

APPENDIX

to the

PETITION FOR A WRIT OF CERTIORARI

**APPENDIX A**

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

**June 3, 2026**

NOTE: This disposition is nonprecedential.

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

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**MICHAEL G. THOROGOOD,**  
*Petitioner*

v.

**DEPARTMENT OF THE NAVY,**  
*Respondent*

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2026-1219

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Petition for review of the Merit Systems Protection  
Board in No. DC-0752-24-0319-I-1.

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Decided: June 3, 2026

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MICHAEL THOROGOOD, Norfolk, VA, pro se.

OLIVER McDONALD, Commercial Litigation Branch,  
Civil Division, United States Department of Justice, Wash-  
ington, DC, for respondent. Also represented by ELIZABETH  
MARIE HOSFORD, PATRICIA M. MCCARTHY, BRETT SHUMATE.

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Before REYNA, HUGHES, and STARK, *Circuit Judges*.  
PER CURIAM.

Michael G. Thorogood appeals a final decision of the Merit Systems Protection Board ("MSPB" or "Board") sustaining his indefinite suspension from the United States Department of the Navy ("Navy"). We affirm.

# I

For more than a decade, Mr. Thorogood worked as a Logistics Management Specialist in the Norfolk Naval Shipyard ("Norfolk"), providing supply chain support for the maintenance and repair of naval vessels such as nuclear submarines. Like all employees at Norfolk, Mr. Thorogood's Logistics Management position required a security clearance.

On July 17, 2023, Mr. Thorogood was notified that his "eligibility to access classified information" was being revoked, "based on [certain] security concerns." Appx. 21.<sup>1</sup> As a result, on September 5, 2023, the Navy proposed indefinitely suspending him "for failure to meet a condition of employment." Appx. 31.

On October 26, 2023, after counsel submitted written and oral responses contesting the charge, a Navy reviewing officer found that there were grounds for instituting an indefinite suspension. On January 12, 2024, that decision was upheld by the Navy's Personnel Security Appeals Board ("PSAB"). Mr. Thorogood appealed to the MSPB. On October 3, 2024, after a hearing, an administrative judge ("AJ") affirmed his indefinite suspension. On November 25, 2025, the Board affirmed the AJ's decision.

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<sup>1</sup> "Appx." refers to the appendix submitted by Mr. Thorogood, ECF No. 21, while "S.A." refers to the Supplemental Appendix attached to the Navy's brief, ECF No. 27.

THOROGOOD v. NAVY

3

Mr. Thorogood timely appealed to this court. The Board had jurisdiction under 5 U.S.C. § 7701. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(9).

## II

“Our scope of review in an appeal from a decision of the Board is limited.” *Cheney v. Dep’t of Just.*, 479 F.3d 1343, 1348 (Fed. Cir. 2007). “We will uphold a decision of the MSPB unless it is ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law’ or ‘unsupported by substantial evidence.’” *Jenkins v. Merit Sys. Prot. Bd.*, 911 F.3d 1370, 1373 (Fed. Cir. 2019) (quoting 5 U.S.C. § 7703(c)). “Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *McIntosh v. Dep’t of Def.*, 53 F.4th 630, 638 (Fed. Cir. 2022) (internal quotation marks omitted). “On appeal, the petitioner bears the burden of establishing error in the Board’s decision.” *Jones v. Merit Sys. Prot. Bd.*, 98 F.4th 1376, 1380 (Fed. Cir. 2024) (internal quotation marks and alterations omitted).

“[I]n a case involving a suspension resulting from the suspension of a security clearance,” “[n]either the Board nor this court may review the underlying merits of an agency’s decision to suspend a security clearance.” *Cheney*, 479 F.3d at 1351-52; *see also Hesse v. Dep’t of State*, 217 F.3d 1372, 1376 (Fed. Cir. 2000). Instead, “review of adverse actions stemming from security clearance determinations is limited to determining (1) whether a security clearance was denied [or revoked], (2) whether the security clearance was a requirement for appellant’s position, and (3) whether the procedures set forth in [5 U.S.C.] § 7513 were followed.” *Hornseth v. Dep’t of the Navy*, 916 F.3d 1369, 1373-74 (Fed. Cir. 2019) (internal quotation marks and alteration omitted); *see also Gargiulo v. Dep’t of Homeland Sec.*, 727 F.3d 1181, 1185 (Fed. Cir. 2013).

## III

Mr. Thorogood advances three principal challenges on appeal.

First, he contends that the Board erred in finding that his position of Logistics Management Specialist required a security clearance. We disagree. The Board's finding is supported by substantial evidence, including documentary and testimonial evidence the Navy presented at the hearing before the AJ, establishing that Mr. Thorogood's position "[r]equires eligibility for access to classified information." Appx. 72 ("[The] [p]osition requires eligibility for access to Secret, Confidential, or 'L' level information."); S.A. 52 ("[T]he position that Mr. Thorogood was occupying at the time . . . require[d] eligibility for access [to] classified information."). The evidence that Mr. Thorogood was permitted, at times, to work from home, and that some of his job duties did not involve accessing classified information does not undermine the AJ's finding that it was a condition of employment that he maintain a security clearance.

Second, Mr. Thorogood asserts that he was denied sufficient process under 5 U.S.C. § 7513. The statute "requires the agency to provide notice of denial or revocation of the security clearance; a statement of the reason(s) upon which the negative decision was based; and an opportunity to respond," including with the assistance of an attorney or other representative. *Hornseth*, 916 F.3d at 1374 (internal quotation marks and alterations omitted); *see also* 5 U.S.C. § 7513(b)(1)-(4). Substantial evidence supports the Board's finding that each of these requirements was satisfied here.

On September 5, 2023, the Navy issued Mr. Thorogood a "Notice of Proposed Indefinite Suspension," to take effect "no earlier than thirty (30) calendar days from the date [he] receive[d] th[e] notice." Appx. 31. It explained the reason for the notice was his "failure to meet a condition of employment, revocation of eligibility for access to classified

THOROGOOD v. NAVY

5

information and assignment to sensitive duties.” *Id.* The notice further advised Mr. Thorogood he had 15 days to respond and apprised him of additional rights, including the right to representation and to appeal; he used the subsequent period to hire an attorney, submit a response, and then present evidence at the AJ hearing.

Finally, Mr. Thorogood argues that he was prejudiced by several procedural errors at various phases of his suspension proceedings, including that the Navy failed to provide him a union representative and that the AJ made erroneous evidentiary rulings at the hearing. Mr. Thorogood, who was represented by an attorney at the hearing, has failed to persuade us that any aspect of that hearing, including the evidentiary rulings, constituted an abuse of discretion or was otherwise not in accordance with law.

Thus, we find no merit in Mr. Thorogood’s contentions.

#### IV

We have considered Mr. Thorogood’s remaining arguments and find them unpersuasive. Accordingly, for the foregoing reasons, we affirm the final decision of the Board.

#### **AFFIRMED**

#### **COSTS**

No costs.

**APPENDIX B**

**Order Denying Panel Rehearing and Rehearing En Banc**

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

**July 14, 2026**



NOTE: This order is nonprecedential.

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

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**MICHAEL G. THOROGOOD,**  
*Petitioner*

v.

**DEPARTMENT OF THE NAVY,**  
*Respondent*

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2026-1219

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Petition for review of the Merit Systems Protection  
Board in No. DC-0752-24-0319-I-1.

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**ON PETITION FOR PANEL REHEARING AND  
REHEARING EN BANC**

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Before MOORE, *Chief Judge*, LOURIE, DYK, PROST, REYNA,  
TARANTO, CHEN, HUGHES, STOLL, CUNNINGHAM, and  
STARK, *Circuit Judges*.<sup>1</sup>

PER CURIAM.

**ORDER**

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<sup>1</sup> Circuit Judge Newman did not participate.

On June 4, 2026, Michael G. Thorogood filed a combined petition for panel rehearing and rehearing en banc [ECF No. 44]. The petition was referred 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.

FOR THE COURT



Jarrett B. Perlow  
Clerk of Court

July 14, 2026  
Date

**APPENDIX C**

**Mandate**

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

**July 27, 2026**

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

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**MICHAEL G. THOROGOOD,**  
*Petitioner*

v.

**DEPARTMENT OF THE NAVY,**  
*Respondent*

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2026-1219

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Petition for review of the Merit Systems Protection  
Board in No. DC-0752-24-0319-I-1.

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**MANDATE**

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In accordance with the judgment of this Court, entered  
June 3, 2026, and pursuant to Rule 41 of the Federal Rules  
of Appellate Procedure, the formal mandate is hereby  
issued.

FOR THE COURT

July 27, 2026  
Date

  
Jarrett B. Perlow  
Clerk of Court

**APPENDIX D**

**Final Order of the Merit Systems Protection Board**

**November 25, 2025**

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

MICHAEL G. THOROGOOD,  
Appellant,

DOCKET NUMBER  
DC-0752-24-0319-I-1

v.

DEPARTMENT OF THE NAVY,  
Agency.

DATE: November 25, 2025

**THIS FINAL ORDER IS NONPRECEDENTIAL<sup>1</sup>**

Michael G. Thorogood, Norfolk, Virginia, pro se.

Debra Mosley Evans, Esquire, and Kimberly Karle, Esquire, Portsmouth,  
Virginia, for the agency.

**BEFORE**

Henry J. Kerner, Vice Chairman  
James J. Woodruff II, Member

**FINAL ORDER**

The appellant has filed a petition for review of the initial decision, which affirmed his indefinite suspension. On petition for review, the appellant argues that his position did not require access to classified information, the administrative judge abused his discretion and was biased against him, the agency's security clearance hearing did not follow required agency procedures,

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

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

The appellant alleges that the administrative judge abused his discretion and was biased against him. Petition for Review (PFR) File, Tab 2 at 10-12, 17-20. He bases these allegations on several claims. First, he alleges that he was not permitted to call all his requested witnesses at the hearing. *Id.* at 17-18, 21. He requested six witnesses, but the administrative judge's May 16, 2024 Order and Summary of Prehearing Conference did not approve two of them. Initial Appeal File (IAF), Tab 12 at 3-5. The administrative judge gave the parties 5 days to object to the order. *Id.* at 6. The appellant filed an objection on other issues but did not address the denial of these prospective witnesses. IAF, Tab 13. The Board has held that the failure to timely object to an administrative judge's disallowance of a witness at hearing precludes from doing so on petition for review. *Tarpley v. U.S. Postal Service*, 37 M.S.P.R. 579, 581 (1988). The appellant has provided no information that he made a timely objection.

Second, the appellant alleges that the administrative judge abused his discretion and was biased against him when ruling on the agency's objections during the hearing. PFR File, Tab 2 at 11. The Board's regulation, 5 C.F.R. § 1201.41(b) gives administrative judges broad discretion to conduct fair and impartial hearings. *Guzman v. Department of Veterans Affairs*, 114 M.S.P.R. 566 ¶ 12 (2010). The appellant alleges that he was not permitted to ask a witness a question about the appellant's job interview for the Logistics Management Specialist position. PFR File, Tab 2 at 11 (citing IAF, Tab 16 at 1:10:12-1:11:09). The administrative judge sustained the agency's objection, which was based on the question's relevance, but informed the appellant that he could ask the witness whether maintaining eligibility to access classified information was a requirement for the position he held in July 2023. IAF, Tab 16 at 1:10:25. Likewise, he alleges that the administrative judge did not permit him to ask another witness to identify the location in the Logistics Management Specialist position description where it lists the requirement to maintain access to classified information. PFR File, Tab 2 at 11 (citing IAF, Tab 16 at 1:56:05). The administrative judge sustained the agency's objection that the question had been asked and answered. IAF, Tab 16 at 1:56:16. The appellant had previously asked the same question and received an answer from the witness. *Id.* at 1:51:41.

Third, the appellant alleges that the administrative judge abused his discretion and was biased against him by not addressing in the initial decision a nonprecedential initial decision that the appellant mentioned during his closing argument and potentially conflicting statements made by a hearing witness on whether the appellant had access to classified information before the indefinite suspension. PFR File, Tab 2 at 11. An administrative judge's decision not to mention all the evidence of record does not mean that he did not consider it. *Marques v. Department of Health and Human Services*, 22 M.S.P.R. 129, 132 (1984) *aff'd*, 776 F.2d 1062 (Fed. Cir. 1985) (Table).



In making a claim of bias or prejudice against an administrative judge, a party must overcome the presumption of honesty and integrity that accompanies administrative adjudicators. *Oliver v. Department of Transportation*, 1 M.S.P.R. 382, 386 (1980). Moreover, an administrative judge's conduct during the course of a Board proceeding warrants a new adjudication only if the administrative judge's comments or actions evidence "a deep-seated favoritism or antagonism that would make fair judgment impossible." *Bieber v. Department of the Army*, 287 F.3d 1358, 1362-63 (Fed. Cir. 2002) (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)). The appellant's assertions fail to overcome the presumption of honesty and integrity afforded to administrative judges or show such deep-seated favoritism or antagonism to meet the necessary standard set forth above.

Furthermore, administrative judges have broad discretion in regulating the proceedings before them. *Ryan v. Department of the Air Force*, 117 M.S.P.R. 362, ¶ 5 (2012). We do not believe that the appellant has proven by preponderant evidence that any of his claims rise to the level of an abuse of discretion. Therefore, we find that these arguments provide no basis to disturb the initial decision.

#### NOTICE OF APPEAL RIGHTS<sup>2</sup>

You may obtain review of this final decision. 5 U.S.C. § 7703(a)(1). By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. 5 U.S.C. § 7703(b). Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their

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<sup>2</sup> Since the issuance of the initial decision in this matter, the Board may have updated the notice of review rights included in final decisions. As indicated in the notice, the Board cannot advise which option is most appropriate in any matter.

jurisdiction. If you wish to seek review of this final decision, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

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

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

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

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

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

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at <http://www.mspb.gov/probono> for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The

Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

**(2) Judicial or EEOC review of cases involving a claim of discrimination.** This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days after you receive** this decision. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. 420 (2017). If you have a representative in this case, and your representative receives this decision before you do, then you must file with the district court no later than **30 calendar days after your representative** receives this decision. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

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

[http://www.uscourts.gov/Court\\_Locator/CourtWebsites.aspx](http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx).

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. 5 U.S.C. § 7702(b)(1). You must file any such request with the EEOC's Office of Federal Operations within **30 calendar days after you receive** this decision. 5 U.S.C. § 7702(b)(1). If you have a representative in this case, and your representative receives this decision before you do, then you must file

with the EEOC no later than **30 calendar days** after your representative receives this decision.

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

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

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

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

**(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012.** This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and your judicial petition for review “raises no challenge to the Board’s disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D),” then you may file a petition for judicial review either with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction.<sup>3</sup> The court of appeals must receive your

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<sup>3</sup> The original statutory provision that provided for judicial review of certain whistleblower claims by any court of appeals of competent jurisdiction expired on December 27, 2017. The All Circuit Review Act, signed into law by the President on July 7, 2018, permanently allows appellants to file petitions for judicial review of MSPB decisions in certain whistleblower reprisal cases with the U.S. Court of Appeals for the Federal Circuit or any other circuit court of appeals of competent jurisdiction. The All Circuit Review Act is retroactive to November 26, 2017. Pub. L. No. 115-195, 132 Stat. 1510.

petition for review within **60 days** of the date of issuance of this decision.  
5 U.S.C. § 7703(b)(1)(B).

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

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

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

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

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

[http://www.uscourts.gov/Court\\_Locator/CourtWebsites.aspx](http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx).

FOR THE BOARD:

Washington, D.C.

*Gina K. Grippando*

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Gina K. Grippando  
Clerk of the Board

# CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent as indicated this day to each of the following:

## Appellant

Electronic Service      Michael Thorogood  
Served on email address registered with MSPB

## Agency Representative

Electronic Service      Debra Evans  
Served on email address registered with MSPB

## Agency Representative

Electronic Service      Kimberly Karle  
Served on email address registered with MSPB

11/25/2025

(Date)

*Markita Bryant*

Markita Bryant  
Paralegal Specialist

**APPENDIX E**

**Initial Decision of the Merit Systems Protection Board**

**October 3, 2024**

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD  
WASHINGTON REGIONAL OFFICE**

MICHAEL G. THOROGOOD,  
Appellant,

DOCKET NUMBER  
DC-0752-24-0319-I-1

v.

DEPARTMENT OF THE NAVY,  
Agency.

DATE: October 3, 2024

Michael G. Thorogood, Norfolk, Virginia, pro se.

Kimberly Karle, Esquire, and Debra Mosley Evans, Esquire, Portsmouth,  
Virginia, for the agency.

**BEFORE**  
Robert Fedder  
Administrative Judge

**INITIAL DECISION**

On February 8, 2024, the appellant filed an appeal with the Merit Systems Protection Board (Board) challenging the Department of the Navy's (agency) decision to indefinitely suspend him, effective January 28, 2024, for failure to meet a condition of employment. Appeal File (AF), Tab 1. The Board has jurisdiction over this appeal pursuant to 5 U.S.C. §§ 7511-7513. I held a hearing at the appellant's request on May 29, 2024. AF, Tab 16. For the reasons discussed below, the agency's indefinite suspension is AFFIRMED, and the appellant's claims of harmful procedural error are DENIED.

Background

At all times relevant to this appeal, the appellant served as a Logistics Management Specialist at the Norfolk Naval Shipyard. See AF, Tab 12 at 1



(stipulation #1). In that role, the appellant performed the duties set forth in position description #E116B. *Id.* (stipulation #2). On July 14, 2023, the Defense Counterintelligence and Security Agency (DCSA) revoked the appellant's eligibility to access classified information and/or to be assigned duties that have been designated national security sensitive. AF, Tab 5 at 84-86. Secondary to that revocation, on July 17, 2024, the Norfolk Naval Shipyard issued the appellant a separate notice informing him that his "access to classified information and sensitive duties have been revoked." *Id.* at 59-60. The Norfolk Naval Shipyard also informed the appellant that he was "prohibited from accessing any NAVSEA workspaces while awaiting any appeal" of DCSA's revocation decision. *Id.*

On September 5, 2023, the agency proposed to indefinitely suspend<sup>1</sup> the appellant "for failure to meet a condition of employment, revocation of eligibility for access to classified information and assignment to sensitive duties[.]" AF, Tab 5 at 55. On October 5, 2023, through his attorney and designated representative, the appellant submitted a written response (with exhibits). *Id.* at 24-54. On October 26, 2023, the agency issued its decision to indefinitely suspend the appellant, effective January 28, 2024.<sup>2</sup> *Id.* at 19-22. The decision informed the appellant that, beginning on January 28, 2024, he would "be carried in an indefinite suspension status (non-duty, non-pay status) until a final decision is made on [his] eligibility for access to classified information and assignment to sensitive duties." *Id.* at 20.

In his appeal to the Board, the appellant alleged that the agency denied him Union contact information during the adverse action process, and that the decision to indefinitely suspend him "was completely discriminatory[.]" AF, Tab

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<sup>1</sup> The agency had previously issued the appellant incomplete notices of proposed indefinite suspension on July 20, 2023 and July 28, 2023. See AF, Tab 5 at 61-64 and 65-68.

<sup>2</sup> At the appellant's request, the agency permitted the appellant to use accrued leave or leave without pay from the date of its decision until January 28, 2024. *Id.* at 20.

1 at 2. The appellant also alleged that the subsequent Defense Office of Hearings and Appeals' (DOHA) decision to sustain the revocation of his eligibility to access classified information was incorrect, including that DOHA's decision was "biased" and failed to evaluate him under the "Whole Person" standard. *Id.* In the appellant's view, the DOHA Judge's "opinion [was] completely opposite of what was in the record and on the transcript, and the facts of the case." *Id.*

The agency proved its charge

In this appeal, the agency indefinitely suspended the appellant for failure to meet a condition of employment based upon the revocation of his eligibility to access classified information or to be assigned sensitive duties. AF, Tab 1 at 10. A government employee has no "right" to a security clearance. *Hornseth v. Department of the Navy*, 916 F.3d 1369, 1373 (Fed. Cir. 2019) (citing *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988)); *Gargiulo v. Department of Homeland Security*, 727 F.3d 1181, 1184-85 (Fed. Cir. 2013). When an employee files a Board appeal challenging an adverse action based on the suspension or revocation of a security clearance or eligibility to access classified information, the Board does not have authority to review the substance of the underlying security clearance/eligibility determination. *Egan*, 484 U.S. 518, 530-31 (1988); *Cheney v. Department of Justice*, 479 F.3d 1343, 1352 (Fed. Cir. 2007); *Palafox v. Department of the Navy*, 124 M.S.P.R. 54, ¶ 8 (2016); *Rodgers v. Department of Defense*, 122 M.S.P.R. 671, ¶ 5 (2015); *Ryan v. Department of Homeland Security*, 121 M.S.P.R. 460, ¶ 5 (2014), *overruled in unrelated part by Freeze v. Department of the Navy*, 122 M.S.P.R. 179, fn. 2 (2015). Similarly, "the Board does not have the authority to review an agency's reasons for imposing a security clearance requirement" for a position. *Gamboa v. Department of the Air Force*, 120 M.S.P.R. 594, ¶ 5; *see also West v. Department of the Navy*, 63 M.S.P.R. 86, 88-89 (1994) ("It is well settled that

the Board lacks authority to review the agency's reasons for imposing a security requirement as a condition of employment for a position."').<sup>3</sup>

Rather, the scope of the Board's review in such matters is limited to: 1) whether the clearance or eligibility for a clearance is a requirement of the appellant's position, 2) whether the clearance/eligibility was suspended, revoked or denied, and 3) whether the agency followed the procedures set forth in 5 U.S.C. § 7513 when it took the related adverse action. *Hornseth*, 916 F.3d at 1374; *Gargiulo*, 727 F.3d at 1184-85; *Hesse v. Department of State*, 217 F.3d 1372, 1376 (Fed. Cir. 2000); *Palafox*, 124 M.S.P.R. 54, ¶ 8; *Rodgers*, 122 M.S.P.R. 671, ¶ 5; *Munoz v. Department of Homeland Security*, 121 M.S.P.R. 483, ¶ 7 (2014); *Ryan*, 121 M.S.P.R. 460, ¶ 5.<sup>4</sup>

At the hearing, the agency demonstrated that the appellant's position, Logistics Management Specialist, required that he maintain his eligibility to access classified information, or to be assigned to sensitive duties. AF, Tab 16 (Hearing Recording – testimony of Hyater, Hackney and Dalphonse); *see also* Tab 5 at 76-77. In fact, every position at the Norfolk Naval Shipyard requires that the occupant hold and maintain eligibility to be assigned and perform sensitive duties. *Id.* (HR -- testimony of Hyater and Hackney). At the same time, the appellant presented testimony that he periodically would work from home, and performed some of his duties while on situational telework. *Id.* (HR – testimony of Sprenger). He also presented evidence suggesting that his job rarely

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<sup>3</sup> The Board's reviewing court has also made clear the Board and courts are prohibited from reviewing an agency's determination to classify the sensitivity level of the position. *Kaplan v. Conyers*, 733 F.3d 1148, 1155, 1160 (Fed. Cir. 2013); *see also Brown v. Department of Defense*, 646 F. App'x 989, 992 (Fed. Cir. 2016) ("An agency's ultimate eligibility determination is unreviewable.").

<sup>4</sup> To be valid, an indefinite suspension action must have an ascertainable end, that is, a determinable condition subsequent that will bring the suspension to a conclusion. 5 U.S.C. § 7513(a); *Freeze v. Department of the Navy*, 122 M.S.P.R. 179, ¶ 10 (2015) (citations omitted).

(if ever) required him to actually access classified information. *Id.* (HR – testimony of Sprenger).

Despite the evidence that the appellant could perform some work from home and did not ordinarily access classified information, the agency showed that the appellant's position was to be performed on-base, at the Norfolk Naval Shipyard. *See* AF, Tab 16 (HR – testimony of Hyater and Hackney); Tab 5 at 72. To access his workspace and fulfil that role, the appellant had to maintain his eligibility to access classified information and be assigned to sensitive duties. *Id.* (HR – testimony of Hyater, Hackney and Dalphonse); *see also* AF, Tab 5 at 76. While working from home, the appellant could only access the agency's unclassified network and could not perform any work using the network applications designated as sensitive. *Id.* (HR – testimony of Sprenger). As a consequence, I find that the agency proved that eligibility to access classified information or be assigned sensitive duties was a requirement of the appellant's position, despite his history of performing some of his work from home. *Id.* (HR – testimony of Hyater, Hackney and Dalphonse); *see also* AF, Tab 5 at 76.

Next, the agency proved that, on July 14, 2023, DCSA revoked the appellant's eligibility to access classified information and/or assignment to duties that have been designated national security sensitive. *See* AF, Tab 5 at 84-86; Tab 12 at 1 (stipulation #3<sup>5</sup>). Moreover, once DCSA revoked the appellant's eligibility to access classified information, or to be assigned sensitive duties, the local command had no authority to override or disregard that decision. AF, Tab 16 (HR – testimony of Hyater).

Lastly, the evidence at hearing showed that the agency followed the adverse action procedures set forth in 5 U.S.C. § 7513 when it indefinitely

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<sup>5</sup> In a submission objecting to my Order and Summary of Prehearing Conference, the appellant denied that he had agreed to stipulation #4 (i.e., that Norfolk Naval Shipyard had suspended his access to classified information or to be assigned a sensitive position). AF, Tab 13 at 4. However, he did not dispute that DCSA revoked his eligibility to access classified information or to be assigned sensitive duties. *Id.*

suspended the appellant. Under 5 U.S.C. § 7513(b), an employee is entitled to 1) at least 30 days' advanced written notice of the reasons for the proposed action, 2) a reasonable time to answer orally and in writing and to furnish evidence, 3) the opportunity to be represented by an attorney or other representative, and 4) a written decision explaining the reasons for the action. *See* 5 U.S.C. § 7513(b); *Drumheller v. Department of the Army*, 49 F.3d 1566, 1570 (Fed. Cir. 1995).

Here, the agency issued the appellant a Notice of Proposed Indefinite Suspension on September 5, 2023.<sup>6</sup> AF, Tab 5 at 55-58. In that notice, the agency explained that the proposed suspension was based on “failure to meet a condition of employment, revocation of eligibility for access to classified information and assignment to sensitive duties[.]” *Id.* at 55. It also informed the appellant that, if effected, the indefinite suspension “will occur no earlier than thirty (30) calendar days from the date you receive this notice.” *Id.* After a written and oral reply from the appellant, the agency issued a written decision on October 26, 2023. *Id.* at 19-22. Based on this evidence, I find the agency complied with the requirements of 5 U.S.C. § 7513(b)(1).

During this process, the appellant secured, and was represented by, legal counsel. *See* AF, Tab 5 at 24-25 and 79-83. On his behalf, legal counsel requested information from the agency, obtained an extension of time to respond to the agency's proposal, and later presented both a written and oral reply to the agency's proposed action. *See id.* In light of that evidence, I find that the agency afforded the appellant and his legal counsel a reasonable time (greater than 7 days) to answer the proposal in writing and orally. *See id.* The agency also permitted the appellant to furnish documentary evidence as part of his reply to the proposal. *See id.* at 26-54. Accordingly, I find the agency satisfied the requirements of 5 U.S.C. § 7513(b)(2).

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<sup>6</sup> The appellant had also been issued two prior proposals – on July 20, 2023 and July 28, 2023 – that contained administrative errors. *See* AF, Tab 5 at 61-64 and 65-68.

Despite having legal counsel while the proposal was pending, the appellant claimed the agency failed to respond to his concurrent requests for his local union leadership's contact information. For this reason, the appellant argued that he was denied the representation described in 5 U.S.C. § 7513(b)(3). *See* AF, Tab 11 at 21 (Admitted as Appellant Ex. C-2). Under subsection 7513(b)(3), however, an employee against whom an action is proposed is entitled to "be represented by an attorney or other representative." 5 U.S.C. § 7513(b)(3) (emphasis added). Contrary to the appellant's claim, this provision of law clearly does not entitle an employee to both legal counsel and a union representative while an adverse action is pending. *Id.* Moreover, nothing in this provision indicates the agency must facilitate, arrange for, or coordinate contact between the employee and his union leadership.<sup>7</sup> *Id.* Based on the evidence the appellant was represented by legal counsel for his written and oral replies, and the absence of any evidence the agency denied (or would have denied) a duly designated union representative, I find the agency satisfied the requirements of 5 U.S.C. § 7513(b)(3).

Lastly, the evidence showed that the agency issued the appellant a written decision sustaining the indefinite suspension, which provided the reasons for the action. AF, Tab 5 at 19-20. In particular, the agency's decision informed the appellant that his position required eligibility to access classified information and to be assigned sensitive duties, and that as long as his eligibility was revoked he was unable to meet a condition of his position and employment. *Id.* at 19. The decision also indicated that the indefinite suspension would continue until a final decision was made on the appellant's eligibility. *Id.* at 20. For these reasons, I find the agency proved that it followed the procedures set forth in 5 U.S.C. § 7513(b)(4).

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<sup>7</sup> There was also no evidence at hearing that, had the appellant designated a union representative, the agency would have denied their participation during the indefinite suspension process. *See* AF, Tab 16 (HR).

In broader terms, the appellant also argued that the agency failed to comply with 5 U.S.C. § 7513(b) because the agency file did not contain a summary of the oral reply, or the final PSAB decision,<sup>8</sup> and that the agency could not have complied with 5 U.S.C. § 7513(b) because the deciding official could not recite the statute at the hearing. *See* AF, Tab 16 (HR). These arguments are not persuasive. Nothing in 5 U.S.C. § 7513(b) supports the appellant's contentions as to the content of the agency file; nor did he present any evidence the deciding official relied on an undisclosed written summary from the oral reply. *See id.* There was likewise no evidence the deciding official considered the PSAB decision -- which was not available in October 2023 -- when she decided to indefinitely suspend the appellant. *See id.* Finally, I find that the deciding official's inability to recite section 7513 from memory is not probative evidence that the agency failed to adhere to the statute when effecting the appellant's indefinite suspension.

The appellant failed to prove his affirmative defense of harmful procedural error

In addition to the procedural protections afforded pursuant to 5 U.S.C. § 7513, the Board will also consider whether the agency complied with the adverse action and clearance revocation procedures established by its own regulations and/or policies. *Romero v. Department of Defense*, 527 F.3d 1324, 1328 (Fed. Cir. 2008); *Ryan*, 121 M.S.P.R. 460, ¶ 5; *Rothlisberger v. Department of the Army*, 111 M.S.P.R. 662, ¶ 14 (2008). In the event the agency fails to do so, the action will be reversed if the employee can demonstrate the agency's error was harmful, i.e., that the outcome of the action would have likely been different in the absence of the procedural error. *Romero*, 527 F.3d at 1328; *Rothlisberger*, 111 M.S.P.R. 662, ¶ 14. The Board may not review the merits of the revocation decision when considering whether the agency committed error. *See Ryan v. Department of Homeland Security*, 793 F.3d 1368, 1373, 1375 (Fed. Cir. 2015);

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<sup>8</sup> Below, I also discuss these claims within the context of the appellant's harmful procedural error affirmative defenses.

*Hesse*, 217 F.3d at 1376 (the MSPB is not authorized to review security clearance determinations or agency actions based on security clearance determinations).

In his initial appeal and at the hearing, the appellant alleged that the DOHA Judge's incorrect evidentiary rulings, the DOHA Judge's erroneous factual determinations, and the DOHA Judge's omission of information that otherwise would have been favorable to the appellant, all show bias and constitute harmful procedural errors in the agency's indefinite suspension action. *See* AF, Tab 1 at 2; Tab 11 at 4 and 7; Tab 16. The appellant also claimed that these errors ultimately caused the PSAB to incorrectly uphold the revocation of his eligibility to access classified information or to be assigned sensitive duties. *See* AF, Tab 1 at 2. The appellant's claims of harmful procedural error in this regard are not persuasive for several reasons.

First, the appellant was indefinitely suspended based on the decision by the DCSA, in July 2023, to revoke his eligibility to access classified information or to be assigned sensitive duties. *See* AF, Tab 5 at 19-20 (indefinite suspension decision letter referring to revocation) and 55-58 (proposal identifying DCSA revocation as basis for indefinite suspension). The appellant even stipulated that DCSA had, in fact, revoked his eligibility to access classified information and/or to be assigned sensitive duties. AF, Tab 12 at 1. The errors the appellant alleges all occurred after the DCSA's decision to revoke his eligibility, which constituted the sole basis for his indefinite suspension. *Compare* AF, Tab 5 at 19-20, 55-58 *with* Tab 5 at 54; Tab 13 at 4-6. Accordingly, any purported error(s) during the subsequent DOHA hearing and decision could not have affected the outcome in the agency's decision to indefinitely suspend the appellant based on DCSA's revocation.

Second, in order to consider and adjudicate the appellant's claims the DOHA Judge and/or the PSAB committed error, the Board would have to pass some measure of judgment upon the merits of those revocation decisions. In particular, the appellant claimed his DOHA hearing was an "unfair and partial



proceeding.” See e.g., AF, Tab 13 at 4-6. To determine whether the appellant has proved error in this regard, the Board must evaluate whether the DOHA Judge properly admitted certain evidence, made sound factual findings, and/or properly applied the adjudicative guidelines in a manner consistent with the “whole person” concept.<sup>9</sup> See *id.* The appellant’s argument seeks to have the Board render judgment on whether the DOHA Judge and PSAB offered the appellant a *meaningful* hearing and decision. The appellant’s argument, and request of the Board, is inconsistent with the well-established limits established in *Department of the Navy v. Egan* on the Board’s authority. See *Ryan*, 793 F.3d at 1375; *Hesse*, 217 F.3d at 1376.

Third, under the harmful procedural error standard, the Board must also assess whether the outcome at DOHA or the PSAB would have likely been different had the errors the appellant complained of not occurred. See *Romero*, 527 F.3d at 1328; *Rothlisberger*, 111 M.S.P.R. 662, ¶ 14. This too involves the Board second-guessing the DOHA Judge and/or the PSAB by deciding whether “correct” factual findings would change the determination(s) to revoke the appellant’s eligibility to access classified information. The exercise of the Board deciding what would – and would not – alter outcomes in a revocation decision is equally inconsistent with the well-established limits on Board authority established by *Egan*. See *Ryan*, 793 F.3d at 1375; *Hesse*, 217 F.3d at 1376.

Furthermore, the evidence at hearing showed that the agency ultimately followed the procedures set forth in SECNAV Instruction 5510 and Department of Defense Manual 5200.02. See AF, Tab 5 at 91-132 (SECNAV INST 5510) and 145-46 (section 10 of DoD Manual 5200.02). The appellant was afforded a DOHA hearing, a DOHA written decision explaining its reasons, and an appeal to the PSAB, during all of which the appellant contested DCSA’s revocation and the

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<sup>9</sup> The appellant also sought to question witnesses, and introduce documents, about purported deficiencies in the DOHA Judge’s decision. I denied those requests because the evidence the appellant sought to introduce went to matters beyond the scope of the Board’s authority (i.e., the merits of the security clearance determinations).

reasons therefor. He was also provided with a written decision from PSAB upholding the revocation of his eligibility to access classified information or to be assigned sensitive duties. Lastly, the agency also demonstrated that it had no regulation or policy to reassign the appellant to a position without an eligibility or clearance requirement. *See id.* at 23. For these reasons, I find the agency demonstrated that it followed its own procedures during the revocation and when it effected the indefinite suspension.

As to the appellant's other claims of harmful procedural error, I find that he failed to demonstrate that had the agency file contained a summary of the oral reply, or a copy of the final PSAB decision, it would have changed the outcome of his indefinite suspension. As discussed above, the indefinite suspension was based on DCSA's revocation of the appellant's eligibility and the appellant stipulated that DCSA, in fact, revoked his eligibility in July 2023. Moreover, the appellant failed to explain or prove how a summary of his oral reply would have altered the agency's decision to indefinitely suspend him, especially in light of the deciding official's credible testimony that she carefully considered the matters discussed during the oral reply before deciding to indefinitely suspend the appellant. *See AF, Tab 16 (HR – testimony of Dalphonse).*

For all the foregoing reasons, I find the appellant failed to prove by preponderant evidence that the agency committed a procedural error in the application of its own procedures, or that any such presumed error(s) would have changed the outcome in the agency's indefinite suspension action. Accordingly, the appellant failed to prove his affirmative defenses of harmful procedural error.<sup>10</sup>

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<sup>10</sup> As noted, the appellant also claimed the indefinite suspension – and more specifically the revocation decisions – were discriminatory. *See AF, Tab 1 at 2.* As noted in my Order and Summary of Prehearing Conference, however, “the Board is not permitted to adjudicate whether an agency's adverse action, which is premised on the suspension or revocation of a security clearance, constitutes impermissible discrimination or reprisal.” *Putnam v. Department of Homeland Security*, 121 M.S.P.R. 532, ¶ 18 (2014).

### Conclusion

As detailed above, I find the agency proved by preponderant evidence that eligibility to access classified information or sensitive duties was a requirement of the appellant's position, the appellant's eligibility was revoked, and that the agency followed the procedures set forth in 5 U.S.C. § 7513. I further find that the agency followed the procedures set forth in its own policies when effecting the appellant's indefinite suspension. As to nexus and penalty, it is well settled that the failure to meet the requirements of a position will support adverse actions such as an indefinite suspension. *See Flores v. Department of Defense*, 121 M.S.P.R. 287, ¶ 12 (2014). At the same time, the appellant failed to prove his affirmative defenses. Accordingly, the agency's decision to indefinitely suspend the appellant is AFFIRMED.

**DECISION**

The agency's action is AFFIRMED.

*Robert Fedder*

FOR THE BOARD:

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Robert Fedder  
Administrative Judge

**NOTICE TO APPELLANT**

This initial decision will become final on **November 7, 2024**, unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with one of the authorities discussed in the "Notice of Appeal Rights" section, below. The paragraphs that follow tell you how and when to file with the Board or one of those authorities. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

**BOARD REVIEW**

You may request Board review of this initial decision by filing a petition for review.

If the other party has already filed a timely petition for review, you may file a cross petition for review. Your petition or cross petition for review must

state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file it with:

The Clerk of the Board  
Merit Systems Protection Board  
1615 M Street, NW.  
Washington, DC 20419

A petition or cross petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (<https://e-appeal.mspb.gov/>).

#### **Criteria for Granting a Petition or Cross Petition for Review**

Pursuant to 5 C.F.R. § 1201.115, the Board normally will consider only issues raised in a timely filed petition or cross petition for review. Situations in which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that:

(a) The initial decision contains erroneous findings of material fact. (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

(b) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The petitioner must explain how the error affected the outcome of the case.

(c) The judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case.

(d) New and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed.

As stated in 5 C.F.R. § 1201.114(h), a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

If you file a petition or cross petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. A petition for review must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date

you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

A cross petition for review must be filed within 25 days after the date of service of the petition for review.

#### **NOTICE TO AGENCY/INTERVENOR**

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

#### **NOTICE OF APPEAL RIGHTS**

You may obtain review of this initial decision only after it becomes final, as explained in the "Notice to Appellant" section above. 5 U.S.C. § 7703(a)(1). By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. 5 U.S.C. § 7703(b). Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a

statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this decision when it becomes final, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

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

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

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

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

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

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at <http://www.mspb.gov/probono> for information regarding pro bono representation



for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

**(2) Judicial or EEOC review of cases involving a claim of discrimination.** This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days after this decision becomes final** under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. 420 (2017). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

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

[http://www.uscourts.gov/Court\\_Locator/CourtWebsites.aspx](http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx).

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. 5 U.S.C. § 7702(b)(1). You must file any such request with the EEOC's Office of Federal Operations within **30 calendar days after this decision becomes final** as explained above. 5 U.S.C. § 7702(b)(1).

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

Office of Federal Operations  
Equal Employment Opportunity Commission

P.O. Box 77960  
Washington, D.C. 20013

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

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

**(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012.** This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and your judicial petition for review “raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8) or 2302(b)(9)(A)(i), (B), (C), or (D),” then you may file a petition for judicial review with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. The court of appeals must receive your petition for review within **60 days of the date this decision becomes final** under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(1)(B).

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

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

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, [www.cafc.uscourts.gov](http://www.cafc.uscourts.gov). Of particular

relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is

contained within the court's Rules of Practice, and Forms 2, 6, 10, and 11.

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

Contact information for the courts of appeals can be found at their

respective websites, which can be accessed through the link below:

[http://www.uscourts.gov/Court\\_Location/CourtWebsites.aspx](http://www.uscourts.gov/Court_Location/CourtWebsites.aspx)

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent as indicated this day to each of the following:

Appellant

Electronic Service      Michael Thorogood  
Served on email address registered with MSPB

Agency Representative

Electronic Service      Debra Evans  
Served on email address registered with MSPB

Agency Representative

Electronic Service      Kimberly Karle  
Served on email address registered with MSPB

10/03/2024

(Date)

*Jeremy Meyers*

Jeremy Meyers

Supervisory Paralegal Specialist

**Additional material  
from this filing is  
available in the  
Clerk's Office.**