UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

SHERMAN S. STARTZ JR.,
Appellant,

v.

DEPARTMENT OF THE ARMY,
Agency.

DOCKET NUMBER
SF-1221-23-0258-W-1

DATE: January 8, 2024

Sherman S. Startz Jr., Bremerton, Washington, pro se.

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

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

BEFORE
Michael Shachat
Administrative Judge

INITIAL DECISION

INTRODUCTION

On March 22, 2023, the appellant timely filed an individual right of action (IRA) appeal alleging that the agency retaliated against him for engaging in protected whistleblowing activities. Initial Appeal File (IAF), Tab 1. The Board has jurisdiction pursuant to 5 U.S.C. §§ 1214(a)(2)(B)(3)(A)(i)-(ii) and 1221(a). The appellant waived his right to a hearing by not requesting one, and this appeal is therefore being decided on the record. IAF, Tab 1 at 2; Tab 22.

For the reasons discussed below, the appellant's request for corrective action is DENIED.

ANALYSIS AND FINDINGS

Background

Because the appellant did not request a hearing, I must rely exclusively on hearsay evidence in reaching my findings. In examining the weight to be given hearsay evidence, particularly documentary evidence such as an administrative record, the Board has identified the following factors in considering the probative value of hearsay evidence: (1) the availability of persons with firsthand knowledge to testify at hearing (2) whether the statements of the out-of-court declarants were signed or in affidavit form, and whether anyone witnessed the signing; (3) the explanation for failing to obtain signed or sworn statements; (4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; (5) the consistency of declarants' accounts with other information in the case, internal consistency, and their consistency with each other; (6) whether corroboration for statements can otherwise be found in the agency record; (7) the absence of contradictory evidence; and (8) the credibility of the declarant when he made the statement attributed to him." *Borninkhof v. Department of Justice*, 5 M.S.P.R. 77, 87 (1981).

Preponderant record evidence demonstrates the following. On January 31, 2022, the appellant received a career-conditional appointment in the competitive service to the position of Construction Control Inspector (CCI), GS-0809-9, at the agency's United States Army Installation Management Command, United States Army Garrison Alaska (Command), located in Fort Wainright, Alaska. IAF, Tab 9 at 16-18. The Standard Form (SF) 50, Notification of Personnel Action, memorializing the appellant's appointment stated that the "Appointment is subject to completion of two year initial probationary period beginning 31-JAN-2022." *Id*. at 18.

The relevant Position Description (PD) for the appellant's CCI position provides that, as a CCI, the appellant was "responsible for the quality assurance in a variety of maintenance, repair, renovation, and minor construction projects;

and services, by contract, within administrative, training, barracks, dining, medical, recreational, range, utility, and transportation facilities." IAF, Tab 4 at 74. The appellant's duties included interpretation of "contract specifications and other directives to resolve problems," and maintaining "surveillance, on a day-to-day basis, over the full range of technical support and field engineering activities associated with specific phases of maintenance, repair, renovation, and minor construction projects." *Id.* As a CCI, the appellant was expected to "Independently monitor[] contractor performance and notif[y] Project Manager (PM), Contracting Officer Representative (COR), and Supervisor of contractors' noncompliance with contract documents." *Id.* at 75. The appellant was also required, on a daily basis, to "track[] and maintain[] documentation of contractors progress through Quality Assurance Reports (QAR) and note[] any decisions, recommendations, or suggestions made regarding contractors' performance and status of projects to the PM, COR, and Supervisor." *Id.* The appellant also served to represent the Directorate of Public Works (DPW) as its construction representative. *Id.*

The appellant was assigned to serve as the CCI on several construction projects associated with the renovation of barracks located on Fort Wainright grounds, primarily a re-roofing project at a building identified as Building 3415. IAF, Tab 4 at 20; Tab 32 at 9, 19-20, 31-141; Tab 33 at 10-17, 40-56, 107-162; Tab 34 at 8-31. The prime contractor on the re-roofing project was Aleut Federal LLC (Aleut), an Alaska Native Corporation, that in turn relied on subsidiary subcontractors to perform the actual projects. IAF, Tab 4 at 20; Tab 31 at 33; Tab 33 at 31, 57-58. In 2021, the appellant had previously worked for one of Aleut Federal's subsidiary contractors, Patrick Constructors, in an at-will employment capacity performing similar safety inspection functions as those of his CCI position with the agency and on the same or similar Fort Wainright barracks renovation projects as those he was assigned to work on by the agency. IAF, Tab 4 at 9-19, 32. The appellant's at-will employment was terminated by

Patrick Constructors on or about September 20, 2021, soon after raising concerns with the agency about safety issues at the job site. *Id.* at 32; Tab 14 at 20.

In a letter dated June 27, 2022, David Zrna, Chief of the Fort Wainwright Command's Contract Management Branch, notified the appellant of his decision to terminate the appellant during his probationary period. IAF, Tab 9 at 20-21. In his letter, Chief Zrna informed the appellant that his termination decision was based on the appellant's inability to "maintain professional working relationships" with his coworkers and with agency contractors, which he claimed was having a "detrimental effect on the organization." *Id.* at 20. The appellant's termination was effective that same day. *Id*. at 20, 22.

In or about January 2023, the appellant filed a whistleblower complaint with the Office of Special Counsel (OSC). *Id.* at 39. OSC summarized the appellant's whistleblowing allegations as follows:

> You allege that [between January 31 and June 27, 2022]… Army officials were not properly overseeing work completed by contractors. You also allege that you identified irregularities in the Army's Unified Command Specifications, that Aleut Federal, a contractor working on building projects at Fort Wainwright, was submitting fictitious specification numbers, and that your supervisors instructed you to sign for construction materials that were not delivered. You raised these concerns to David Zrna, your direct supervisor, and refused to sign for materials that were not delivered. You allege that, in retaliation for you raising these concerns and refusing to follow your supervisors' instructions, Mr. Zrna subjected you to a hostile work environment and terminated you on June 27, 2022.

IAF, Tab 4 at 25.

The appellant filed a separate whistleblowing complaint with the Department of Defense (DoD)'s Office of Inspector General (OIG) on February 10, 2023, through the DoD's OIG Hotline. *Id.* at 40-53. There is no record evidence that the DoD's OIG has to date taken any action with respect to the appellant's complaint.

In a letter dated March 22, 2023, OSC notified the appellant that it was closing its investigation without making any findings of whistleblower retaliation, and informed the appellant of his right to file a whistleblower appeal with the Board. IAF, Tab 1 at 4-5.[1] In its closeout letter, OSC summarized the appellant's allegations as follows:

> In your complaint against the U.S. Department of the Army (Army), Army Installation Management Command, Headquarters, U.S. Army Garrison Alaska, you alleged that you were retaliated against for disclosing to Army officials that they violated a law, rule, or regulation, engaged in gross mismanagement, grossly wasted funds, and abused their authority by not properly overseeing contractor work, accepting fictitious specification numbers from a contractor, and instructing you to sign for materials that were not delivered. You alleged that, in retaliation for these disclosures, Army officials subjected you to a hostile work environment and terminated your employment during your probationary period.

Id. at 4.

The appellant thereafter filed his appeal to the Board that same day. *Id*. In an order issued on May 12, 2023, I found that the appellant had met his burden of establishing Board jurisdiction over his IRA appeal. IAF, Tab 20. Specifically, I found that the appellant had proven by a preponderance of the evidence[2] that he had exhausted his administrative remedies before OSC and timely filed his Board appeal, and that he had nonfrivolously[3] alleged that he made a protected

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[1] Although an appellant bringing an individual right of action (IRA) appeal to the Board must show that he or he has exhausted OSC procedures, OSC's decision to close its investigation may not be considered in an IRA appeal. *See* 5 U.S.C. § 122l(f)(2); *Bloom v. Department of the Army*, 101 M.S.P.R. 79, ¶ 10 (2006).

[2] A preponderance of the evidence is the 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] A nonfrivolous allegation is an assertion that, if proven, could establish the matter at issue; 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).

disclosure and/or engaged in protected activities which were a contributing factor in the agency's decision to terminate him. *see Graves v. Department of Veterans Affairs*, 123 M.S.P.R. 434, ¶ 12 (2016); 5 U.S.C. §§ 1214(a)(2)(B)(3)(A)(i)-(ii), 1221(e)(1). As the appellant did not request a hearing, I issued an order providing the parties with an opportunity to submit evidence and argument in support of their respective positions, along with a close of record date. IAF, Tab 23. The record in this appeal closed on August 18, 2023. IAF, Tab 27.

Burdens of Proof

Once an appellant has established Board jurisdiction, he bears the initial burden of proving the elements of his claim by preponderant evidence. *Spencer v. Department of the Navy*, 327 F.3d 1354, 1356–57 (Fed. Cir. 2003). Under the Whistleblower Protection Act (WPA), as amended by the Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112–19, 126 Stat. 1465 (WPEA), an appellant may seek corrective action with respect to any personnel action taken, or proposed to be taken, against him as the result of a prohibited personnel practice described in 5 U.S.C. §§ 2302(b)(8) and (b)(9)(A)(i), (B), (C), or (D). 5 U.S.C. § 1221(a); *Hooker v. Department of Veterans Affairs*, 120 M.S.P.R. 629, ¶ 9 (2014). When reviewing the merits of an IRA appeal, the Board considers whether the appellant has established by a preponderance of the evidence that (1) he made a protected disclosure described under 5 U.S.C. § 2302(b)(8) or engaged in protected activity described under 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D); and (2) the protected disclosure or activity was a contributing factor in the agency's decision to take or fail to take a personnel action as defined by 5 U.S.C. § 2302(a). *See, e.g., Scoggins v. Department of the Army*, 123 M.S.P.R. 592, ¶ 21 (2016) (protected disclosure); *Alarid v. Department of the Army*, 122 M.S.P.R. 600, ¶ 13 (2015) (protected activity).

Recent amendments to the WPEA have placed an additional burden of proof on an appellant whose disclosures were made "during the normal course of

duties" and whose "principal job function…is to regularly investigate and disclose wrongdoing." 5 U.S.C. § 2302(b)(9)(f)(2). In those instances, the disclosures will only be protected under 5 U.S.C. § 2302(b)(8) if the appellant proves that the personnel action(s) taken against him were in reprisal for his disclosure(s). *Id.* Here, at least some of the appellant's alleged disclosures appear to have been made as part of the appellant's normal course of duties as a CCI. But I do not find the appellant's position to be one whose principal functions were to "regularly investigate and disclose wrongdoing." Rather, the appellant's duties were focused on "surveilling" and "monitoring" construction projects to ensure that agency contractors were in compliance with contract requirements, including safety requirements, and to notify the PM, COR, and his supervisor of any identified "noncompliance with contract documents." IAF, Tab 4 at 75. "Surveilling" and "monitoring" contract performance does not necessarily equate to "investigating" potential non-performance by agency contractors, and I find no credible record evidence that any of the appellant's duties included conducting investigations, let alone that investigations were his principal duties. In addition, I do not find issues of contract "noncompliance" to necessarily equate to wrongdoing, and presume that any finding of noncompliance might simply involve ensuring that a contractor take steps to come into compliance. Accordingly, I find that the appellant's disclosures would fall under the generally applicable disclosures of 5 U.S.C. § 2302(b)(8), rather than under 5 U.S.C. § 2302(f)(2). *See Salazar v. Department of Veterans Affairs*, 2022 MSPB 42, ¶ 22.

Once an appellant meets his prima facie burden of proof, the Board must order corrective action unless the agency can establish by clear and convincing evidence that it would have taken the same personnel action in the absence of the appellant's protected disclosure or activity. *Scoggins*, 123 M.S.P.R. 592, ¶ 26;

Alarid, 122 M.S.P.R. 600, ¶ 14.[4] In determining whether the agency has carried its burden, the Board will consider all the relevant facts and circumstances, including: (1) the strength of the agency's evidence in support of its action; (2) the existence and strength of any motive to retaliate on the part of agency officials involved in the decision; and (3) any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. *Id*. (citing *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999)).

The appellant has failed to prove by a preponderance of the evidence that he made a protected disclosure

To establish that he made a protected disclosure under the WPA, the appellant must demonstrate by preponderant evidence that he disclosed information that he reasonably believed evidenced a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial or specific danger to public health or safety. *Mithen v. Department of Veterans Affairs*, 119 M.S.P.R. 215, ¶ 13 (2013) (citing 5 U.S.C. § 2302(b)(8)(A)); *see also Chambers v. Department of the Interior*, 515 F.3d 1362, 1367 (Fed. Cir. 2008). The proper test for determining whether the appellant had a reasonable belief that his disclosure was protected is whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the appellant could reasonably conclude that the agency's actions evidenced one of the categories of wrongdoing triggering whistleblower protection. *Mithen*, at ¶ 13 (citing *Stiles v. Department of Homeland Security*, 116 M.S.P.R. 263, ¶ 9 (2011)). To establish that he had a reasonable belief that a disclosure met the criteria of 5 U.S.C. § 2302(b)(8), the appellant need not prove that the condition(s) disclosed actually established any of the situations detailed under 5

[4] Clear and convincing evidence is "that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established." 5 C.F.R. § 1209.4(e).

U.S.C. § 2302(b)(8); rather, he must show that the matter disclosed was one which a reasonable person in his position would believe evidenced any of the situations specified in 5 U.S.C. § 2302(b)(8). *See, e.g., Schnell v. Department of the Army*, 114 M.S.P.R. 83, ¶ 19 (2010).

As previously discussed, the appellant has alleged that he made a single protected disclosure: namely, that on or about June 24, 2022, he disclosed to Chief Zrna that Aleut Federal, through its subsidiary, Patrick Constructors, was submitting fictitious specification numbers for flooring materials being used on the barracks renovation project, and that his supervisors were improperly instructing him to sign for construction materials that were not delivered, which he told Chief Zrna he refused to do. IAF, Tab 4 at 21, 25, 32. The appellant alleged in his correspondence with OSC that the disclosure occurred "at Building 1555 while discussing the flooring that was not there for COLNEL SURREY Personal Office." (Same as in original). *Id.* at 21.

The appellant has nowhere alleged that his disclosure was witnessed by any other individual or to provide any other corroborating evidence, and conceded to OSC that this was a "He said she said" situation. Furthermore, the agency has nowhere admitted that the appellant made any disclosures to Chief Zrna, protected or otherwise. *Id.* at 34; *see also* IAF, Tab 32 at 13 (submission by the appellant of the agency's response to the appellant's interrogatories stating that Chief Zrna was "unaware of an incident in which Appellant refused to sign for goods.")

I recognize that the appellant's allegations in his Board appeal were made under oath, while the agency failed to submit a sworn statement from Chief Zrna denying the allegations or to offer any explanation for failing to provide any such sworn statement. But I nonetheless find that the appellant has failed to prove by a preponderance of the evidence that he disclosed to Chief Zrna on June 24, 2022, that Aleut Federal and Patrick Constructors were submitting "fictitious" specification numbers for flooring materials and that he was being forced by his

own supervisors to sign for undelivered flooring material or that even assuming, *arguendo*, that he had done so, that his disclosure would have been protected. The appellant admitted in his submissions to OSC that he had no actual evidence that Aleut Federal and Patrick Constructors were submitting fictitious specification numbers for flooring materials. IAF, Tab 4 at 34 (responding to OSC's concerns that the appellant had no evidentiary support by indicating that "the evidence is my word.") While the appellant was afforded the opportunity in his Board appeal to conduct discovery and thereafter submit evidence demonstrating that he had information at the time he made his alleged disclosure to Chief Zrna justifying his belief that Aleut Federal and/or Patrick Constructors were seeking to defraud the agency, he has failed to submit any such evidence. In his close of record submission, the appellant simply submitted daily inspection reports for a barracks roofing project that shed no light whatsoever on his allegations, at most demonstrating that the contractor was remiss in complying with what appears to be relatively minor safety issues on the job site. *See*, *e.g.*, IAF, Tab 32 at 44, 114; Tab 33 at 10, 20, 40, 47, 54, 128. The appellant himself admitted in his prehearing submission that these daily reports were "relatively mundane." IAF, Tab 32 at 9.

The appellant has alleged at various times in his pleadings that his termination by Patrick Constructors in September 2021 is credible evidence of Patrick Constructors' lack of trustworthiness and was what led him, at least in part, to believe that fraudulent activity was occurring with respect to these flooring materials, given that the termination occurred so soon after the appellant notified the agency of safety violations involving Patrick Constructors. But being subject to a retaliatory termination for reporting safety violations, even assuming without finding that such a retaliatory termination occurred, is a far cry from evidence that Patrick Constructors was seeking to defraud the federal government through a scheme of falsifying the provision or valuation of flooring materials. The appellant has submitted credible evidence that, on or about August 25, 2022,

the Department of Justice's Antitrust Division brought charges in Alaska federal district court against a flooring subcontractor who provided flooring materials on certain projects at Fort Wainright with providing kickbacks, including money, gifts, and gratuities, to an unnamed prime contractor between 2016 and 2021 "for the purpose of improperly obtaining and rewarding favorable treatment in connection with" multiple subcontracts, and that the subcontractor and the prime contractor conspired to provide such kickbacks. IAF, Tab 4 at 65-72. But there is no indication from the charges that the prime contractor is Aleut Federal, or what connection, if any, the subcontractor had with Patrick Constructors, the subcontractor on the barracks project the appellant was associated with. In any event, this information was not available to the appellant at the time he made his alleged disclosure to Chief Zrna, and therefore is of little value in assessing what information the appellant had at the time which could have led the appellant to reasonably believe that Aleut Federal and/or Patrick Constructors were engaged in wrongdoing. *See Mithen*, 119 M.S.P.R. 215, ¶ 13 (The test for determining whether the appellant had a reasonable belief that his disclosure was protected is based on the essential facts known to and readily ascertainable by the appellant when he made the disclosure).

Furthermore, even a disclosure of wrongdoing by a contractor would not, in and of itself, be protected. Rather, a disclosure of wrongdoing committed by a non-Federal Government entity may be protected only when the Government's interests and good name are implicated in the alleged wrongdoing, and the employee shows that he reasonably believed that the information he disclosed evidenced that wrongdoing. *Miller v. Department of Homeland Security*, 99 M.S.P.R. 175, ¶ 12 (2005). In *Johnson v. Department of Health & Human Services*, 93 M.S.P.R. 38, ¶¶ 9-11 (2002), for example, the Board held that the government's interests and reputation were implicated by the appellant's disclosure of alleged contract violations and illegal employment practices by a Government contractor because the appellant claimed that agency officials

ignored the contractor's conduct. Thus, to be protected, the appellant would have had to have reasonably believed at the time he made his alleged disclosure to Chief Zrna that Aleut Federal and/or Patrick Constructors were not only engaged in wrongdoing, but that the agency either ignored or participated in those efforts. The appellant's basis for reaching that conclusion appears to be based on his allegation that his supervisors were forcing him to sign for materials that were not in fact delivered. But the appellant's allegations with respect to his own involvement in being ordered to sign for undelivered materials are vague, conclusory, and internally inconsistent. For example, the appellant alleged in one of his OSC submissions that the signatures at issue were only done for training purposes, claiming that he "was being instructed and noticed my co-workers during "training" exercises, signing off for goods that were not on site, and being asked to sign a blank piece of paper," and that he had earlier brought up his concerns with Chief Zrna "about this unusual request." IAF, Tab 4 at 34. The appellant further alleged before OSC that in his disclosure to Chief Zrna he "explained that he was having issues with Aleut and most especially [BP] and [DB], both of whom were asking me to sign blank documents," which would be unrelated to his allegation that it was his own agency supervisors who were ordering him to do so. *Id.* at 34.[5]

Ultimately, the appellant's allegations in this appeal appear to be based almost entirely on conjecture and speculation largely based on matters that occurred after the date of his alleged June 24, 2022, disclosure to Chief Zrna: namely, that based on his termination by the agency, combined with later-acquired information about a separate criminal action involving flooring materials on another Fort Wainright project, the appellant had a reasonable belief that Aleut Federal and Patrick Constructors were conspiring with agency employees to

[5] In this Initial Decision, I use initials for certain individuals, although their full names are in the record.

defraud the agency with respect to the delivery and/or pricing of flooring materials for the barracks projects at Fort Wainright.

Based on the foregoing and my review of the entire record, I find that the appellant has failed to prove by a preponderance of the evidence that he made a protected disclosure to Chief Zrna on June 24, 2022, of any of the situations specified in 5 U.S.C. § 2302(b)(8).

The appellant did not engage in protected whistleblowing activities under 5 U.S.C. § 2302(b)(9)

Pursuant to 5 U.S.C. § 2302(b)(9)(D), the agency is prohibited from taking or threatening to take a covered personnel action against an individual "for refusing to obey an order that would require the individual to violate a law, rule, or regulation." For the reasons already discussed, I find that the appellant has failed to prove by preponderant evidence that he had refused to sign for flooring materials that were not delivered or otherwise was being ordered by the agency to obey an order that would violate a law, rule or regulation. Accordingly, I find that the appellant has failed to prove that he was subject to a covered personnel action for engaging in protected activity under 5 U.S.C. § 2302(b)(9)(D).

The appellant's OSC complaint and a separate OIG complaint are both protected whistleblowing activities under 5 U.S.C. § 2302(b)(9)(C). But both the appellant's OSC complaint and his OIG complaint were filed in 2023, after the appellant's termination by the agency on June 27, 2022. Since these whistleblowing activities occurred after the appellant's termination, they could not have been a contributing factor in the agency's decision to terminate him or in creation of an alleged hostile working environment during the appellant's employment with the agency. *See, e.g., Johnson v. Department of Justice*, 104 M.S.P.R. 624, ¶ 26 (2007).

Conclusion

As the appellant has failed to meet his prima facie burden of proof, his request for corrective action must be DENIED.

DECISION

The appellant's request for corrective action is DENIED.

FOR THE BOARD: Michael Shachat
_____
Michael Shachat
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **February 12, 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. 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.

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. 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

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 — Sherman Startz
Served on email address registered with MSPB

Agency Representative

Electronic Service — Charles Eiser
Served on email address registered with MSPB

Agency Representative

Electronic Service — Pacific Region
Served on email address registered with MSPB

01/08/2024
(Date)

Stacy Abbott
Stacy Abbott
Paralegal Specialist