NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

In re: **WILLIAM B. JOLLEY**

WILLIAM B. JOLLEY,

Petitioner,

v.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,
MERIT SYSTEMS PROTECTION BOARD,
UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT,

Respondents,

Federal Circuit Case No. 2022-2303

Petition for Writ regarding Merit Systems Protection Board appeal
and Federal Circuit Court of Appeals
In No. AT-3330-18-0138-B-1

PETITION FOR A WRIT OF MANDAMUS

AND/OR PROHIBITION

William B. Jolley (pro se)
73 Bartram Trail
Brunswick, Georgia 31523
;912-264-5900

QUESTIONS PRESENTED

I

Do Merit Systems Protection Board (MSPB) decisions of Veteran and Whistleblower appeals fail for lack of "due process" where 5 C.F.R. ¶ 1201.57(d), states "the Board will not consider matters described at 5 U.S.C. ¶ 7701(c)(2) in an appeal covered by this section."?

II

Did the ultra vires act of two individual MSPB Board members creating the so called "Ratification Order" stating, "we today approve these appointments as our own under Article II of the Constitution," satisfy the Supreme Court requirements for administrative judges as set forth by the Supreme Court in *Lucia v. SEC,* et. seq. (App.7)

III

Should 38 U.S.C. ¶ 4324 (App.3) be declared unconstitutional because it creates unequal protection of laws for Veterans from that which is provided by 38 U.S.C. ¶ 4323. (App.4)

PETITION FOR WRIT OF MANDAMUS
AND/OR PROHIBITION

William B. Jolley (pro se), the Petitioner, applies, pursuant to Section 1651, Title 28, United States Code, and Rule 20 of the Supreme Court Rules, for writs of mandamus and/or for writs of prohibition, directed to the Court of Appeals for the Federal Circuit; the Merit Systems Protection Board (MSPB); and the Department of Housing and Urban Development (HUD).

"***Petitioner's Motion To Supplement The Informal Reply Brief And Informal Appendix With This Motion And Attached Copy of Petition for Rulemaking***" *(App.2),* was sent to the Federal Circuit for inclusion in 22-2302 on 24 April 2023.

The motion, as to the issue of ***due process***, was not responded to in the 7 December 2023 Federal Circuit decision in 22-2302 (App.1). Petitioner's motion, (App.2), explains why MSPB rule 5 C.F.R. ¶ 1201.57(d) precludes "*due process*" for Veterans in Merit Systems Protection Board "appeal" procedures.

Due Process suffers in that MSPB Administrative Judges (App.1 at page 7) are not constitutionally qualified "according to the criteria in *Lucia v. SEC,* [138 S. Ct. 2044 (2018),]".

Due Process: The USERRA provides grossly unequal treatment for litigating and resolving employment disputes. Compare: 38 U.S. Code ¶ 4324 (App.3) - Enforcement with respect to Federal executive agencies vs. 38 U.S. Code ¶ 4323 (App.4) - Enforcement with respect to the State or private employers. The 5th Amendment due process

clause requires the U.S. Government to practice equal protection. USERRA ¶ 4324 denies equal protection for veterans. ¶ 4324 requires appeals to MSPB. MSPB does not use the Federal Rules of Civil Procedure or the Federal Rules of Evidence. The MSPB, under ¶ 4324, lacks constitutionally qualified judges and protections available through courts of law under ¶ 4323.

JURISDICTION

This Petition is timely filed within 90 days of the 7 December 2023 decision of 22-2302 by the Federal Circuit. The Merit Systems Protection Board (MSPB) had jurisdiction over this appeal under 5 U.S.C. ¶ 7701(a). The Court of Appeals for the Federal Circuit has exclusive jurisdiction under 28 U.S.C. § 1295(a)(9) of an appeal from a final order or final decision of the Merit Systems Protection Board (MSPB), pursuant to section 7703(b)(1) of title 5. The United States Supreme Court has jurisdiction to hear and determine this Petition under 28 U.S.C. § 1651(a).

REASON RELIEF IS NOT AVAILABLE IN ANY OTHER COURT

The case is a Veteran's appeal to the Merit Systems Protection Board of an employment application to a federal agency. 5 U.S.C. ¶ 7701(a) provides the matter be referred to the Merit Systems Protection Board (MSPB). 5 U.S.C. 7703 (b)(1)(A) provides appeal of an MSPB decision go to the Federal Circuit Court of Appeals. Appeal from the Federal Circuit Court of Appeals can only go to the U.S. Supreme Court.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1651: (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

STATEMENT OF THE CASE

The facts necessary to an understanding of the issues are best provided in the Appendix (App.2) and by reference to 5 C.F.R. ¶ 1201.57 (App.5); 5 U.S.C. ¶ 7701 (App.6); and the information below.

It appeared an MSPB rule (App.2) had mislead the Federal Circuit. Petitioner was wrong. The Court knew about 5 C.F.R. 1201.57(d). Inquiries in the 22-1882 case revealed the same. This litigant was gobstruck. A panel of three appellate judges agrees with the MSPB and denies this Veteran, and all other similarly situated Veterans, due process for nine years (2015-2024).

If MSPB was without due process ... then CAFC affirmati on is void for failure of due process. CAFC must act under 5 U.S.C. 7703(c) and set aside any Agency action, findings or conclusions obtained without procedures required by law, rule, or regulation having been followed. Failure, with respect to due process, is a violation of the Constitution (law); Court of Appeals for the Federal Circuit (CAFC) should find, under 5 U.S.C. ¶ 7703(c)(2), that Petitioner (this Veteran) prevails because "... the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be – (2) obtained without procedures required by law, rule, or regulation having been followed; ..." (¶ 7703(c)(2)).

REASONS FOR GRANTING THE PETITION

5 C.F.R. ¶ 1201.57(d) deprived the Petitioner from presenting important facts that would show that the Agency acted in violation of various sections of law, rules and regulations. (1) The MSPB Board refused to consider (under ¶ 1201.57(d)): harmful error in the application of the agency's procedures; (2) Where the decision did not comply with law; and (3) How the decision violated Prohibited Personnel Practices (5 U.S.C. ¶ 2302).

THE RELIEF SOUGHT BY PETITIONER IS AS FOLLOWS

1. The Supreme Court is asked to Order the Federal Circuit, MSPB and HUD that **appeals** made during the effective period of 5 C.F.R. ¶ 1201.57(d) require a decision acknowledging failure of due process.

2. The Supreme Court is asked to Order the Federal Circuit to correct No. 2022-2303 from "Affirmed" to "Petitioner Prevails" per 5 U.S.C. ¶ 7703(c)(2); Agency failed to comply with "... procedures required by law...". The Federal Circuit must Order MSPB and HUD that Petitioner will receive corrective award including a GS-15, Step 10, HUD Field Office Director position with back-pay plus an amount equal to the back-pay as damages. (See: App.1 @ pg 3 under II).

3. The Supreme Court is asked to Order that MSPB administrative judges are not constitutionally qualified per *Lucia v. SEC;* and that the MSPB "Ratification Order" is void as an ultra vires act of two individual Board members. (App.7)

4. The MSPB is not qualified to render decisions on Veteran appeals where for nine years its judges have ignored the failure of due process inherent with 5 C.F.R. ¶ 1201.57(d). Veterans,

with rights to enforcement of employment actions of federal executive agencies (38 U.S.C. 4324) do not have equal rights as veterans enforcing employment rights of private business and state jobs (38 U.S.C. 4323). The Supreme Court is asked to declare 38 U.S.C. 4324 unconstitutional.

CONCLUSION

Blacks Law Dictionary (5th Ed. p-449), states "Due process of law implies the right of the person thereby ... to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved. If any matter of fact or liability be conclusively presumed against him, this is not due process of law."

5 C.F.R. ¶ 1201.57(d) provides the MSPB conclusively presumes against this Petitioner all facts that relate to the following: [1].

> (A) shows harmful error in the application of the agency's procedures in arriving at such decision;
> (B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or
> (C) shows that the decision was not in accordance with law.

Instant case represents a denial of "due process of law".

Respectfully submitted,

William B. Jolley 26 December 2023

William B. Jolley (Petitioner, pro se)
73 Bartram Trail
Brunswick, Georgia
912-222-1660 or n61u@yahoo.com

[1] " ... the Board will not consider matters described at 5 U.S.C. ¶ 7701(c)(2) in an appeal covered by this section."

No._____

IN THE SUPREME COURT OF THE UNITED STATES

APPENDIX

Page numbers refer to numbers in pen at lower right of Appendix documents.

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NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

WILLIAM B. JOLLEY,
Petitioner

v.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,
Respondent

2022-2303

Petition for review of the Merit Systems Protection Board in No. AT-3330-18-0138-B-1.

Decided: December 7, 2023

WILLIAM B. JOLLEY, Brunswick, GA, pro se.

MATNEY ELIZABETH ROLFE, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for respondent. Also represented by BRIAN M. BOYNTON, PATRICIA M. MCCARTHY, FRANKLIN E. WHITE, JR.

Before TARANTO, CHEN, and CUNNINGHAM, *Circuit Judges*.

PER CURIAM.

William B. Jolley applied for two positions with the U.S. Department of Housing and Urban Development (HUD)—each one to serve as a field office director—but was not selected for either position. He then sought corrective action from the Merit Systems Protection Board, asserting that HUD had violated the Veterans Employment Opportunities Act of 1998 (VEOA), 5 U.S.C. § 3300a. The Board denied his request. *Jolley v. Department of Housing and Urban Development*, No. AT-3330-18-0138-B-1, 2022 WL 3578093 (M.S.P.B. Aug. 19, 2022); SAppx. 307–24.[1] On Mr. Jolley's appeal, we affirm the Board's decision.

I

In February 2017, HUD issued two job-vacancy announcements, each announcement addressing the same pair of job openings for field office director positions: one position in Louisville, Kentucky; the other position in Columbia, South Carolina. SAppx. 167, 308. One of the announcements (17-HUD-269) identified a merit-promotion process, and the other (17-HUD-270-P) identified an open competitive-examination process. *See* SAppx. 185–86, 196–98, 204; *see also Joseph v. Federal Trade Commission*, 505 F.3d 1380, 1381–82 (Fed. Cir. 2007) (describing government hiring processes). Mr. Jolley, a preference-eligible veteran, was interviewed for both positions but was not selected. SAppx. 205, 308. Ultimately, both positions were filled via a merit-promotion process. SAppx. 205.

In December 2017, Mr. Jolley filed an appeal with the Board under 5 U.S.C. § 3330a, alleging that HUD's decision not to hire him for either position violated the VEOA. SAppx. 1–10. In January 2018, the assigned administrative judge dismissed the appeal for lack of jurisdiction.

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[1] "SAppx." refers to the supplemental appendix filed by HUD in this court with its brief as respondent.

SAppx. 101–14. Mr. Jolley sought review by the full Board, SAppx. 118–27, and in May 2022, the Board reversed the dismissal, holding that Mr. Jolley had met the requirements to establish the Board's jurisdiction to hear his VEOA appeal, and remanded the case for adjudication on the merits. SAppx. 325–29.

On August 19, 2022, the administrative judge denied Mr. Jolley's request for corrective action under the VEOA, SAppx. 307–24, relying on the written record because there were "no genuine issues of material fact in dispute," SAppx. 307–08. The administrative judge ruled that Mr. Jolley failed to establish a VEOA violation because (1) he did not show that HUD violated any statutes or regulations related to veterans' preference and (2) he was allowed to compete for both positions as required under the merit-promotion process. SAppx. 308–16. That ruling became the final decision of the Board on September 23, 2022. SAppx. 316.

Mr. Jolley timely filed his appeal on September 29, 2022, as permitted by 5 U.S.C. § 7703(b)(1)(A). We have jurisdiction under 28 U.S.C. § 1295(a)(9) and 5 U.S.C. § 7703(b)(1)(A).

II

We will affirm the Board's decision unless it is "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c). Substantial evidence is "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *McLaughlin v. Office of Personnel Management*, 353 F.3d 1363, 1369 (Fed. Cir. 2004) (quoting *Matsushita Electric Industrial Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984)). "The petitioner [in this court, Mr. Jolley] bears the burden of establishing error in the Board's

decision." *Harris v. Department of Veterans Affairs*, 142 F.3d 1463, 1467 (Fed. Cir. 1998).

In the present appeal, Mr. Jolley's arguments fall into two classes. First, he asserts that the Board made several factual and legal errors related to the merits of his VEOA claims. Second, he asserts that the Board committed miscellaneous procedural errors during the proceedings. We address these arguments in turn.

A

We start by considering Mr. Jolley's challenges related to the merits of the Board's decision. "Federal agencies generally use two types of selection to fill vacancies: (1) the open 'competitive examination' process and (2) the 'merit promotion' process.'" *Joseph*, 505 F.3d at 1381. Under the competitive-examination process, applicants are given a numerical rating and placed on a list of qualified personnel for appointment. *Id.* (citing 5 C.F.R. § 2.1). The three highest-rated applicants are then considered by the appointing official, who is generally required to select one of them. *Id.* (citing 5 U.S.C. § 3318(a)). Under the VEOA, veterans receive special advantages in this process; for example, five or ten points are added to their scores, and they are ranked ahead of candidates with the same score. *Id.* at 1381–82 (first citing 5 U.S.C. § 3309; 5 C.F.R. § 337.101(b); and then citing 5 U.S.C. § 3313; 5 C.F.R. § 332.401). Under the merit-promotion process, veterans are not entitled to those hiring preferences (*e.g.*, veterans' point preferences). *Id.* at 1382. But veterans are guaranteed the opportunity to apply and compete. *Id.* (citing 5 U.S.C. § 3304(f)(1)).

A preference-eligible veteran, which Mr. Jolley undisputedly is, can present either of two types of claims to the Board under the VEOA. The first is a claim that an agency violated his rights under a statute or regulation that relates to veterans' preferences in federal employment. *See* 5 U.S.C. § 3330a(a)(1)(A). The second is a claim that an

agency denied him the opportunity to compete for a vacant position. *See* 5 U.S.C. §§ 3304(f)(1), 3330a(a)(1)(B).

Here, Mr. Jolley appears to argue that it was error for the Board not to consider the amount of time that elapsed between the announcement of a field officer director position in Columbia and the agency's eventual filling of that position. But he has not shown that this elapsed-time grievance gives him a VEOA claim of either of the two types. As to the first, Mr. Jolley has failed to identify a statute or regulation related to hiring timing that is relevant to veterans' preference rights. As to the second, Mr. Jolley was undeniably given an opportunity to compete. He was listed on the Columbia position hiring certificates, *see* SAppx. 208–09, and was interviewed for the position, *see* SAppx. 205. *See Joseph*, 505 F.3d at 1383–84 (explaining that the petitioner was given a full opportunity to compete when he was included on the merit-promotion list and interviewed); *Abell v. Department of the Navy*, 343 F.3d 1378, 1383–85 (Fed. Cir. 2003).

Mr. Jolley next alleges that the Board incorrectly stated that vacancy announcement 17-HUD-269, with its competitive-examination process, was "for Louisville" and that vacancy announcement 17-HUD-270-P, with its merit-promotion process, was "for Columbia," SAppx. 308 n.1, 309, when in fact both vacancy announcements advertised both positions (in the two locations). But Mr. Jolley has not shown how the Board's description produced an error in finding no VEOA claim. He has identified no statute or regulation that is violated by dual-position announcements. In a case in which a single position was the subject of two announcements, we found no violation and explained that, when hiring, an agency has "the discretion to fill a vacant position by any authorized method." *Joseph,* 505 F.3d at 1384–85 (citation omitted); *see* 5 C.F.R. § 330.102. Mr. Jolley has not shown a violation on the facts he describes: HUD accepted applications for the positions under both the competitive-examination and merit-

promotion processes and ultimately chose to fill both positions under the merit-promotion procedure. Mr. Jolley also was clearly given an opportunity to compete for both positions.

Relatedly, Mr. Jolley offers no sound criticism of the Board's decision when he points out that HUD did not utilize category rating in making its hiring decisions. Under the merit-promotion process, the process by which both the Louisville and Columbia positions were ultimately filled, *see* SAppx. 205, HUD was not required to use category rating. Indeed, the VEOA expressly states that the "opportunity to compete" provision which applies to the merit-promotion process, "shall *not* be construed to confer an entitlement to veterans' preference that is not otherwise required by law." 5 U.S.C. § 3304(f)(3) (emphasis added); *see also Joseph*, 505 F.3d at 1383 ("[A]n employee is not entitled to veterans' preference in the merit promotion process." (citation omitted)).

Mr. Jolley also argues that he has been "adversely affected by HUD's non-compliance with 42 U.S.C. [§] 3535(p)." Pet'r Inf. Br. at 12–13. The cited subsection relates to the reorganization of HUD field offices. The Board correctly found it irrelevant to Mr. Jolley's VEOA claim. *See* SAppx. 309–10.

Finally, Mr. Jolley appears to argue that the Board "accepted argument" about the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) and thus should have decided this case on USERRA grounds. But Mr. Jolley's USERRA claims related to these field office director positions have never been part of this appeal, *see* SAppx. 6, and indeed have already been addressed separately, by the Board and this court, *see Jolley*

v. Merit Systems Protection Board, 752 F. App'x 964 (Fed. Cir. 2018).[2]

B

We now turn to Mr. Jolley's procedural arguments. First, Mr. Jolley argues that the Board erred in deciding his appeal without a hearing. We discern no error. A hearing is unnecessary if there is no genuine issue of fact that could alter the outcome. *See* 5 C.F.R. § 1208.23(b). We have recognized this familiar principle in the VEOA context before. *Jones v. Department of Health and Human Services*, 640 F. App'x 861, 864 (Fed. Cir. 2006). As discussed above, Mr. Jolley's legal arguments are unavailing, and he has failed to identify a factual dispute that could change the outcome of his case.

Finally, Mr. Jolley argues that the administrative judge who decided his case is "according to the criteria in *Lucia v. SEC*, [138 S. Ct. 2044 (2018),] not constitutionally qualified." Pet'r Inf. Br. at 13. That argument lacks merit. We have previously held that the Board's administrative judges are not principal officers under the Appointments Clause. *McIntosh v. Department of Defense*, 53 F.4th 630, 638–41 (Fed. Cir. 2022). And if the Board's administrative judges are inferior officers, the administrative judge here was properly appointed under the Appointments Clause—

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[2] For this reason, we also deny Mr. Jolley's motion for reconsideration of our January 25, 2023 order directing him to pay the docketing fee or move to proceed in forma pauperis (if appropriate). Motion Regarding USERRA Fee Waiver, ECF No. 18; *see* Order, ECF No. 17; Order, ECF No. 20. With no USERRA claim here, Mr. Jolley is not entitled to invoke the exemption from the docketing fee applicable to petitions for review of a Board decision where the underlying appeal at the Board involved a claim under USERRA. 38 U.S.C. §§ 4323(h), 4324; Fed. Cir. R. 52 note.

by the Board's quorum as the "head[] of department[]." *See id.* at 641–42. While the Board lacked a quorum between January 7, 2017 and March 3, 2022, a reconstituted quorum of the Board, which qualifies as a "head[] of department[]" under the Appointments Clause, *id.* at 641, issued an order on March 4, 2022, ratifying prior appointments of administrative judges—including the administrative judge here. *See* U.S. Merit Systems Protection Board Ratification Order (Mar. 4, 2022), available at https://www.mspb.gov/foia/files/AJ_Ratification_Order_3-4-2022.pdf. That ratification order was issued over two months before Mr. Jolley's case was remanded for the adjudication that is the subject of the present appeal. *See* SAppx. 325–26.

III

We have considered Mr. Jolley's remaining arguments and find them unpersuasive. For the foregoing reasons, the decision of the Merit Systems Protection Board is affirmed.

The parties shall bear their own costs.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

WILLIAM B. JOLLEY,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 22-2303
	)	
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,	)	
	)	
	)	
Respondent.	)	

PETITIONER'S MOTION TO SUPPLEMENT HIS INFORMAL BRIEF AND INFORMALAPPENDIX WITH THIS MOTION AND ATTACHED COPY OF PETITION FOR RULEMAKING

Petitioner, pro se (not an attorney), attaches a copy of a Petition for Rulemaking dated 18 April as a matter of interest to this Court with respect to instant USERRA-VEOA case which contains issues, grossly unconsidered by the MSPB, of non-compliance with law, rule or regulation.

5 U.S.C. ¶ 7701(c)(2) demands the MSPB consider violations of law, rule, and regulation; and set aside any agency action , findings or conclusions, obtained without compliance with law, rule or regulation. MSPB Rule 1201.57(d) states: **"1201.57(d) *Scope of the appeal.* Appeals covered by this section are limited in scope. With the exception of denial of restoration appeals, the Board will not consider matters described at 5 U.S.C. 7701(c)(2) in an appeal covered by this section."**

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Blacks Law Dictionary (Fifth Edition at page 449) states, "Due process of law implies the right of the person thereby ... to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved. If any matter of fact or liability be conclusively presumed against him, this is not due process of law."

MSPB procedure as stated in 1201.57(d) provides that **the MSPB conclusively presumes against this Petitioner** all facts that relate to the following words from 5 U.S.C. ¶ 7701(c)(2):

(A)
shows harmful error in the application of the agency's procedures in arriving at such decision;
(B)
shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or
(C)
shows that the decision was not in accordance with law.

Petitioner urges the Court to reach the conclusion that instant case represents a denial of "due process of law" by the Merit Systems Protection Board procedure memorialized by 5 C.F.R. ¶ 1201.57(d). [1]

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[1] Petitioner has found absolutely NO authority for the MSPB to abrogate terms and/or conditions of Statutory law (5 U.S.C. ¶ 7701(c)(2)) by the creation of an MSPB Rule (5 C.F.R. ¶ 1201.57(d)).

See, however, 5 U.S.C. ¶ 7703(c) quoted next below:

(c)In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—
(1)
arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(2)
obtained without procedures required by law, rule, or regulation having been followed; or
(3)
unsupported by substantial evidence;
except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

The Federal Circuit Court of Appeals is asked to apply 5 U.S.C. 7703(c)(1) and find for the Petitioner.

Petitioner is entitled to a position as a GS-15, step 10, Field Office Director, in South Carolina, Kentucky, Florida or West Virginia, plus back-pay from 31 March 2010 to the start of salary in the position awarded. Petitioner is also entitled to an amount equal to the back-pay for damages, plus attorney charges and other costs of pursuing this matter for more than ten years.

William B. Jolley ~~(pro se)~~ 22 April 2023
William B Jolley ~~(pro se)~~ Date

11

PETITION FOR RULEMAKING
18 APRIL 2023

William B. Jolley
73 Bartram Trail
Brunswick, Georgia 31523

Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW
Washington, D.C. 20419

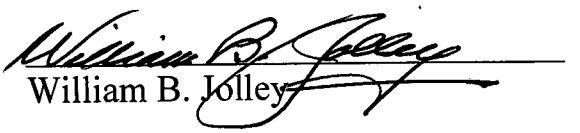
SUBJECT: Petition for (MSPB) Rulemaking under 5 U.S.C ¶ 553(e) and 5 C.F.R. ¶ 1200.4

In accordance with 5 C.F.R. ¶ 1200.4, William B. Jolley hereby petitions for amendment or repeal of 5 C.F.R. ¶ 1201.57 which violates statutory law established by 5 U.S.C. ¶ 7701(c)(2). 5 C.F.R. ¶ 1201.57(d) abrogates 5 U.S.C. ¶ 7701(c)(2).

Per 1200.4(a)(3): Petitioner has numerous USERRA and VEOA cases that are pending in the Court of Appeals for the Federal Circuit, and other cases including IRA, USERRA, and VEOA, that have been decided with MSPB rule 5 C.F.R. ¶ 1201.57(d) in place.

Per 1200.4(a)(4):The MSPB does not have authority to violate the clear language of any statutory law (U.S.C.) by the use of the Code of Federal Regulations (C.F.R.). The MSPB has violated 5 U.S.C. ¶ 7701(c)(2) in a manner that is a violation of 18 U.S.C. 1001(a)(1), (a)(2) and (a)(3).

William B. Jolley hereby petitions for amendment or repeal of 5 C.F.R. ¶ 1201.57.



William B. Jolley

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§ 4324. Enforcement of rights with respect to Federal executive agencies

(a)(1) A person who receives from the Secretary a notification pursuant to section 4322(e) may request that the Secretary refer the complaint for litigation before the Merit Systems Protection Board. The Secretary shall refer the complaint to the Office of Special Counsel established by section 1211 of title 5.

(2)(A) If the Special Counsel is reasonably satisfied that the person on whose behalf a complaint is referred under paragraph (1) is entitled to the rights or benefits sought, the Special Counsel (upon the request of the person submitting the complaint) may appear on behalf of, and act as attorney for, the person and initiate an action regarding such complaint before the Merit Systems Protection Board.

(B) If the Special Counsel declines to initiate an action and represent a person before the Merit Systems Protection Board under subparagraph (A), the Special Counsel shall notify such person of that decision.

(b) A person may submit a complaint against a Federal executive agency or the Office of Personnel Management under this subchapter directly to the Merit Systems Protection Board if that person--

(1) has chosen not to apply to the Secretary for assistance under section 4322(a);

(2) has received a notification from the Secretary under section 4322(e);

(3) has chosen not to be represented before the Board by the Special Counsel pursuant to subsection (a)(2)(A); or

(4) has received a notification of a decision from the Special Counsel under subsection (a)(2)(B).

(c)(1) The Merit Systems Protection Board shall adjudicate any complaint brought before the Board pursuant to subsection (a)(2)(A) or (b), without, regard as to whether the complaint accured before, on, or after October 13, 1994. A person who seeks a hearing or adjudication by submitting such a complaint under this paragraph may be represented at such hearing or adjudication in accordance with the rules of the Board.

(2) If the Board determines that a Federal executive agency or the Office of Personnel Management has not complied with the provisions of this chapter relating to the employment or reemployment of a person by the agency, the Board shall enter an order requiring the agency or Office to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by such person by reason of such lack of compliance.

(3) Any compensation received by a person pursuant to an order under paragraph (2) shall be in addition to any other right or benefit provided for by this chapter and shall not diminish any such right or benefit.

(4) If the Board determines as a result of a hearing or adjudication condaccrueducted pursuant to a complaint submitted by a person directly to the Board pursuant to subsection (b) that such person is entitled to an order referred to in paragraph (2), the Board may, in its discretion, award such person reasonable attorney fees, expert witness fees, and other litigation expenses.

(d)(1) A person adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board under subsection (c) may petition the United States Court of Appeals for the Federal Circuit to review the final order or decision. Such petition and review shall be in accordance with the procedures set forth in section 7703 of title 5.

(2) Such person may be represented in the Federal Circuit proceeding by the Special Counsel unless the person was not represented by the Special Counsel before the Merit Systems Protection Board regarding such order or decision.

§ 4323. Enforcement of rights with respect to a State or private employer

(a) ACTION FOR RELIEF-(1) A person who receives from the Secretary a notification pursuant to section 4322(e) of this title of an unsuccessful effort to resolve a complaint relating to a State (as an employer) or a private employer may request that the Secretary refer the complaint to the Attorney General. If the Attorney General is responsibly satisfied that the person on whose behalf the complaint is referred is entitled to the rights or benefits sought, the Attorney General may appear on behalf of, and act as attorney for, the person on whose behalf the complaint is submitted and commence an action for relief under this chapter for such person. In the case of such an action against a State (as an employer), the action shall be brought in the name of the United States as the plaintiff in the action.

(2) A person may commence an action for relief with respect to a complaint against a State (as an employer) or a private employer if the person--

(A) has chosen not to apply to the Secretary for assistance under section 4322(a) of this title;

(B) has chosen not to request that the Secretary refer the complaint to the Attorney General under paragraph (1); or

(C) has been refused representation by the Attorney General with respect to the complaint under such paragraph .

(b) JURISDICTION-(1) In the case of an action against a State (as an employer) or a private employer commenced by the United States, the district courts of the United States shall have jurisdiction over the action.

(2) In the case of action against a State (as an employer) by a person, the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State.

(3) In the case of an action against a private employer by a person, the district courts of the United States shall have jurisdiction of the action.

(c) VENUE-(1) In the case of an action by the United States against a State (as an employer), the action may proceed in the United States district court for any district in which the State exercises any authority or carries out any function.

(2) In the case of an action against a private employer, the action may proceed in the United States district court for any district in which the private employer of the person maintains a place of business.

(d) REMEDIES-(1) In any action under this section, the court may award relief as follows:

(A) The court may require the employer to comply with the provisions of this chapter.

(B) The court may require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter.

(C) The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful.

(2)(A) Any compensation awarded under subparagraph (B) or (C) of paragraph (1) shall be in addition to, and shall not diminish, any of the other rights and benefits provided for under this chapter.

(B) In the case of an action commenced in the name of the United States for which the relief includes compensation awarded under subparagraph (B) or (C) of paragraph (1), such compensation shall be held in a special deposit account and shall be paid, on order of the Attorney General, directly to the person. If the compensation is not paid to the person because of inability to do so within a period of 3 years, the compensation shall be converted into the Treasury of the United States as miscellaneous receipts.

(3) A State shall be subject to the same remedies, including prejudgment interest, as may be imposed upon any private employer under this section.

(e) EQUITY POWERS- The court may use its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights of benefits of persons under this chapter.

(f) STANDING- An action under this chapter may be initiated only by a person claiming rights or benefits under this chapter under subsection (a) or by the United States under subsection (a)(1).

(g) RESPONDENT- In any action under this chapter, only an employer or a potential employer, as the case may be, shall be a necessary party respondent.

(h) FEES, COURT COSTS- (1) No fees or court costs may be charged or taxed against any person claiming rights under this chapter.

(2) In any action or proceeding to enforce a provision of this chapter by a person under subsection (a)(2) who obtained private counsel for such action or proceeding, the court may award any such person who prevails in such action or proceeding reasonable attorney fees, expert witness fees, and other litigation expenses.

(i) INAPPLICABILITY OF STATE STATUTE OF LIMITATIONS- No State statute of limitations shall apply to any proceeding under this chapter.

(j) DEFINITION- In this section, the term 'private employer' includes a political subdivision of a State.'.

5 C.F.R. § 1201.57 Establishing jurisdiction in appeals not covered by § 1201.56; burden and degree of proof; scope of review. [80 FR 4496, Jan. 28, 2015]

(a) ***Applicability.*** This section applies to the following types of appeals:

(1) An individual right of action (IRA) appeal under the Whistleblower Protection Act, 5 U.S.C. 1221;

(2) A request for corrective action under the Veterans Employment Opportunities Act (VEOA), 5 U.S.C. 3330a(d);

(3) A request for corrective action under the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4324, in which the appellant alleges discrimination or retaliation in violation of 38 U.S.C. 4311; and

(4) An appeal under 5 CFR 353.304, in which an appellant alleges a failure to restore, improper restoration of, or failure to return following a leave of absence (denial of restoration appeal).

(b) ***Matters that must be supported by nonfrivolous allegations.*** Except for proving exhaustion of a required statutory complaint process and standing to appeal (paragraphs (c)(1) and (3) of this section), in order to establish jurisdiction, an appellant who initiates an appeal covered by this section must make nonfrivolous allegations (as defined in § 1201.4(s)) with regard to the substantive jurisdictional elements applicable to the particular type of appeal he or she has initiated.

(c) ***Matters that must be proven by a preponderance of the evidence.*** An appellant who initiates an appeal covered by this section has the burden of proof, by a preponderance of the evidence (as defined in § 1201.4(q)), on the following matters:

(1) When applicable, exhaustion of a statutory complaint process that is preliminary to an appeal to the Board;

(2) Timeliness of an appeal under 5 CFR 1201.22;

(3) Standing to appeal, when disputed by the agency or questioned by the Board. (An appellant has "standing" when he or she falls within the class of persons who may file an appeal under the law applicable to the appeal.); and

(4) The merits of an appeal, if the appeal is within the Board's jurisdiction and was timely filed.

(d) ***Scope of the appeal.*** Appeals covered by this section are limited in scope. With the exception of denial of restoration appeals, the Board will not consider matters described at 5 U.S.C. 7701(c)(2) in an appeal covered by this section.

(e) ***Notice of jurisdictional, timeliness, and merits elements.*** The administrative judge will provide notice to the parties of the specific jurisdictional, timeliness, and merits elements that apply in a particular appeal.

(f) ***Additional information.*** For additional information on IRA appeals, the reader should consult 5 CFR part 1209. For additional information on VEOA appeals, the reader should consult 5 CFR part 1208, subparts A & C. For additional information on USERRA appeals, the reader should consult 5 CFR part 1208, subparts A and B.

(g) For additional information on denial of restoration appeals, the reader should consult 5 CFR part 353, subparts A and C.

5 U.S. Code § 7701 - Appellate procedures

(a)An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right—

(1)

to a hearing for which a transcript will be kept; and

(2)

to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

(b)

(1)

The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title or other employee of the Board designated by the Board to hear such cases, except that in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge. The Board, administrative law judge, or other employee (as the case may be) shall make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing under subsection (a)(1) of this section. A copy of the decision shall be furnished to each party to the appeal and to the Office of Personnel Management.

(2)

(A)If an employee or applicant for employment is the prevailing party in an appeal under this subsection, the employee or applicant shall be granted the relief provided in the decision effective upon the making of the decision, and remaining in effect pending the outcome of any petition for review under subsection (e), unless—

(i)

the deciding official determines that the granting of such relief is not appropriate; or

(ii)

(I)

the relief granted in the decision provides that such employee or applicant shall return or be present at the place of employment during the period pending the outcome of any petition for review under subsection (e); and

(II)

the employing agency, subject to the provisions of subparagraph (B), determines that the return or presence of such employee or applicant is unduly disruptive to the work environment.

(B)

If an agency makes a determination under subparagraph (A)(ii)(II) that prevents the return or presence of an employee at the place of employment, such employee shall receive pay, compensation, and all other benefits as terms and conditions of

employment during the period pending the outcome of any petition for review under subsection (e).

(C)

Nothing in the provisions of this paragraph may be construed to require any award of back pay or attorney fees be paid before the decision is final.

(3)

With respect to an appeal from an adverse action covered by subchapter V of chapter 75, authority to mitigate the personnel action involved shall be available, subject to the same standards as would apply in an appeal involving an action covered by subchapter II of chapter 75 with respect to which mitigation authority under this section exists.

(c)

(1)Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision—

(A)

in the case of an action based on unacceptable performance described in section 4303, is supported by substantial evidence; or

(B)

in any other case, is supported by a preponderance of the evidence.

(2)Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment—

(A)

shows harmful error in the application of the agency's procedures in arriving at such decision;

(B)

shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or

(C)

shows that the decision was not in accordance with law.

(d)

(1)In any case in which—

(A)

the interpretation or application of any civil service law, rule, or regulation, under the jurisdiction of the Office of Personnel Management is at issue in any proceeding under this section; and

(B)

the Director of the Office of Personnel Management is of the opinion that an erroneous decision would have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office;

the Director may as a matter of right intervene or otherwise participate in that proceeding before the Board. If the Director exercises his right to participate in a proceeding before the Board, he shall do so as early in the proceeding as practicable.

Nothing in this title shall be construed to permit the Office to interfere with the independent decisionmaking of the Merit Systems Protection Board.

(2)

The Board shall promptly notify the Director whenever the interpretation of any civil service law, rule, or regulation under the jurisdiction of the Office is at issue in any proceeding under this section.

(e)

(1)Except as provided in section 7702 of this title, any decision under subsection (b) of this section shall be final unless—

(A)

a party to the appeal or the Director petitions the Board for review within 30 days after the receipt of the decision; or

(B)

the Board reopens and reconsiders a case on its own motion.

The Board, for good cause shown, may extend the 30-day period referred to in subparagraph (A) of this paragraph. One member of the Board may grant a petition or otherwise direct that a decision be reviewed by the full Board. The preceding sentence shall not apply if, by law, a decision of an administrative law judge is required to be acted upon by the Board.

(2)

The Director may petition the Board for a review under paragraph (1) of this subsection only if the Director is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office.

(f)The Board, or an administrative law judge or other employee of the Board designated to hear a case, may—

(1)

consolidate appeals filed by two or more appellants, or

(2)

join two or more appeals filed by the same appellant and hear and decide them concurrently,

if the deciding official or officials hearing the cases are of the opinion that the action could result in the appeals' being processed more expeditiously and would not adversely affect any party.

(g)

(1)

Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of

justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

(2)

If an employee or applicant for employment is the prevailing party and the decision is based on a finding of discrimination prohibited under section 2302(b)(1) of this title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–5(k)).

(h)

The Board may, by regulation, provide for one or more alternative methods for settling matters subject to the appellate jurisdiction of the Board which shall be applicable at the election of an applicant for employment or of an employee who is not in a unit for which a labor organization is accorded exclusive recognition, and shall be in lieu of other procedures provided for under this section. A decision under such a method shall be final, unless the Board reopens and reconsiders a case at the request of the Office of Personnel Management under subsection (e) of this section.

(i)

(1)

Upon the submission of any appeal to the Board under this section, the Board, through reference to such categories of cases, or other means, as it determines appropriate, shall establish and announce publicly the date by which it intends to complete action on the matter. Such date shall assure expeditious consideration of the appeal, consistent with the interests of fairness and other priorities of the Board. If the Board fails to complete action on the appeal by the announced date, and the expected delay will exceed 30 days, the Board shall publicly announce the new date by which it intends to complete action on the appeal.

(2)

Not later than March 1 of each year, the Board shall submit to the Congress a report describing the number of appeals submitted to it during the preceding fiscal year, the number of appeals on which it completed action during that year, and the number of instances during that year in which it failed to conclude a proceeding by the date originally announced, together with an explanation of the reasons therefor.

(3)

The Board shall by rule indicate any other category of significant Board action which the Board determines should be subject to the provisions of this subsection.

(4)

It shall be the duty of the Board, an administrative law judge, or employee designated by the Board to hear any proceeding under this section to expedite to the extent practicable that proceeding.

(j)

In determining the appealability under this section of any case involving a removal from the service (other than the removal of a reemployed annuitant), neither an individual's status under any retirement system established by or under Federal

statute nor any election made by such individual under any such system may be taken into account.

(k)

The Board may prescribe regulations to carry out the purpose of this section.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 530; Pub. L. 95–454, title II, § 205, Oct. 13, 1978, 92 Stat. 1138; Pub. L. 96–54, § 2(a)(45), Aug. 14, 1979, 93 Stat. 384; Pub. L. 99–386, title II, § 208, Aug. 22, 1986, 100 Stat. 824; Pub. L. 101–12, § 6, Apr. 10, 1989, 103 Stat. 33; Pub. L. 101–194, title V, § 506(b)(6), Nov. 30, 1989, 103 Stat. 1758; Pub. L. 101–280, § 6(d)(2), May 4, 1990, 104 Stat. 160; Pub. L. 101–376, § 3, Aug. 17, 1990, 104 Stat. 462; Pub. L. 102–175, § 5, Dec. 2, 1991, 105 Stat. 1223; Pub. L. 102–378, § 2(56), Oct. 2, 1992, 106 Stat. 1354; Pub. L. 107–296, title XIII, § 1321(a)(3), Nov. 25, 2002, 116 Stat. 2297.)

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Kendra Doty
Brown and Peisch
1225 19th Street N.W., Ste 700
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Ms. Doty,

Reading the "Brief for the Appellee" in 21-5181, I noted several items to comment on to you. Below is one of them.

The MSPB Ratification Order is not a "work of art" as legal documents go. That "Order" reads as follows:

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.

The "Order" is suppose to be an Order of the MSPB Board. It begins, however by saying *"In our capacity as Members of the Merit Systems Protection Board ("MSPB"), we hereby ratify the prior appointments"* It ends saying, "*we today approve these appointments **as our own** under Article II of the Constitution.*" Sounds like the Members have decided to commit mutiny and set up their own operation and ignore the "Board". Of course, to add authenticity, the Members have authorized the action, "***as our own** under Article II of the Constitution."*

Rushing right past "ultra vires", how is this supposed document an Order of the Merit Systems Protection ***Board***?

How did the two Members think that they had acquired authority under Article II of the Constitution? The reference is to Article II, Sec. 2, Cl. 2 and the ending of that clause states, "**...** ***but the Congress may by law vest the Appointment of such inferior officers, as they think proper, in the president alone, in the courts of law, or in the Heads of Departments***."

The two members (one was "acting chairman"; the other just a "member") did not qualify as the Head of a Department. So that is how two Members ... ***in our capacity as Members*** ... try to avoid the fact that the MSPB administrative judges are unqualified as measured by the standards of the Supreme Court in *Lucia v. SEC.*

Of course, there is another hurdle and that is whether a "Board" would qualify as "the "Head of a Department". The answer to that is not yet needed.

Regards,

_____

William B. Jolley (pro se)

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