afghanistan and would be taking sick and administrative leave for a few weeks before returning to work.

On November 3, 2014, Mr. Chin-Young was issued an official memorandum informing him that his new detail would be with the Cyber Security Directorate in the Program Integration and Training Division at the Pentagon. He also received an email from the Chief of Human Resources informing him that his supervisor for this detail position would be Ms. Autumn Aquinaldo. His grade and pay in this detail were the same as the grade and pay he had received when he was at the CXO Directorate and remained the same until his removal.

After reporting to his new Cyber Security Directorate detail only one time (on December 17, 2014), Mr. Chin-Young "effectively declined the detail and refused to report for work." S.A. 3 (citing S.A. 38). Instead, he maintained that he was working remotely in his former capacity at the CXO Directorate. He was reminded on numerous occasions by his then-supervisor (Ms. Aquinaldo), his former supervisor (Mr. Lundgren), the Director of Cybersecurity (Ms. Miller), and the Deputy Chief Information Officer (Mr. Wang) that he was currently detailed to the Pentagon Cyber Security Directorate and was required to appear at his workstation at the Pentagon. Still, he argued that his detail was improper, Ms. Aquinaldo was his subordinate (not his supervisor), and he was entitled to keep working at the CXO Directorate. Other than four hours on December 17, 2014, Mr. Chin-Young never reported to work at his new detail in the Cyber Security Directorate.

On May 29, 2015, the Agency issued Mr. Chin-Young a memorandum proposing his removal from the federal

service for misconduct. The Agency based his removal on five charges: (1) Absence without Leave (AWOL), (2) Failure to Comply with Leave Procedures, (3) Failure to Follow Instructions, (4) Insolence, and (5) Lack of Candor. Mr. Chin-Young submitted a written response to the memo. But despite being given an opportunity to review the evidence supporting his removal, the Agency found he did not do so. On July 24, 2015, the Agency deciding official sustained all charges and specifications in the May 29, 2015 memorandum. The Agency removed Mr. Chin-Young from service effective July 31, 2015.

II

Mr. Chin-Young filed an appeal with the Board challenging his removal and raising affirmative defenses, including retaliation, whistleblower reprisal, and harmful procedural error. After a four-day hearing, an administrative judge issued a 76-page initial decision which held that the Agency had proved all charges for Mr. Chin-Young's removal and that Mr. Chin-Young had failed to prove his affirmative defenses. The Board affirmed that decision, with a few modifications, on January 13, 2023.

Mr. Chin-Young now appeals the Board's decision.[2] We have jurisdiction under 28 U.S.C. § 1295(a)(9).

III

We review Board decisions for whether they are "(1) arbitrary, capricious, an abuse of discretion, or otherwise not

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[2] Mr. Chin-Young subsequently filed five other appeals with this court that are not decided here. *Chin-Young v. Dep't of the Army*, No. 23-1587 (Fed. Cir.); *Chin-Young v. Dep't of the Army*, No. 23-1588 (Fed. Cir.); *Chin-Young v. Merit Sys. Prot. Bd.*, No. 23-1589 (Fed. Cir.); *Chin-Young v. Merit Sys. Prot. Bd.*, No. 23-1590 (Fed. Cir.); *Chin-Young v. Dep't of the Army*, No. 23-1595 (Fed. Cir.).

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). We review legal conclusions de novo and factual findings for substantial evidence. *Salmon v. Soc. Sec. Admin.*, 663 F.3d 1378, 1381 (Fed. Cir. 2011); *Moravec v. Off. of Pers. Mgmt.*, 393 F.3d 1263, 1266 (Fed. Cir. 2004). Whether the Board has jurisdiction over an appeal is a question of law we review de novo. *Coradeschi v. Dep't of Homeland Sec.*, 439 F.3d 1329, 1331 (Fed. Cir. 2006). Although pro se pleadings are generally held to less stringent standards than pleadings drafted by counsel, pro se litigants still bear the burden of establishing jurisdiction over their claims. *Prewitt v. Merit Sys. Prot. Bd.*, 133 F.3d 885, 886 (Fed. Cir. 1998).

IV

On appeal, Mr. Chin-Young identifies four instances he believes to be reversible error. In particular, he argues that (1) his removal was improper because it was based solely on an "illegitimate" detail to the Cyber Security Directorate, (2) the Board erred by not finding whistleblower retaliation, (3) the Board erred by not addressing his argument that he had the right to return to his job at the CXO Directorate, and (4) it was harmful procedural error for the Agency not to send him the evidence it relied on in deciding to remove him. We affirm the Board's decision.

A

We start with Mr. Chin-Young's argument that his detail to the Cyber Security Directorate was "illegitimate," and that he therefore was not required to report to work at this detail. Informal Op. Br. at 18. We agree with the Board that such an argument goes to the merits of the Agency's decision to detail him, and thus does not fall within the Board's jurisdiction.

The Board does not have jurisdiction over the merits of an Agency's reassignment or detail if that employment action does not result in the loss of grade or pay for that employee. *Artmann v. Dep't of the Interior*, 926 F.2d 1120, 1122 (Fed. Cir. 1991). This is true even if the reassignment or detail "reduces the employee's status, duties, or responsibilities." *Id.*[3] Here, Mr. Chin-Young debates the legality of his detail to the Cyber Security Directorate. But the fact that he did not suffer a loss in grade or pay as a result of that detail is supported by substantial evidence. Indeed, his removal papers from 2015 reflect that he had the same GS-15 grade and pay when he was removed from the Agency. Thus, whether the Agency's decision to detail him to the Cyber Security Directorate was unlawful is not a question for the Board because the detail itself was not an adverse action.

Moreover, Mr. Chin-Young was not entitled to unilaterally refuse to report to his detail even if he believed it to be illegitimate. Rather, an employee who is reassigned to different job duties and who questions the legal basis for that reassignment "must perform his assigned job duties and then petition for relief through the appropriate grievance proceedings." *Hamlin v. U.S. Postal Serv.*, 1998 WL 887041, at *2 (Fed. Cir. Dec. 15, 1998); *accord Bigelow v. Dep't of Health & Human Servs.*, 750 F.2d 962, 965–66 (Fed. Cir. 1984). We need not reach the merits of Mr. Chin-Young's detail here because, even if it were somehow improper, he still would have been required to report to work and protest the legality of the detail while doing so.

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[3] Although there are limited exceptions to this general rule, such as for "constructive demotion" when an employee's prior job title should have been reclassified at a higher pay grade, it is unclear how such an exception would apply here.

Mr. Chin-Young's arguments can also be read as arguments that his detail never happened at all. We are similarly unpersuaded by this argument. Substantial evidence supports the Board's conclusion that Mr. Chin-Young was detailed from his role at the CXO Directorate to the Cyber Security Directorate. For example, the record supports the Board's findings that the Agency had begun to phase out the CXO Directorate in 2014 (S.A. 216–24); Mr. Chin-Young had already been detailed to the Cyber Security Directorate before his deployment to Afghanistan (S.A. 486–93); when he returned from Afghanistan, Mr. Chin-Young emailed his former supervisor at the Cyber Security Directorate that he would be returning to work (S.A. 123); and the Chief of Human Resources notified Mr. Chin-Young of his new detail to the Cyber Security Directorate in writing upon his return to the United States (S.A. 133, 148–52). The record also includes numerous emails where his colleagues questioned why he was not at his detail at the Cyber Security Directorate. *E.g.*, S.A. 37, 45, 48–49, 127–30, 139, 144–45, 153–60.

Mr. Chin-Young's argument that he was not detailed to the Cyber Security Directorate rests on his belief that he had never been released from his MoDA assignment when he returned early from Afghanistan, and so the Agency could not have detailed him to a different position. But the administrative judge found Mr. Chin-Young's testimony on this point to be unreliable and inconsistent with the emails he sent around that time. Rather, she credited the Agency's witnesses' testimony and the August 28, 2014 "Letter of Release for Redeployment" as proof that Mr. Chin-Young had been formally released from the MoDA assignment. S.A. 35–36 (referring to S.A. 121). Mr. Chin-Young argues that this letter does not establish a formal release and is just a travel authorization document. But substantial evidence supports the administrative judge's and Board's contrary findings. In particular, the document states an "[e]ffective date of release" of "29 August 2014" and

explicitly provides that Mr. Chin-Young "will not be returning." S.A. 121. This, paired with a lack of evidence suggesting that something more was required to release him from the MoDA assignment, and considering Mr. Chin-Young's own email to his former supervisor letting him know that he was available to restart his work in the United States, constitutes substantial evidence that he was, in fact, released from the MoDA assignment.

Given the above, there is substantial evidence to support the Board's finding that Mr. Chin-Young was detailed to the Cyber Security Directorate. And whether this detail was legally improper is beyond the Board's jurisdiction because it did not result in a loss of grade or pay.

B

Next, we address Mr. Chin-Young's argument that he was removed from service because of unlawful whistleblower retaliation. We hold that the Board did not err by concluding there was no whistleblower retaliation in Mr. Chin-Young's case.

To establish a claim for whistleblower retaliation, an employee must prove by a preponderance of the evidence that (1) the employee made a protected disclosure under 5 U.S.C. § 2302(b)(8), (2) they were subject to an adverse personnel action, and (3) the protected disclosure was a contributing factor to the adverse personnel action. *Johnston v. Merit Sys. Prot. Bd.*, 518 F.3d 905, 909 (Fed. Cir. 2008). If the employee provides that proof, then the burden of persuasion shifts to the agency to show by clear and convincing evidence that it would have taken the same personnel action even without the protected disclosure. *Whitmore v. Dep't of Labor*, 680 F.3d 1353, 1367 (Fed. Cir. 2012). We consider the *Carr* factors in assessing whether an agency has satisfied its clear and convincing evidence burden: (1) "the strength of the agency's evidence in support of its personnel action"; (2) "the existence and strength of any motive to retaliate on the part of the agency officials who

were involved in the decision"; and (3) "any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated." *Carr v. Soc. Sec. Admin.*, 185 F.3d 1318, 1323 (Fed. Cir. 1999).

Here, the Board concluded that Mr. Chin-Young made a protected disclosure under § 2302(b)(8) when he filed his SIGAR complaint while in Afghanistan in 2014, in which he alleged fraud, waste, and abuse of funds. The Board also concluded that the officials who proposed or decided to remove Mr. Chin-Young had knowledge of that complaint, and so it was theoretically possible that the SIGAR complaint was a contributing factor in their removal decision. However, the Board went on to consider the *Carr* factors and concluded that the Agency would have removed Mr. Chin-Young regardless of that SIGAR complaint. In particular, the Board pointed to the administrative judge's decision to sustain the charges of AWOL, failure to follow leave procedures, failure to follow instructions, insolence, and lack of candor because of the abundant evidence that Mr. Chin-Young unilaterally rejected his detail orders and did not report to work.

We agree with the Board. Because the legitimate reasons for Mr. Chin-Young's removal were so compelling here, the Board's conclusion that he would have been removed regardless of the SIGAR complaint is supported by substantial evidence. Moreover, the Board properly considered the *Carr* factors in its analysis and we discern no legal error.[4]

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[4] Although the government agrees with the Board's conclusion that there was no whistleblower retaliation, it argues before us that the Board erred in finding that the SIGAR complaint was a protected disclosure in the first

On appeal, Mr. Chin-Young speculates about various sources of retaliatory animus that he argues should lead to reversal. None of these theories lead us to a different outcome. For example, Mr. Chin-Young claims that we should apply the "[c]at's [p]aw theory of law"[5] because (1) his former supervisor, Mr. Krieger, was the one who informed the new Director of the Cyber Security Directorate, Mr. Wang, that Mr. Chin-Young's position at the CXO Directorate was "abolished," and (2) Mr. Krieger's reason for doing so was to "get[] back at the Appellant for not containing [a] class action complaint" against Mr. Krieger. Informal Op. Br. at 13. As another example, Mr. Chin-Young argues that a memorandum written by a colleague in Afghanistan, Dr. Warner, recommending his deployment back to the United States was improperly considered by the official who issued his proposal for removal and "inflame[d]" that official's "retaliatory animus." Informal Op. Br. at 16. But these speculative arguments are disagreements on issues of fact and are not supported by the record.

Mr. Chin-Young also references alleged protected disclosures other than his SIGAR complaint, including his vocal opposition to the Agency's hiring of other employees. The administrative judge addressed most of these other alleged protected disclosures and found that they could not have been motivating factors in his removal because the removing officials were not aware of the disclosures. These conclusions are supported by substantial evidence because Mr. Chin-Young did not provide evidence that these other

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place. We need not reach this issue because we agree with the Board's analysis on the *Carr* factors.

[5] A "cat's paw" issue arises in the context of a deciding official being improperly influenced by someone with animus. *See, e.g.*, *King v. Dep't of Army*, 602 F. App'x 812, 815 n.1 (Fed. Cir. 2015) (citing *Staub v. Proctor Hosp.*, 562 U.S. 411 (2011)).

alleged disclosures were provided to the removing officials. But even if they were protected disclosures, the Agency would succeed on the *Carr* factors for the same reason as with respect to the SIGAR complaint: the record provides substantial evidence that the Agency would have removed Mr. Chin-Young regardless. As explained above, the record is replete with evidence that Mr. Chin-Young refused to show up to his detail position at the Cyber Security Directorate and instead unilaterally re-appointed himself to a position at the CXO Directorate that no longer existed. Thus, the government has met its burden of persuasion on the *Carr* factors because of these strong, legitimate reasons for Mr. Chin-Young's removal.

Finally, to the extent Mr. Chin-Young argues retaliation based on his Equal Employment Opportunity (EEO) activity, these issues are not properly before us. As Mr. Chin-Young himself acknowledges, although he "raised claims of discrimination and retaliation based on his race and prior protected EEO activities . . . discrimination is not a part of this appeal." Informal Op. Br. at 7.

For these reasons, we affirm the Board's conclusion that Mr. Chin-Young's removal was not a result of retaliation for protected whistleblowing activity.

C

We turn next to Mr. Chin-Young's argument that the Board erred because it did not address his argument that he had the right to return to his job at the CXO Directorate under 10 U.S.C. § 1586, a statute that gives those deployed abroad a right to return to their positions in the United States once they have successfully completed their tour. We find no error with the Board's conclusion that Mr. Chin-Young did not establish a claim under § 1586 because substantial evidence supports its finding that Mr. Chin-Young retained his position of record until removed from service.

Mr. Chin-Young argues that it was error for the Board not to consider his arguments under § 1586. But even though the Board found his § 1586 arguments to be forfeited, it also held that Mr. Chin-Young had not established a claim under § 1586 because "[*r*]*egardless* [of whether the arguments were forfeited], the record reflects that the appellant's position of record remained the same." S.A. 18 (emphasis added). Thus, the Board *did* consider the merits of this argument, even though it found it to be forfeited. For this reason, Mr. Chin-Young's argument that the Board erred in not considering the argument is unpersuasive.

We are also unpersuaded as to the merits of Mr. Chin-Young's return-rights argument. Section 1586 entitles an employee who has been assigned to a position abroad to return "without reduction in the seniority, status, and tenure held by the employee immediately before his assignment to duty outside the United States." 10 U.S.C. § 1586(c). If the employee's former position no longer exists, however, the statute provides that the employee can be placed in a different position so long as they retain "rights and benefits equal to the rights and benefits of, and in a grade equal to the grade of, the position which he held immediately before his assignment to duty outside the United States." *Id.* § 1586(c)(2). Here, the Board's finding that Mr. Chin-Young retained his position of record until his removal is supported by substantial evidence—his removal documents show that he maintained the same grade and pay up until he was removed. The Board's finding that the CXO Directorate was effectively dissolved is also supported by substantial evidence, including testimony that the administrative judge appeared to find credible. S.A. 33 (citing the consistent testimonies by the Chief Information Officer, the Deputy Chief Information Officer, and the Chief of Human Resources). Given these facts, Mr. Chin-Young has not established a violation of his return rights under § 1586.

Mr. Chin-Young has also failed to show that the Agency violated § 1586 for a separate, independent reason: the

statute applies only to employees "who satisfactorily complete[]" their duty abroad. 10 U.S.C. § 1586(b)(2). Here, Mr. Chin-Young has not shown that he satisfactorily completed his duties in Afghanistan. To the contrary, the evidence of record shows that he came back to the United States ten months early and that at least one other employee in Afghanistan recommended that he be sent back because of unsatisfactory work.

For these reasons, Mr. Chin-Young has not shown that the Agency violated § 1586, nor that the Board erred in handling its argument to that effect. .

D

Finally, we address Mr. Chin-Young's argument that the Agency committed harmful procedural error by not making accessible the evidence it relied on in deciding to remove him. This argument is contrary to the substantial evidence of record, and the Board did not err by concluding that offering to make the materials available upon request was not a harmful procedural error.

We have previously held that there is no harmful procedural error where an agency has provided an employee with access to the documents it relied upon in making its removal decision, even if the type of access granted was inconvenient. *Novotny v. Dep't of Transp.*, 735 F.2d 521, 523 (Fed. Cir. 1984); *see also Harding v. U.S. Naval Acad.*, 567 F. App'x 920, 925 (Fed. Cir. 2014) ("[P]roviding access to the materials the agency relied upon to support the removal action was sufficient to satisfy any possible due process concerns."); *Charity v. Gen. Servs. Admin.*, 180 F. App'x 952, 954 (Fed. Cir. 2006) (concluding there was no harmful procedural error where "the record showed that the agency offered [the employee] access to the evidence it relied on in its charges but that there was no showing that [the employee] requested and was denied such access").

Here, substantial evidence supports the Board's conclusion that the Agency made the evidence accessible to Mr. Chin-Young by offering it for inspection upon request. *E.g.*, S.A. 181–82 (Notice of Proposed Removal informing Mr. Chin-Young that he had the right to reply to the notice and "to review the material relied upon in this matter," by contacting a Human Resource Specialist whose contact information was provided). And while Mr. Chin-Young implies that he tried to access the documents but was refused access, this allegation is not supported by the record. As the administrative judge explained in her decision, the only evidence that Mr. Chin-Young tried to access these documents was his own testimony, and the administrative judge did not find that testimony credible. S.A. 89 n.33. In contrast, the other testimony—which the administrative judge did find credible—and the email evidence on this point show (1) that Mr. Chin-Young was informed he needed to contact the Human Resource Specialist to access the evidence supporting his removal and (2) that he did *not* request those documents. Thus, there is substantial evidence that the Agency made the materials accessible to Mr. Chin-Young and that Mr. Chin-Young was not denied access.

Like in *Charity*, this type of access is sufficient to meet the Agency's procedural burden. 180 F. App'x at 955. Thus, the Board properly applied our prior decisions in holding that there was no harmful procedural error.

V

We have considered the remainder of Mr. Chin-Young's arguments and find them unpersuasive. Thus, we affirm the Board's decision denying Mr. Chin-Young's petition for review of the initial decision that sustained his removal.

AFFIRMED

COSTS

No costs.

United States Court of Appeals for the Federal Circuit

CHRISTOPHER R. CHIN-YOUNG,
Petitioner

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent

2023-1590

Petition for review of the Merit Systems Protection Board in No. DC-1221-17-0013-W-1.

MANDATE

In accordance with the judgment of this Court, entered November 14, 2023, and pursuant to Rule 41 of the Federal Rules of Appellate Procedure, the formal mandate is hereby issued.

FOR THE COURT

January 5, 2024
Date

Jarrett B. Perlow
Clerk of Court

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

CHRISTOPHER R. CHIN-YOUNG,
Petitioner

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent

2023-1590

Petition for review of the Merit Systems Protection Board in No. DC-1221-17-0013-W-1.

Decided: November 14, 2023

CHRISTOPHER CHIN-YOUNG, Tallahassee, FL, pro se.

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

Before DYK, CHEN, and STOLL, *Circuit Judges*.

PER CURIAM.

Christopher Chin-Young (petitioner), appearing pro se, petitions for review of the Merit Systems Protection Board (MSPB or Board) dismissing his appeal for lack of jurisdiction. We *affirm*.

BACKGROUND

I

On June 26, 2014, petitioner, an employee of the Army, was issued orders to deploy to Camp Atterbury, Indiana and Kabul, Afghanistan and was scheduled to serve a 14-month tour as an Advisor to the International Security Assistance Force (ISAF). The ISAF was a NATO-led security mission in Afghanistan, established by the United Nations Security Council. Petitioner arrived in Afghanistan on July 3, 2014, and reported to work.

On August 11, 2014, petitioner sent an email to six individuals, including Air Force Colonel Andrew Gale, asking for information related to a contract with DRS Technologies, a contractor, and how a contracting officer's representative (COR) "c[ould] unilaterally award (incentive) fixed fees without a technical assessment." S.A. 42. Later that same day, petitioner sent a follow-up email alleging that he collected "some evidence of fraud." S.A. 42. On August 12, 2014, one of the recipients of petitioner's emails responded requesting documentation to support petitioner's allegations of fraud. S.A. 44. It appears that petitioner did not respond to the email or provide evidence of the alleged fraud.

On August 23, 2014, Dr. Catherine Warner, who petitioner alleges is an employee of the Department of Defense, recommended that petitioner be redeployed to the United States because petitioner "demonstrated an inability to adjust to the changing environment of the NATO ISAF to RSM transition, has caused Senior Leaders to question his ability to perform Ministerial Advising and guardian angel duties, and has been a negative influence to other team

members." S.A. 8–9. On August 28, 2014, Petitioner was ordered to redeploy to the United States. That same day, petitioner wrote an email to an Army official claiming he was targeted by Dr. Warner for, among other things, "illuminating the discrepancies and irregularities with [the] C4ISR contract with DRS (prime) and relaying to them accounts of fraudulent reporting and improper contract claims." S.A. 55.

II

On February 10, 2015, Petitioner filed a complaint with the Office of Special Counsel (OSC) listing the Department of Defense (DOD) as the responding agency. S.A. 110–14. Petitioner's complaint alleged "Fraudulent Hire of Catherine Warner" using "Direct-Hire Authority." S.A. 113–114. Petitioner later clarified that he alleged Dr. Warner was also improperly promoted and unlawfully kept in her position past the set term limit. On August 26, 2015, OCS notified petitioner that it was closing its inquiry into the February 10th complaint. OSC found petitioner's allegation that the DOD unlawfully appointed Dr. Warner to Senior Executive Status to "have no basis for further inquiry." S.A. 103–104. OSC also determined it could not address the improper promotion and unlawful employment past the term limit allegations because "the information [petitioner] initially provided only clearly presented an allegation involving [Dr.] Warner's DHA appointment." S.A. 104.

Petitioner filed a second complaint with OSC on or around March 31, 2016, again listing the "unlawful hiring and placement actions" from his previous complaint to OSC. S.A. 97–98, 100. In addition, petitioner alleged retaliation by Dr. Warner for petitioner's Whistleblower Protection Act disclosures.

On August 16, 2016, OSC advised petitioner of its preliminary decision to close its investigation. OSC found that petitioner's allegations regarding Dr. Warner's

employment were addressed in petitioner's earlier complaint. OSC concluded that petitioner did not provide any new evidence and information, and the original allegations were too vague and speculative to justify conducting an investigation. OSC determined petitioner's Whistleblower Protection Act (WPA) allegations did not constitute WPA violations because the alleged disclosures were not protected disclosures.

On October 6, 2016, petitioner filed an Individual Right of Action (IRA) appeal with the MSPB. Petitioner alleged that he disclosed "contract fraud etc made on 14 August 2014 to PM/KO, leaders, IG – two weeks later Dr. Warner issued a memo of negative suitability determination and recommendation for immediate redeployment[;] Curtailment of ISAF assignment; & const [sic] suspension." S.A. 26.

In response to the Board's Order on Jurisdiction and Proof Requirements, petitioner submitted a "Statement of Facts," alleging that "[o]n or about 12 August 2014, [petitioner] discovered contract anomalies including fraud, waste, and abuse with the prime DoD contract for ICT products and services [provided] to GiROA MOI ICT." S.A. 116. Petitioner further alleged he made these disclosures to various officials and that he was reassigned by Dr. Warner in retaliation. *Id.* Petitioner's appeal to the Board listed the DOD as the responding agency. S.A. 25. The Board designated the Army as the proper agency since petitioner was an Army employee.

Ultimately, the Board determined that it lacked jurisdiction over petitioner's WPA claims because petitioner failed to exhaust such claims with the OSC. Petitioner petitions for review.

We have jurisdiction under 5 U.S.C. § 7703(b)(1)(A).

DISCUSSION

I

"We must affirm the Board's decision unless we find it to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; obtained without procedures required by law, rule, or regulation having been followed; or unsupported by substantial evidence." *Campion v. M.S.P.B.*, 326 F.3d 1210, 1212 (Fed. Cir. 2003) (first citing 5 U.S.C. § 7703(c); and then citing *Kewley v. Dep't of Health & Human Servs.*, 153 F.3d 1357, 1361 (Fed. Cir. 1998)). "Whether the Board has jurisdiction to adjudicate an appeal is a question of law that we review de novo," *Campion*, 326 F.3d at 1212, but we review the Board's underlying factual findings for substantial evidence. *Bolton v. M.S.P.B.*, 154 F.3d 1313, 1316 (Fed. Cir. 1998). The petitioner has the burden of establishing the Board's jurisdiction by a preponderance of the evidence. *See Campion*, 326 F.3d at 1212–13.

> [I]n order to establish the Board's jurisdiction over [an] IRA appeal, [the petitioner] had to show by preponderant evidence that (1) he engaged in whistleblowing activity by making a disclosure protected by 5 U.S.C. § 2302(b)(8); (2) the agency took or threatened to take a "personnel action" against him as defined in 5 U.S.C. § 2302(a)(2)(A); (3) he sought corrective action from OSC; and (4) he exhausted corrective action proceedings before OSC.

Serrao v. M.S.P.B., 95 F.3d 1569, 1574 (Fed. Cir. 1996). "For the exhaustion remedy to serve its intended purpose, . . . the employee must inform the Special Counsel of the precise ground of his charge of whistleblowing." *Ward v. M.S.P.B.*, 981 F.2d 521, 526 (Fed. Cir. 1992); *see also Ellison v. M.S.P.B.*, 7 F.3d 1031, 1037 (Fed. Cir. 1993) (noting "the need for an employee to articulate with reasonable clarity and precision the basis for his request for corrective action under the WPA").

We agree with the Board that petitioner failed to present his whistleblower claims based on his disclosures of contract fraud to the OSC. His first complaint to OSC did not allege contract fraud—it only alleged that Dr. Warner was improperly hired, exceeded the term limit of her position, and was improperly promoted. While petitioner's second complaint to OSC made vague mentions of contract irregularities, it did not mention contract fraud.

The Board did not err in deciding that petitioner failed to inform OSC with the required particularity and clarity of the basis for his request for corrective action based on fraud under the WPA and that the Board lacked jurisdiction.[1]

II

Petitioner also argues that the Board erred in substituting the Department of the Army as the responding agency and that correcting this error would somehow cure the jurisdictional defect. Petitioner contends that the DOD is the proper agency because Dr. Warner, who petitioner contends retaliated against him, was an employee of the DOD.

The Board determined the Department of the Army was the proper agency because it was petitioner's employer. Petitioner does not now contest the Board's determination that he was an employee of the Department of the Army and that the Army would be responsible for

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[1] We note that in a related case petitioner alleged that he made protected disclosures of "fraud, waste, and abuse of funds." *Chin-Young v. Dep't of the Army*, No. 2023-1510, 2023 WL 6135788, at *4 (Fed. Cir. Sept. 20, 2023). In that case, we held that "the Board did not err by concluding there was no whistleblower retaliation" based on these disclosures. *Id.* at *3.

corrective action. The Board correctly determined that the Army was the proper responding agency.

AFFIRMED

COSTS

No Costs.

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

CHRISTOPHER R. CHIN-YOUNG,
Petitioner

v.

DEPARTMENT OF THE ARMY,
Respondent

2023-1588

Petition for review of the Merit Systems Protection Board in No. DC-0752-11-0394-I-1.

Decided: November 9, 2023

CHRISTOPHER CHIN-YOUNG, Tallahassee, FL, pro se.

YARIV S. PIERCE, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for respondent. Also represented by BRIAN M. BOYNTON, STEVEN JOHN GILLINGHAM, PATRICIA M. MCCARTHY; PATRICK L. GARY, Civilian Personnel Litigation Branch, Litigation Division, United States Army Legal Services Agency, Fort Belvoir, VA.

Before DYK, SCHALL, and STARK, *Circuit Judges*.

PER CURIAM.

Christopher Chin-Young (petitioner), appearing pro se, petitions for review of the Merit Systems Protection Board's (MSPB or Board) final decision dismissing the case as settled. We *affirm*.

BACKGROUND

On January 18, 2011, the Department of the Army removed petitioner from his position with the U.S. Army Contracting Command (ACC) as a Supervisory Program Analyst. Petitioner appealed through his then-counsel, Robert Waldeck, to the MSPB.[1] Shortly thereafter, Mr. Waldeck withdrew as petitioner's counsel, and petitioner informed the counsel for the Army that he retained new counsel. The new counsel was identified to be James Shoemaker. Mr. Shoemaker submitted a Designation of Representative form, which was not signed by petitioner, indicating that he was representing petitioner.

Mr. Shoemaker appeared before the Board and arranged a settlement agreement to resolve petitioner's claims. The settlement agreement was signed by Mr. Shoemaker and petitioner. A Board administrative judge approved the settlement and dismissed the appeal on May 19, 2011.

On September 6, 2011, petitioner filed a petition to enforce the settlement agreement with the Board, asserting that the Army failed to comply with the terms of the settlement agreement by failing to rescind or expunge certain entries from petitioner's record and providing improper

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[1] Petitioner contends this is not correct and that Mr. Waldeck was retained only for a different case. Whether Robert Waldeck was retained or not makes no difference to the outcome of this case.

references to managers in other federal agencies, preventing petitioner from being hired. On November 29, 2011, Mr. Shoemaker filed a modified settlement agreement, signed by petitioner, Mr. Shoemaker, and representatives for the Department of the Army, with the administrative judge. S.A. 127–129. On November 30, 2011, the administrative judge dismissed the petition as settled. S.A. 130–34. On February 7, 2012, Mr. Shoemaker withdrew as petitioner's counsel. S.A. 136–39.

On August 31, 2017, petitioner, pro se, filed a petition for review of the administrative judge's May 19, 2011, decision that dismissed the case as settled. Petitioner alleged newly discovered evidence in the form of an affidavit from Mr. Shoemaker, which stated that Mr. Shoemaker was not designated as petitioner's representative in the case. Petitioner referred to the designation of representative form submitted to the MSPB in March of 2011, which lacked petitioner's signature. Because the designation of representative form was not signed by petitioner, petitioner contended that Mr. Shoemaker was not petitioner's designated representative and was not authorized to enter into the settlement agreement nor the modified settlement agreement. Petitioner argues that Mr. Shoemaker "was without any authority to access the record, submit various documents, and negotiate a settlement at [petitioner's] expense." S.A. 252.

The Board denied petitioner's petition for review and affirmed the initial decision. S.A. 2. While the Board acknowledged that petitioner never signed the designation of representative form, the Board found Mr. Shoemaker's actions "bore the indicia of authority" because petitioner failed to indicate otherwise and Mr. Shoemaker engaged in activities such as "discovery, fil[ing] prehearing submissions, participat[ing] in a prehearing conference, enter[ing] into stipulations, participat[ing] in settlement negotiations, and sign[ing] the settlement on [petitioner's] behalf." S.A. 2–3. The Board further determined that even if Mr.

Shoemaker lacked settlement authority, the settlement agreement was still valid because petitioner signed it himself. S.A. 3.

Petitioner petitions for review of the Board's decision. We have jurisdiction under 5 U.S.C. § 7703.

DISCUSSION

I

Petitioner argues that Mr. Shoemaker did not have authority to enter into the settlement agreement under 5 C.F.R. § 1201.31(a). We disagree.

We do not find any procedural defect under section 1201.31(a). That section provides "[a] party to an appeal may be represented in any matter related to the appeal. Parties may designate a representative, revoke such a designation, and change such a designation in a signed submission, submitted as a pleading." 5 C.F.R. § 1201.31(a). Petitioner contends that this regulation requires a signed submission in order for a designation to take effect. The Department of the Army contends that the regulation does not require a signed submission because it uses the word "may" instead of "shall."

We agree with the Board that petitioner's failure to sign the designation of representative form does not invalidate the settlement agreement or the modified settlement agreement. Mr. Shoemaker acted with apparent authority as petitioner's representative, and petitioner previously admitted that he hired Mr. Shoemaker. S.A. 241 (noting he retained Mr. Shoemaker's firm). Even if Mr. Shoemaker lacked the authority to execute the settlement agreement and the modified settlement agreement, the petitioner also signed those documents.

The Board did not err in concluding that the settlement agreements were not rendered ineffective because petitioner did not sign the designation of representative form.

II

Petitioner also challenges the validity of the settlement agreements because the Board's and Army's actions "were not in good faith for settlement and not freely entered," and the administrative judge allegedly pressured the petitioner and Mr. Shoemaker to sign the agreement. Petitioner's Br. 12.

Petitioner has challenged the enforceability of the settlement agreement and modified settlement agreement on similar grounds in other proceedings before the Board and in federal district courts. *See e.g.*, *Chin-Young v. Dep't of Army*, No. DC-0752-11-0394-C-1, 2013 WL 9658987, at *3–5 (M.S.P.B. Nov. 14, 2013); *Chin-Young v. McHugh*, No. RWT 13-CV-3772, 2015 WL 1522880, at *1 (D. Md. Apr. 2, 2015), *aff'd sub nom. Chin-Young v. Rowell*, 623 F. App'x 121 (4th Cir. 2015); *Chin-Young v. United States*, No. 1:16-CV-1454, 2017 WL 2960532, at *2 (E.D. Va. July 11, 2017), *aff'd in part, rev'd in part and remanded*, 774 F. App'x 106 (4th Cir. 2019). However, there is no indication that petitioner has adequately raised these allegations of coercion, bad faith, and other procedural issues before the administrative judge in the present case. These allegations are, at best, made in passing and in a conclusory manner in the petition to the Board.

The Board did not address these allegations in its decision, instead focusing solely on the issue of whether Mr. Shoemaker had the authority to enter into the settlement agreement. We understand the Board determined that those allegations were not properly raised in this case. "Our precedent clearly establishes the impropriety of seeking a reversal of the [B]oard's decision [approving a settlement agreement] on the basis of assertions never presented to the presiding official or to the [B]oard." *Sargent v. Dep't of Health & Human Servs.*, 229 F.3d 1088, 1091 (Fed. Cir. 2000) (collecting cases). Because these issues were not

properly raised before the administrative judge or the Board, we cannot address them on review. *See id.*

We affirm the Board's decision.

AFFIRMED

COSTS

No costs.

APPENDIX B

FRCP RULES

FRCP Rule 25. Substitution of Parties

(c) Transfer of Interest. If an interest is transferred, the action may be continued by or against the original party unless the court, on motion, orders the transferee to be substituted in the action or joined with the original party. The motion must be served as provided in Rule 25(a)(3).

FRCP Rule 15. Amended and Supplemental Pleadings

(c) Relation Back of Amendments.

(1) When an Amendment Relates Back. An amendment to a pleading relates back to the date of the original pleading when:

(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:

(i) received such notice of the action that it will not be prejudiced in defending on the merits; and

(ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

Federal Rule of Civil Procedures, Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes Primary tabs

(a) In General. A party may serve on any other party a request within the scope of Rule 26(b):

(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:

(A) any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or

(B) any designated tangible things; or

(2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Federal Rule of Evidence 404(b). Character Evidence; Crimes or Other Acts

. . . .

(b) Crimes, Wrongs, or Other Acts.

(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) Permitted Uses; Notice in a Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial--or during trial if the court, for good cause, excuses lack of pretrial notice.

APPENDIX C

MSPB AJ Ratification

U.S. MERIT SYSTEMS PROTECTION BOARD
RATIFICATION ORDER

In our capacity as Members of the Merit Systems Protection Board ("MSPB"), we hereby ratify the prior appointments of the individuals listed below to the position of MSPB Attorney Examiner (commonly known as Administrative Judge), Supervisory Attorney Examiner (commonly known as Chief Administrative Judge), or Regional Director, as the case may be, and we today approve these appointments as our own under Article II of the Constitution.

Raymond Limon
Vice Chairman and Acting Chairman

3/4/22

DATE

Tristan L. Leavitt
Member

3/4/22

DATE

Appointments Ratified

Laura Albornoz, Regional Director
Joel Alexander, Attorney Examiner
Chizoma Ihekere Anokwute, Attorney Examiner
Craig Berg, Attorney Examiner
Monique Binswanger, Attorney Examiner
Samantha Black, Attorney Examiner
Richard Brian Bohlen, Attorney Examiner
Scott Borrowman, Attorney Examiner
William Boulden, Regional Director
David Brooks, Attorney Examiner
Grace Carter, Attorney Examiner
Jennifer Cassell, Attorney Examiner
Jeremiah Cassidy, Regional Director
Theresa Chung, Attorney Examiner
Silva de la Cruz, Attorney Examiner
Cynthia De Nardi, Attorney Examiner
Nicole Decrescenzo, Attorney Examiner
Sarah Diouf, Attorney Examiner
Paul Ditomasso, Attorney Examiner
Maria Dominguez, Attorney Examiner
Daniel Fine, Attorney Examiner
Andrew Flick, Attorney Examiner
Lindsay Young Harrell, Attorney Examiner
John Alick Henderson, Attorney Examiner
Edward Hertwig, Attorney Examiner
Pamela Jackson, Attorney Examiner
Franklin Kang, Attorney Examiner
Katherine Beaumont Kern, Attorney Examiner
Thomas Lanphear, Regional Director
David Lidow, Attorney Examiner
Sherry Linville, Attorney Examiner
Daniel Mclaughlin, Attorney Examiner
Patrick Mehan, Attorney Examiner
Melissa Mehring, Attorney Examiner
Patricia Miller, Attorney Examiner
Stephanie Miller, Attorney Examiner
Stephen Mish, Supervisory Attorney Examiner
Jeffrey Morris, Attorney Examiner
John Andrew Niedrick, Attorney Examiner
Jennifer Pao, Attorney Examiner
Michael Perry, Attorney Examiner
Sharon Pomeranz, Attorney Examiner
Gregory Prophet, Attorney Examiner
Nina Puglia, Attorney Examiner
Tamara Ribas, Attorney Examiner
Christoph Riddle, Attorney Examiner
Evan Roth, Attorney Examiner
Michael Rudisill, Attorney Examiner
Joann Ruggiero, Attorney Examiner
Martha Russo, Attorney Examiner
Michele Schroeder, Regional Director
Mary Senoo, Attorney Examiner
Michael Shachat, Attorney Examiner
Gregory Smith, Attorney Examiner
Sara Snyder, Regional Director
Christopher Sprague, Attorney Examiner
Kasandra Styles, Attorney Examiner
Kara Svendsen, Attorney Examiner
Mark Syska, Attorney Examiner
Ronald Weiss, Attorney Examiner
Glen Williams, Attorney Examiner
Daniel Yehl, Attorney Examiner
Sherry Zamora, Attorney Examiner

APPENDIX D

CFR

denied, filing an individual appeal within the additional 35-day period.

(c) *Standards.* In determining whether it is appropriate to treat an appeal as a class action, the judge will be guided but not controlled by the applicable provisions of the Federal Rules of Civil Procedure.

(d) *Electronic filing.* A request to hear a case as a class appeal and any opposition thereto may not be filed in electronic form. Subsequent pleadings may be filed and served in electronic form, provided that the requirements of § 1201.14 are satisfied.

[54 FR 53504, Dec. 29, 1989, as amended at 59 FR 31109, June 17, 1994; 62 FR 59992, Nov. 6, 1997; 68 FR 59862, Oct. 20, 2003; 69 FR 57630, Sept. 27, 2004]

§ 1201.28 Case suspension procedures.

(a) *Joint requests.* The parties may submit a joint request for additional time to pursue discovery or settlement. Upon receipt of such request, an order suspending processing of the case for a period up to 30 days may be issued at the discretion of the judge.

(b) *Unilateral requests.* In lieu of participating in a joint request, either party may submit a unilateral request for additional time to pursue discovery as provided in this subpart. Unilateral requests for additional time of up to 30 days may be granted for good cause shown at the discretion of the judge.

(c) *Time for filing requests.* The parties must file a joint request that the adjudication of the appeal be suspended within 45 days of the date of the acknowledgment order (or within 7 days of the appellant's receipt of the agency file, whichever date is later).

(d) *Untimely requests.* The judge may consider requests for suspensions that are filed after the time limit set forth in paragraph (c) of this section. Such requests may be granted at the discretion of the judge.

(e) *Early termination of suspension period.* The suspension period may be terminated prior to the end of the agreed upon period if the parties request the judge's assistance relative to discovery or settlement during the suspension period and the judge's involvement pursuant to that request is likely to be extensive.

(f) *Limitation on suspension period.* No case may be suspended for more than a total of 30 days under the provisions of this section.

[68 FR 54651, Sept. 18, 2003]

PARTIES, REPRESENTATIVES, AND WITNESSES

§ 1201.31 Representatives.

(a) *Procedure.* A party to an appeal may be represented in any matter related to the appeal. Parties may designate a representative, revoke such a designation, and change such a designation in a signed submission, submitted as a pleading.

(b) A party may choose any representative as long as that person is willing and available to serve. The other party or parties may challenge the designation, however, on the ground that it involves a conflict of interest or a conflict of position. Any party who challenges the designation must do so by filing a motion with the judge within 15 days after the date of service of the notice of designation. The judge will rule on the motion before considering the merits of the appeal. These procedures apply equally to each designation of representative, regardless of whether the representative was the first one designated by a party or a subsequently designated representative. If a representative is disqualified, the judge will give the party whose representative was disqualified a reasonable time to obtain another one.

(c) The judge, on his or her own motion, may disqualify a party's representative on the grounds described in paragraph (b) of this section.

(d)(1) A judge may exclude a party, a representative, or other person from all or any portion of the proceeding before him or her for contumacious misconduct or conduct that is prejudicial to the administration of justice.

(2) When a judge determines that a person should be excluded from participation in a proceeding, the judge shall inform the person of this determination through issuance of an order to show cause why he or she should not be excluded. The show cause order shall be delivered to the person by the most expeditious means of delivery available, including issuance of an oral order on