

SHERMAN S. STARTZ v. DEPARTMENT OF THE ARMY

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

MOTION TO DISMISS AGENCY FILINGS 5/5/2023

Summary Page

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

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

Pleading Title : MOTION TO DISMISS AGENCY FILINGS 5/5/2023

Filer's Name : Sherman S. Startz

Filer's Pleading Role : Appellant

Details about the supporting documentation

#	Title/ Description	Mode of Delivery
1	Attachment 1	Uploaded

Table of Contents

Pleading Interview	3
Uploaded Pleading Text Document	4
Attachment 1	7
Certificate of Service	19

SHERMAN S. STARTZ v. DEPARTMENT OF THE ARMY

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

MOTION TO DISMISS AGENCY FILINGS 5/5/2023

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

MOTION TO DISMISS AGENCY FILINGS 5/5/2023

Come now, PRO SE Appellant SHERMAN SHELBY STARTZ with a Pleading “MOTION TO DISMISS AGENCY FILINGS 5/5/2023” in the Appeal, SF -1221-23-0258-W-1

MERITS OF MOTION TO DISMISS

PRO SE Appellant SHERMAN SHELBY STARTZ asks the Honorable Administrative Judge Michael Shachat to Dismiss **1) AGENCY MOTION TO DISMISS FOR LACK OF JURISDICTION**; 1.a.) AGENCY FILE B1; 1.b.) AGENCY FILE B2; 1c.) AGENCY FILE B2B / **2) AGENCY MOTION TO DISMISS FOR LACK OF JURISDICTION**; 2.a.) AGENCY MOTION TO DISMISS TAB D PART E; 2.b.) AGENCY MOTION TO DISMISS TAB E; and 2.c.) AGENCY MOTION TO DISMISS TAB E duplicate, based of misinterpretation of facts and time line. The below response will speak to **1) AGENCY MOTION TO DISMISS FOR LACK OF JURISDICTION and 2) AGENCY MOTION TO DISMISS FOR LACK OF JURISDICTION** and include subsequent filings by reference above.

- 1) AGENCY MOTION TO DISMISS FOR LACK OF JURISDICTION** – Agency Representative Gwendolyn L. Smith has failed to address the merits of this case as described in original pleading and specifically noted in the original pleading and as described on the OSC IRA Letter supporting Jurisdiction and Scope, Whistleblower Retaliation from a previously disclosed event and Violation of my PPP’s.

See [5 C.F.R. § 1209.2\(b\)\(1\)](#). IRA appeals are an extension of the Board’s jurisdiction pursuant to [5 U.S.C. § 1221\(a\)](#). If the personnel action in question is not within the Board’s regular appellate jurisdiction, the appellant must first seek corrective action from OSC before appealing to the Board.

- 2) AGENCY MOTION TO DISMISS FOR LACK OF JURISDICTION** – This case was filed incorrectly. The right to file an IRA appeal is not conditioned on an appellant’s exhaustion of his or her EEO administrative remedies after filing a formal EEO complaint on the underlying personnel action.

See [Horton v. Department of the Navy](#), 47 M.S.P.R. 475 (1991). Thus, filing an IRA appeal before receiving a final agency decision on an EEO complaint does not render the IRA appeal premature. The EEO issue may not be heard in the IRA appeal.

Without burdening the Court with details on procedure; it appears this is yet another example of Senior Civilian Federal Employees representing the Department of Army unwillingness to comply; or simply unaware of rules and regulations and relying on personal interpretation for their guidance; which has resulted in further delay and unnecessary aggravation and economic hardship on Appellant PRO SE SHERMAN SHELBY STARTZ. This is simply not allowed.

Also

A termination during probation is a personnel action, but not generally considered an appealable matter. Thus, if an appellant first files an OAA (**315H**) appeal based on a

termination during probation that is ultimately found not to be within the Board's jurisdiction, the appellant can then file an IRA appeal without being held to his initial election of a direct appeal, since he had no right to make such an election. *Shannon v. Department of Homeland Security*, 100 M.S.P.R. 629, ¶ 17 (2005). Please see the Case numbers.

Further, PRO SE SHERMAN SHELBY STARTZ attempted to avoid this regrettable waste of the Courts time and my attempts to avoid even more aggravation and hardship what appears to be punitive; in nature in a most respectful way, accepting late response, excuses, and unwillingness to simply respond to simple question. While the Agency can find refuge behind an understanding of communicating with me, I find this unusual considering I am a PRO SE. Please see ATTACHMENT 1; emails supporting my frustration and willingness to work collaboratively towards a resolve and not waste the courts time. Nevertheless, my efforts failed and the Agency pressed forward resulting in Appellant having to dismiss all of the Pleadings filed by Agency on 5-5-2023.

Also, I do not want to Burden the court with acknowledgment receipts and documentation already sitting before the court supporting 2 separate cases with different merit before the court; one in Western Region Office and one in Headquarters. They are completely different and should be addressed accordingly.

Lastly, once the Court allows (if it does allow) my request for leave, it is my hope to migrate relevant items found in the IRA to the EEO Case; all argument that cannot be spoken too here. My careful reference to the EEO in the IRA case have been appropriate and within the rules of the Court; but you simply cannot do this the way Agency is attempting.

CLOSING and PRAYER

Pro Se Appellant SHERMAN SHELBY STARTZ asks the court to dismiss the Agency Motion to Dismiss and allow this / these cases to migrate to discovery. **Pro Se Appellant SHERMAN SHELBY STARTZ** Prays the Honorable Administrative Judge Michael Shachat grant immediate relief.

As stated in 28 U.S Code 1746 Unsworn Declaration Under Penalty of Perjury

Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

(1) If executed without the United States: "I, **SHERMAN SHELBY STARTZ, declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.**

Executed on (5-11-2023). Sherman Shelby Startz

(2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (5-11-2023).

Sherman Shelby Startz

From: Sherman Startz
Sent: Tuesday, April 18, 2023 1:24 PM
To: MSPB
Subject: Question / SF-315H-22-0532-I-1 and SF-1221-23-0258-W-1

Good day,

I have 2 cases with MSPB; both originated through Alaska to Western Region, one (SF-315H-22-0532-I-1) is in Washington DC, after a long laborious period it seems to have had movement. A new Local Agency Representative has been assigned, replacing Charles Eiser.

The new agency representative is
Ms. Gwendolyn L. Smith
Fort Wainwright Law Center
ATTN: APVR-WJA (Labor Law)
1046 Marks Road #5700
Fort Wainwright, Alaska 99703-5700
Gwendolyn.l.smith8.civ@army.mil
(907) 353-6546

My question is, do I wait for the representative to contact me or can I initiate some dialogue? I see Ms. Smith is Local here in Fairbanks and I am in fact in process of moving away in the near future. I want to avail myself.

Respectfully
Sherman Startz

From: MSPB <MSPB@mspb.gov>
Sent: Wednesday, April 19, 2023 9:37 AM
To: Sherman Startz
Subject: Re: Question / SF-315H-22-0532-I-1 and SF-1221-23-0258-W-1

Dear Mr. Startz,

Thank you for your inquiry. A review of our records indicates that your petition for review in MSPB Docket No. SF-315H-22-0532-I-1 remains pending before the Board. Even though a quorum was restored in March 2022, it is not possible to know when your particular case will be decided. This is because every case is different, i.e., raising different legal issues, possible issues of first impression, its own facts, etc. However, please be assured your petition for review will be considered and once a decision has been reached and issued, you will promptly be sent a copy of that decision. The Board is actively issuing decisions on petitions for review, which you can monitor on our website at www.mspb.gov. Please note that we cannot provide you with legal advice concerning your specific situation.

Further, a review of our records indicates that your appeal, MSPB Docket No. SF-1221-23-0258-W-1, is pending before the Western Regional Office. If you have questions about this appeal that is pending before the Western Regional Office, you should contact that office directly. Contact information for that office is below.

Merit Systems Protection Board
Western Regional Office
1301 Clay Street, Suite 1380N
Oakland, CA 94612-5217
(510) 273-7022 - telephone
(510) 273-7136- fax
westernregionaloffice@mspb.gov

I hope this information is helpful to you.

MSPB/rc

From: Sherman Startz <shelbystartz@outlook.com>
Sent: Tuesday, April 18, 2023 5:23 PM
To: MSPB <MSPB@mspb.gov>
Subject: Question / SF-315H-22-0532-I-1 and SF-1221-23-0258-W-1

Good day,

I have 2 cases with MSPB; both originated through Alaska to Western Region, one (SF-315H-22-0532-I-1) is in Washington DC, after a long laborious period it seems to have had movement. A new Local Agency Representative has been assigned, replacing Charles Eiser.

The new agency representative is
Ms. Gwendolyn L. Smith

Fort Wainwright Law Center
ATTN: APVR-WJA (Labor Law)
1046 Marks Road #5700
Fort Wainwright, Alaska 99703-5700
Gwendolyn.I.smith8.civ@army.mil
(907) 353-6546

My question is, do I wait for the representative to contact me or can I initiate some dialogue? I see Ms. Smith is Local here in Fairbanks and I am in fact in process of moving away in the near future. I want to avail myself.

Respectfully
Sherman Startz

From: Smith, Gwendolyn L CIV (USA) <gwendolyn.l.smith8.civ@army.mil>
Sent: Thursday, April 20, 2023 9:44 AM
To: shelbystartz@outlook.com
Cc: Little, Martha E (Little) CIV USARMY IMCOM PACIFIC (USA)
Subject: Agency Motion for an Extension of Time to Submit Agency File (UNCLASSIFIED)

CLASSIFICATION: UNCLASSIFIED

Good morning Mr. Startz,

I am the attorney representing the Agency in your appeal before the Merit System Protection Board. I was recently assigned to your case and is required to submit the Agency file to MSPB. I am requesting an extension to submit the file as I missed the date while awaiting a response from the court regarding your pleading and I will be unavailable traveling until March 27th. I am requesting a 15 day extension. Please indicate if you object to the extension. Thank you for your time and consideration.

V/r

Gwendolyn L. Smith
Attorney, Labor and Employment Law
Consolidated Legal Office
Fort Wainwright Law Center
Office: (907) 353-6546
E-mail: gwendolyn.l.smith8.civ@army.mil

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CLASSIFICATION: UNCLASSIFIED

From: Sherman Startz <shelbystartz@outlook.com>
Sent: Thursday, April 20, 2023 10:24 AM
To: Smith, Gwendolyn L CIV (USA)
Cc: Little, Martha E (Little) CIV USARMY IMCOM PACIFIC (USA)
Subject: Re: Agency Motion for an Extension of Time to Submit Agency File (UNCLASSIFIED)

Good day, Ms. Smith

I do not have an objection. Does my response need to be more formal or can you accept a response via my cell phone email?

Respectfully
Sherman Startz; Pro Se Appellant
907-231-9270

Sent from my iPhone

> On Apr 20, 2023, at 9:44 AM, Smith, Gwendolyn L CIV (USA) <gwendolyn.l.smith8.civ@army.mil> wrote:
>
> CLASSIFICATION: UNCLASSIFIED
>
> Good morning Mr. Startz,
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> I am the attorney representing the Agency in your appeal before the Merit System Protection Board. I was recently assigned to your case and is required to submit the Agency file to MSPB. I am requesting an extension to submit the file as I missed the date while awaiting a response from the court regarding your pleading and I will be unavailable traveling until March 27th. I am requesting a 15 day extension. Please indicate if you object to the extension. Thank you for your time and consideration.
>
> V/r
>
> Gwendolyn L. Smith
> Attorney, Labor and Employment Law
> Consolidated Legal Office
> Fort Wainwright Law Center
> Office: (907) 353-6546
> E-mail: gwendolyn.l.smith8.civ@army.mil
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>
>
>
>

>

> CLASSIFICATION: UNCLASSIFIED

From: Sherman Startz
Sent: Friday, April 21, 2023 9:51 AM
To: gwendolyn.l.smith8.civ@army.mil
Subject: Question

Good day Ms. Smith;

I am a bit confused about the process. I see you were appointed to replace Charles Eisler involving the original EEOC case filed that migrated to Washington DC., and a request for additional time was made. However looking into the MSPB efilng system it appears the request for additional time was made involving the most recently filed Appeal resting in Oakland at this time; WESTERN REGION OFFICE.

Are the two cases being comingled?

Are you the Designate for both cases now?

Respectfully
Sherman Startz, Pro Se Appellant

907-231-9270

From: Sherman Startz
Sent: Thursday, April 27, 2023 12:44 PM
To: Smith, Gwendolyn L CIV (USA)
Subject: RE: Question (UNCLASSIFIED)

Thank you for the note and update on your status.

No; your response does not help. I filed an MSPB case that spoke solely to a lack of responsiveness to an PTSD outcry; asking to be accommodated and not be attached to ALEUT FEDERAL Projects – I was not only not accommodated it was used against me. This is case SF-315H-22-0532-I-1; which the judge replaced Charles Eisler (whom in my opinion failed at his role), with you. I requested a LEAVE to submit more information on this case and was waiting to hear back; I take it from you after I file the Leave.

After a careful approach for confidentiality for the Security and Care in mind for the Army I disclosed the rest, Fraud, Whistleblower Retaliation Civil Rights Violations and 5 PPP's – not to mention Sherman Act and Anti-Trust Violations with Disclosure to DoD OIG and an IRA from the OSC. This is a completely different case with MSPB in Oakland; Western Region.

You requested an extension for time on case SF-1221-23-0258-W-1 – Am I to assume they have migrated together and you are on both or is it all considered EEOC?

What is so comical if the idiots involved had just accommodated me and not attached me to ALEUT, they would likely still be getting away with it. Go figure. Serves their unsensitive *%\$# right.

Unless I am not keeping up there are a lot of moving parts here.

Respectfully
Sherman S. Startz

From: Smith, Gwendolyn L CIV (USA) <gwendolyn.l.smith8.civ@army.mil>
Sent: Thursday, April 27, 2023 11:52 AM
To: Sherman Startz <shelbystartz@outlook.com>
Subject: RE: Question (UNCLASSIFIED)

CLASSIFICATION: UNCLASSIFIED

Mr. Startz,

I was out of the office. I am the agency counsel for the case before MSPB that originated in EEOC. I hope this answers your question.

V/r

Gwendolyn L. Smith
Attorney, Labor and Employment Law
Consolidated Legal Office
Fort Wainwright Law Center
Office: (907) 353-6546

E-mail: gwendolyn.l.smith8.civ@army.mil

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From: Sherman Startz <shelbystartz@outlook.com>

Sent: Friday, April 21, 2023 1:51 PM

To: Smith, Gwendolyn L CIV (USA) <gwendolyn.l.smith8.civ@army.mil>

Subject: [Non-DoD Source] Question

Good day Ms. Smith;

I am a bit confused about the process. I see you were appointed to replace Charles Eisler involving the original EEOC case filed that migrated to Washington DC., and a request for additional time was made. However looking into the MSPB efilng system it appears the request for additional time was made involving the most recently filed Appeal resting in Oakland at this time; WESTERN REGION OFFICE.

Are the two cases being comingled?

Are you the Designate for both cases now?

Respectfully
Sherman Startz, Pro Se Appellant

907-231-9270

CLASSIFICATION: UNCLASSIFIED

From: Sherman Startz
Sent: Thursday, April 27, 2023 1:56 PM
To: Smith, Gwendolyn L CIV (USA)
Subject: RE: Question (UNCLASSIFIED)

That's fine – my question still remains – the Judge appointed you to replace Charles Eisler – Charles Eisler is not been attached to the case you asked for an extension; was your extension submitted to the wrong case or are they automatically one case now. The information found in the case you asked for an extension has not been approved to submit as evidence in the case you are assigned.

In essence I have an un-responded to my REQUEST FOR LEAVE TO FILE ADDITIONAL PLEADING – which is the only case as far as I am aware you are attached too. The case you filed for the extension is a new case in OAKLAND and no response other than an acknowledge receipt.

My question is why, are you the agency representative for both case? If you cant answer I am also asking MSPB in Oakland.

I will also ask the Court Paralegal Stacy Abbot (via Phone) who is assigned to the case the case you asked for the extension on which is not the EEOC case.

Respectfully

From: Smith, Gwendolyn L CIV (USA) <gwendolyn.l.smith8.civ@army.mil>
Sent: Thursday, April 27, 2023 12:58 PM
To: Sherman Startz shelbystartz@outlook.com
Cc: Little, Martha E (Little) CIV USARMY IMCOM PACIFIC (USA) <martha.e.little4.civ@army.mil>
Subject: RE: Question (UNCLASSIFIED)

CLASSIFICATION: UNCLASSIFIED

Mr. Startz,

I am the new Agency attorney assigned to the case. I have not reviewed the case. I do not correspond with you regarding the case. Procedure required that I reach out to you to see if you opposed the extension I requested to become abreast with the case. Generally, some cases that are appealed from EEOC go to MSPB so long as jurisdiction is met.

V/r

Gwendolyn L. Smith
Attorney, Labor and Employment Law
Consolidated Legal Office
Fort Wainwright Law Center
Office: (907) 353-6546
E-mail: gwendolyn.l.smith8.civ@army.mil

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Sent: Thursday, April 27, 2023 4:44 PM

To: Smith, Gwendolyn L CIV (USA) <gwendolyn.l.smith8.civ@army.mil>

Subject: [Non-DoD Source] RE: Question (UNCLASSIFIED)

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Subject: RE: Question (UNCLASSIFIED)

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Attorney, Labor and Employment Law
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Respectfully
Sherman Startz, Pro Se Appellant

907-231-9270

CLASSIFICATION: UNCLASSIFIED

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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	MOTION TO DISMISS AGENCY FILINGS 5/5/2023	e-Appeal / e-Mail
Gwendolyn L. Smith, Esq. Agency Representative	MOTION TO DISMISS AGENCY FILINGS 5/5/2023	e-Appeal / e-Mail
Pacific Region Agency Representative	MOTION TO DISMISS AGENCY FILINGS 5/5/2023	e-Appeal / e-Mail