

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

SHERMAN S. STARTZ, JR.,)	
)	
Petitioner,)	
)	
v.)	No. 25-1375
)	
DEPARTMENT OF THE ARMY,)	
)	
Respondent.)	

**RESPONDENT’S RESPONSE TO PETITIONER’S
MOTION TO SUPPLEMENT THE RECORD
OR, IN THE ALTERNATIVE, FOR REMAND**

Pursuant to Federal Rule of Appellate Procedure 27(a)(3), respondent, the Department of the Army, respectfully provides this response to the petitioner’s motion to supplement the record or, in the alternative, for remand, filed on May 7, 2025. *See* Pet. Mot., ECF No. 21. Mr. Startz seeks to supplement the record with documents from multiple Freedom of Information Act (FOIA) requests that he believes may support his appeal. Pet. Mot. at 1-2. This Court should deny Mr. Startz’s motion because litigants may not supplement the record on appeal with documents that the Merit Systems Protection Board (MSPB or board) did not consider.

Federal Rule of Appellate Procedure 16(a) provides that:

The record on review or enforcement of an agency order consists of:

- (1) the order involved;
- (2) any findings or report on which it is based; and

- (3) the pleadings, evidence, and other parts of the proceedings before the agency.

This Court has explained that the “general rule on supplementing the record with new evidence is that ‘appellate courts . . . can act on no evidence which was not before the court below, nor receive any paper that was not used at the hearing.’” *Coplin v. United States*, 761 F.2d 688, 691 (Fed. Cir. 1985) (citation omitted). This Court has consistently confirmed the principle that appellate courts will not review evidence that was not presented to the tribunal or administrative agency below. *See, e.g., Ballard Med. Products v. Wright*, 821 F.2d 642, 643 (Fed. Cir. 1987) (“appellate court may consider only the record as it was made before the [trial] court”). Thus, “items [that] were not presented to the Board . . . are not part of the record on appeal and are not properly before” this Court. *Turman-Kent v. MSPB*, 657 F.3d 1280, 1283 (Fed. Cir. 2011); *see also Cruz v. Dep’t of the Navy*, 934 F.2d 1240, 1245 n.6 (Fed. Cir. 1991) (refusing to consider evidence that was not before the MSPB and not part of the record on appeal). The time to build the record was before the board, not on appeal.

The authorities cited by Mr. Startz do not support efforts to supplement the appellate record with new documents. First, Federal Rule of Appellate Procedure 10(e)(2)(B) allows for a corrected supplemental record to be filed from a district court only where information “material to either party is omitted from . . . the existing record by error or accident.” Second, Mr. Startz appears to argue that alleged misstatements of fact from the Army allow him to supplement the record. Pet. Mot.

at 1. Specifically, he references the Army's statement in its response brief that, before the board, "there was no record evidence that OIG took any action with respect to Mr. Startz's hotline complaint," ECF No. 18 at 3, as well as a March 28, 2025, email providing Army's position on his motion for an extension of time. Ex. 1. But the proposed supplemental documents he presents do not demonstrate that either statement is incorrect, and even if they did, any misstatements would not provide grounds for Mr. Startz to supplement the record. Finally, 5 U.S.C. § 7703(c) sets out this Court's standard of review in MSPB appeals and does not address supplementing the appellate record.

With respect to remand, we note that Federal Circuit Rule 27(f) allows motions for remand at this stage only as a joint or unopposed motion, and we have not consented to such a motion. Mr. Startz cites cases from the Supreme Court and Federal Circuit that discuss remand in other contexts, but they do not support a remand in the present case. Pet. Mot. at 1. The Army, after reviewing the documents attached to the motion, believes any remand to the board would be futile, as the proposed documents would not affect the board's decision. Thus, as we set forth in our response brief, the appropriate disposition of this appeal is to affirm the board's decision.

Respectfully submitted,

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May 16, 2025

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. Procedure 32(g), this response complies with the type-volume limitation. This response was prepared using Microsoft Word Garamond 14-point font. In making this certification, I have relied upon the word count function of the Microsoft Word processing system used to prepare this brief. According to the word count, this response contains 656 words.

CERTIFICATE OF SERVICE

I hereby certify that, on May 16, 2025, I caused a true and correct copy of the foregoing **DEFENDANT-APPELLEE'S RESPONSE TO THE COURT'S ORDER REGARDING JURISDICTION** to be served by mail on the below individual at the following address:

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550 Lebo Boulevard #34
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/s/ Blake W. Cowman

Blake W. Cowman