

SHERMAN S. STARTZ v. DEPARTMENT OF THE ARMY

Docket # SF-1221-23-0258-W-1

Agency Motion to Dismiss Tabs D part E

Summary Page

Case Title : SHERMAN S. STARTZ v. DEPARTMENT OF THE ARMY

Docket Number : SF-1221-23-0258-W-1

Pleading Title : Agency Motion to Dismiss Tabs D part E

Filer's Name : Gwendolyn L. Smith, Esq.

Filer's Pleading Role : Agency Representative

Details about the supporting documentation

N/A

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Agency Motion to Dismiss Tabs D part E

Online Interview

1. Would you like to enter the text online or upload a file containing the pleading?

See attached pleading text document

2. Does your pleading assert facts that you know from your personal knowledge?

Yes

3. Do you declare, under penalty of perjury, that the facts stated in this pleading are true and correct?

Yes



DEPARTMENT OF THE ARMY
INSTALLATION MANAGEMENT COMMAND
HEADQUARTERS, U.S. ARMY GARRISON ALASKA
1046 MARKS ROAD #6000
FORT WAINWRIGHT, ALASKA 99703-6000

AMIM-AKP-G

27 June 2022

MEMORANDUM FOR: Sherman Startz, Jr, US Army Installation Management CMD,
US Army Garrison Alaska, Directorate of Public Works, Engineering Division, Contract
Management Branch, Fort Wainwright, AK 99703

SUBJECT: Notice of Discharge During Probationary Period

1. This memorandum is to notify you that you will be discharged during your probationary period from your position of Construction Control Inspector, GS-0809-09. The effective date of your discharge will be 27 June 2022.
2. During the probationary period, I must consider your performance and conduct to determine your fitness for continued employment. Your inability to maintain professional working relationships with your coworkers and the Contractors you are assigned to is having a detrimental effect on the organization. Based on your inability to adapt to our working environment, I have decided to terminate your employment during your probationary period.
3. Because of the nature of your appointment, you do not have the right to reply to this notice or to file a grievance. Furthermore, you have only limited appeal rights to the Merit Systems Protection Board (MSPB) as employees serving a probationary period are not considered employees under 5 U.S.C. §7511(a)(1). However, if you believe that this personnel action discriminated against you on the basis of partisan political reasons or marital status you have the right to appeal this decision to the MSPB. **Filing Deadline:** You must file an appeal with the MSPB within **30 calendar days** of the effective date of this action, or the date you received this decision, whichever is later. If the 30th calendar day falls on a Saturday, Sunday, or a Federal holiday, the filing deadline is extended to the next working day.

How to File an Appeal: You can file by mail or facsimile or by using the electronic filing option on the MSPB website. Although an MSPB appeal may be in any format, it must be in writing and contain all of the information specified in the Board's regulations, found in Title 5, Code of Federal Regulations (CFR), Part 1201. The regulations and an appeal form are available on the MSPB's website, <https://www.mspb.gov>. You may file a hard-copy appeal by personal delivery, facsimile, mail or commercial overnight delivery service to the MSPB Western Regional Office at the following address:

Western Regional Office
201 Mission Street
Suite 2310

AMIM-AKP-G

SUBJECT: Notice of Discharge During Probationary Period

San Francisco, California 94105-1831

Facsimile No.: (415) 904-0580

If you prefer to file your appeal electronically, please visit the Board's e-Appeal Online:
<https://e-appeal.mspb.gov>.

Agency Contact Information for the MSPB: In the event you elect to file an MSPB appeal, the Board should send the Acknowledgment Order and a copy of your appeal to the following Department of the Army ("Agency") representative:

Labor and Employment Law Attorney
Fort Wainwright Law Center
ATTN: APVR-WJA (Labor Law)
1046 Marks Road #5700
Fort Wainwright, AK 99703-5700

In addition, please provide a copy of any appeal you may file to the Agency representative identified above at the time you file it with the Board.

4. If you allege that this removal action is based on discrimination because of race, color, religion, sex, national origin, age, physical or mental disability, genetic information and/or reprisal for prior protected EEO activity, and you did not file an appeal to the MSPB, you may file an EEO complaint not later than 45 days after the effective date of your discharge. An EEO complaint should be addressed to the Equal Employment Opportunity Officer at: Equal Employment Opportunity Office, ATTN: IMFW-EE, 1060 Gaffney Road #4000, Bldg 1045 Rm 17, Ft Wainwright, Alaska 99703-4000.

5. Please acknowledge receipt of this memorandum by signing and dating below. A refusal to sign will not void the contents of this memorandum.

DAVID ZRNA
Chief, Contract Management Branch



refused to sign
Sherman Startz, Jr.

1410hr 27 Jun 22 Rg

27 June 2022
Date

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

SHERMAN S. STARTZ,
Appellant,

DOCKET NUMBER
SF-315H-22-0532-I-1

v.

DEPARTMENT OF THE ARMY,
Agency.

DATE: September 9, 2022

Sherman S. Startz, Fairbanks, Alaska, pro se.

Charles Eiser, Fort Wainwright, Alaska, for the agency.

Pacific Region, Fort Shafter, Hawaii, for the agency.

BEFORE

Michael S. Shachat
Administrative Judge

INITIAL DECISION

INTRODUCTION

The appellant timely filed an appeal from the agency's decision to remove him during his probationary period from the competitive service position of Construction Control Inspector, GS-0809-9, and requested a hearing. *See* Initial Appeal File (IAF), Tab 1. The agency thereafter filed a motion to dismiss the appeal for lack of jurisdiction. IAF, Tabs 6 and 7.

For the reasons discussed below, the agency's motion to dismiss is GRANTED and the appeal is DISMISSED for lack of jurisdiction, without a hearing.

ANALYSIS AND FINDINGS

Background

On January 31, 2022, the appellant received a career-conditional appointment in the competitive service to the position of Construction Control Inspector, GS-0809-9, at the agency's United States Army Installation Management Command, United States Army Garrison Alaska, located in Fort Wainright, Alaska. IAF, Tab 6 at 7-9. This position was made subject to a two-year probationary period. *Id.* at 9. The Standard Form (SF) 50, Notification of Personnel Action, memorializing the appellant's appointment noted in part that the "Appointment is subject to completion of two year initial probationary period beginning 31-JAN-2022." *Id.*

On June 27, 2022, the agency terminated the appellant during his probationary period based on what it alleged was his inability to maintain professional working relationships with his coworkers and with agency contractors. *Id.* at 11-12. The appellant's removal was effective that same day. *Id.* at 12, 13.

This appeal followed. IAF, Tab 1. In my August 8, 2022, Acknowledgment Order, I advised the appellant that the Board may not have jurisdiction over the action he was appealing, explained the limited Board appeal rights of certain employees with less than two years of current, continuous service in the same or similar position, and notified the appellant of his burden of proving Board jurisdiction. *See* IAF, Tab 2. I informed the appellant that he must make nonfrivolous claims that his termination was based on partisan

political reasons, marital status, or matters that occurred before his appointment and directed him to file evidence and argument to establish Board jurisdiction over his termination within 15 calendar days of the Acknowledgment Order. *Id.* The appellant was also advised of the ways in which he could challenge his status as a probationary employee. *Id.* I also advised the appellant that his appeal might be premature to the extent the Board would otherwise have jurisdiction over it, as it appeared that he may have filed an EEO complaint with the agency on the same matter. *Id.* at 6. Finally, I notified the appellant that his appeal appeared to be untimely, and provided him with the necessary information concerning the timeliness issue and steps the appellant must take to show that the Board should not dismiss the appeal as untimely. *Id.* at 7-10.

The appellant did not timely respond to my Acknowledgment Order. The agency timely submitted the agency file and moved to dismiss the appeal based on a lack of jurisdiction, arguing that the appellant was legitimately terminated during his 2-year probationary period for his inability to maintain professional working relationships with co-workers and contractors. IAF, Tabs 6 and 7. The agency also moved to dismiss the appeal as untimely, arguing that he filed his appeal six days late and had not demonstrated good cause for the late filing. IAF, Tab 7 at 4. The appellant thereafter filed a series of pleadings, raising both procedural questions and attempting to directly respond to the jurisdictional question at issue here. IAF, Tabs 8-12.¹ The primary focus of the appellant's jurisdictional argument is that he had uncovered fraudulent or shoddy practices on the part of one of the agency's contractors, and was unfairly terminated when

¹ While the appellant's pleadings were not timely filed in response to the Board's Acknowledgment Order, they were filed within the 10-day period allowed by the Board for responses to opposing party motions – in this case, the agency's motion to dismiss – and I am therefore considering the appellant's filings to be timely filed for that purpose. *See* 5 C.F.R. § 1201.55(b).

he openly brought his concerns to his superiors and asked to be placed in a work environment away from the contractor in question. *See, e.g.*, IAF, Tab 9 at 4-5; Tab 10 at 3-4.

Applicable Law and Findings

The Board's jurisdiction is not plenary; rather, it is limited to those matters over which the Board has been given jurisdiction by statute or regulation. *See* 5 U.S.C. § 7701(a); *Nordhoff v. Department of the Navy*, 78 M.S.P.R. 88, 90-91 (1998), *aff'd*, 185 F.3d 886 (Fed. Cir. 1999) (Table). The appellant has the burden of proving by preponderant evidence² that the Board has jurisdiction over this appeal. *See* 5 C.F.R. § 1201.56(b)(2)(i)(A). In order for the appellant to have a right to a hearing on the issue of jurisdiction, the appellant must first make nonfrivolous allegations that, if proven, would establish Board jurisdiction. *See Garcia v. Department of Homeland Security*, 437 F.3d 1322, 1344 (Fed. Cir. 2006). A nonfrivolous allegation is an assertion that, if proven, could establish the matter at issue.³

As a general rule, an individual employed in a competitive service position may appeal an adverse action, such as a removal, to the Board only if he meets the definition of an employee under 5 U.S.C. § 7511. *Claiborne v. Department of Veterans Affairs*, 118 M.S.P.R. 491, ¶ 6 (2012). To qualify as an "employee" with appeal rights under 5 U.S.C. Chapter 75, an individual appointed on or after November 26, 2015, to a permanent position in the competitive service in the

² A preponderance of the evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.4(q).

³ An allegation generally will be considered nonfrivolous when, under oath or penalty of perjury, an individual makes an allegation that is more than conclusory, is plausible on its face, and is material to the legal issues in the appeal. 5 C.F.R. § 1201.4(s).

Department of Defense (DOD) or one of its Departments must show that he either is (1) not serving a probationary or trial period under an initial appointment; or (2) has completed two years of current continuous service under an appointment to a permanent position. *See* 5 U.S.C. § 7511 (a)(1)(A) and 10 U.S.C. § 1599e.

“Current continuous service” means a period of employment or service immediately preceding an adverse action without a break in federal civilian employment of a workday. *Ellefson v. Department of the Army*, 98 M.S.P.R. 191, ¶ 14 (2005). Such service need not be in the same agency or in the same or similar positions. *Id.* An individual can show that, while he may be a probationer, he is an “employee” with Chapter 75 appeal rights because, immediately preceding the adverse action, he had completed at least two years of current continuous service in the competitive service in any federal agency without a break in Federal civilian employment of a workday. *Hurston*, 113 M.S.P.R. 34, ¶ 9; 5 U.S.C. § 7511 (a)(1)(A), and 10 U.S.C. § 1599e. Alternatively, an appellant who has not served a full two years under his appointment, or who has had a break in service, can show that he has completed the probationary period, and is no longer a probationer, by tacking on prior service if: (1) the prior service was rendered immediately preceding the probationary appointment; (2) it was performed in the same agency; (3) it was performed in the same line of work; and (4) it was completed with no more than one break in service of less than 30 days. *Hurston*, 113 M.S.P.R. 34, ¶ 9; 5 C.F.R. § 315.802(b).

The record evidence demonstrates that the appellant was a probationary employee who had continuously served in his current competitive service position for approximately 5 months at the time of his termination. IAF, Tab 6 at 7-9, 13. There is no credible record evidence that the appellant had any prior service that he could “tack on” to his appointment to show that he had completed his

probationary period. Since the appellant was employed by a DOD agency, he was required to complete two years of current, continuous service in order to attain Board appeal rights, which the record shows he failed to do.

The Office of Personnel Management has provided probationary employees with limited regulatory appeal rights. *See* 5 C.F.R. § 315.806. A probationer terminated for reasons based wholly or in part on conditions arising before his or her appointment may appeal the termination under 5 C.F.R. § 315.806(c) if it is alleged that the agency failed to follow procedural requirements specified in 5 C.F.R. § 315.805. In addition, under 5 C.F.R. § 315.806(b), a probationary employee may appeal a termination taken for reasons arising after appointment if there is a good faith allegation that the action was based on partisan political reasons or marital status.

Here, the agency's stated reason for removing the appellant was for performance and conduct issues that occurred while on duty, and the appellant has nowhere alleged that his termination was based on conditions arising prior to his appointment. The appellant has also failed to allege that his termination was based on partisan political reasons or marital status. Rather, the appellant has alleged that his removal was based on retaliation for disclosing improper activities on the part of an agency contractor. Absent an appealable action, allegations of discrimination, retaliation and prohibited personnel practices are beyond the Board's jurisdiction. *See Cruz v. Department of the Navy*, 934 F.2d 1240, 1245-46 (Fed. Cir. 1991); *Wren v. Department of the Army*, 2 M.S.P.R. 1, 2 (1980) (5 U.S.C. § 2302(b) is not an independent source of Board jurisdiction), *aff'd*, 681 F.2d 867, 871-73 (D.C. Cir. 1982).

Certificate Of Service

e-Appeal has handled service of the assembled pleading to MSPB and all of the Parties.

Following is the list of the Parties in the case:

Name & Address	Documents	Method of Service
MSPB: Western Regional Office	Agency Motion to Dismiss Tabs D part E	e-Appeal / e-Mail
Sherman S. Startz Appellant	Agency Motion to Dismiss Tabs D part E	e-Appeal / e-Mail
Pacific Region Agency Representative	Agency Motion to Dismiss Tabs D part E	e-Appeal / e-Mail