

SHERMAN S. STARTZ v. DEPARTMENT OF THE ARMY

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

Agency File

Summary Page

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

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

Pleading Title : Agency File

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

Filer's Pleading Role : Agency Representative

Details about the supporting documentation

N/A

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SHERMAN S. STARTZ v. DEPARTMENT OF THE ARMY

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Agency File

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

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

Sherman S. Startz,)
Appellant,) Docket No. SF-1221-23-0258-W-1
v.)
Department of the Army,) Administrative Judge: Michael S. Shachat
Agency.) Date: May 5, 2023

AGENCY'S MOTION TO DISMISS FOR LACK OF JURISDICTION

COME NOW, the Agency, by and through undersigned counsel, hereby submits its motion to dismiss for lack of jurisdiction.

I. ARGUMENTS

1. The Appellant was not a government employee when terminated from his contract position with ALEUT Corporation and the MSPB does not have jurisdiction over contract employees.

The Appellant alleges retaliation as a contract worker for the ALEUT Corporation for attempting to disclose fraud, waste and abuse committed by the ALEUT Corporation against the government. He raised his complaints to the Office of Special Counsel which closed its inquiry and issued the closing letter to the Appellant with an indication of right to an Individual Right to Action appeal. *See TAB A.* The disclosure raised by the Appellant allegedly happened during his work as a contract employee. Pursuant to 5 U.S.C. 7511 and 7513, a contract employee is not considered an “employee” of the Federal Government. The

Board's jurisdiction is limited to matters specifically entrusted to it through regulation or statute. *Garcia v. Department of Homeland Security*, 437 F.3d 1322, 1327 (Fed. Cir. 2006) (en banc). Moreover, the Appellant has the burden of proving by a preponderance of the evidence that his case falls within the specific categories and more definitively, that he falls within the class of persons entitled to the appeal to the Board. 5 C.F.R. §§ 1201.56(b)(2)(A), 1201.57(c)(3). The Appellant was not in the competitive or excepted service nor was he ever executed a Standard Form (SF) 50 or SF-52 or its equivalent in his employment with ALEUT Corporation. *See Pflueger v. DOE*, 2015 MSPB LEXIS 7033. The emails in support of the Appellant's appeal are allegations raised while employed by ALEUT Corporation. *See TAB B*. He was not paid through the federal civil-service system. The allegations raised in this appeal are not within the jurisdiction of the MSPB.

2. Appellant was discharged during his probationary period due to his inability to maintain professional working relationships with coworkers and Contractors resulting in a detrimental effect on the organization. The Appellant's termination was not due to retaliation for engaging in whistleblower activity and thus, he is not entitled to an appeal with the MSPB.

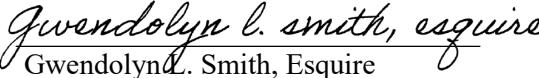
Upon Appellant's termination of employment with the ALEUT Corporation, Appellant was subsequently hired under a career-conditional appointment into a permanent competitive service, construction control inspector position on January 31, 2022. *See Tab C*. The Appellant was terminated from this position during his probationary period on June 27, 2022 for the reasons outlined in the discharge notice dated June 27, 2022. *See Tab D*. The Board previously ruled it lacked jurisdiction over the Appellant's appeal for removal during his probationary

period. See Tab E. The Appellant now seeks to raise retaliation claims for alleged whistleblowing and a hostile work environment as the reasons for his termination. Yet, Appellant did not raise a formal hostile work environment claim with the Equal Employment Opportunity Commission (EEOC). The Appellant arguments fail because he indicated that he raised the whistleblower concerns to the Army while working for the ALEUT Corporation, but the Army proceeded to hire him upon his termination from the ALEUT Corporation. That the Army retaliated against the Appellant by employing him is illogical and inaccurate. The reasons for the Appellant's removal during his probationary period was due to his inability to maintain professional working relationships with coworkers and Contractors resulting in a detrimental effect on the organization. *Id.* There was no unlawful motive behind the Agency's decision to terminate the Appellant during his probationary period. The Appellant was a probationary employee at the time he was terminated, and the MSPB has no jurisdiction in the instant case.

II. CONCLUSION

WHEREFORE, the Agency, by and through undersigned counsel, respectfully ask the Honorable Judge Shachat to dismiss the Appellant's appeal due to lack of jurisdiction. The Appellant was not a federal employee at the time of his alleged disclosures and was subsequently hired as a federal employee despite his alleged disclosures. He was terminated during his probationary period for the aforementioned stated reasons. Neither event falls under the jurisdiction of the MSPB.

FOR THE AGENCY:


Gwendolyn L. Smith, Esquire
Labor and Employment Law Attorney
Consolidated Legal Office
1046 Marks Road #5700

Fort Wainwright Alaska
Gwendolyn.l.smith8.civ@army.mil
(907) 356-6546

CERTIFICATE OF SERVICE

I certify that the attached document was sent as indicated on 5 May 2023 to the following:

MSPB e-Appeal: Hon. Michael S. Shachat
Federal Administrative Judge

MSPB e-Appeal: Sherman S. Startz
Appellant

Gwendolyn L. Smith, Esquire
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Labor and Employment Law Attorney
Consolidated Legal Office
1046 Marks Road #5700
Fort Wainwright Alaska
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NOTIFICATION OF PERSONNEL ACTION

1. Name (Last, First, Middle) STARTZ, JR, SHERMAN S.		2. Social Security Number 572-17-5981	3. Date of Birth 05-31-1961	4. Effective Date 01-31-2022
FIRST ACTION				
5-A. Code 101	5-B. Nature of Action Career-Cond Appointment	6-A. Code	6-B. Nature of Action	
5-C. Code Z5C	5-D. Legal Authority Direct-Hire Authority 5 U.S.C. 9905, 10/15/2021	6-C. Code	6-D. Legal Authority	
5-E. Code	5-F. Legal Authority	6-E. Code	6-F. Legal Authority	

7. FROM: Position Title and Number					15. TO: Position Title and Number CONSTRUCTION CONTROL INSPECTOR 496104 - 4280800						
8. Pay Plan	9.Occ. Code	10.Grade or Level	11.Step or Rate	12. Total Salary	13.Pay Basis	16. Pay Plan	17. Occ. Code	18.Grade or Level	19.Step or Rate	20. Total Salary/Award	21. Pay Basis
12A. Basic Pay		12B. Locality Adj. \$0		12C. Adj. Basic Pay		20A. Basic Pay \$47,097.00	0809	09	01	\$61,424.00	PA
						20B. Locality Adj. \$14,327.00		20C. Adj. Basic Pay \$61,424.00		20D. Other Pay \$0	

14. Name and Location of Position's Organization					22. Name and Location of Position's Organization US ARMY INSTALLATION MANAGEMENT CMD US ARMY GARRISON ALASKA DIRECTORATE OF PUBLIC WORKS ENGINEERING DIVISION CONTRACT MANAGEMENT BRANCH FORT WAINWRIGHT, AK 99703 4PAAC				
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EMPLOYEE DATA																		
23. Veterans Preference <table border="1" style="margin-left: auto; margin-right: auto;"><tr><td>1</td><td>1 - None 2 - 5-Point</td><td>3 - 10-Point/Disability 4 - 10-Point/Compensable</td><td>5 - 10-Point/Other 6 - 10-Point/Compensable/30%</td><td></td></tr></table>					1	1 - None 2 - 5-Point	3 - 10-Point/Disability 4 - 10-Point/Compensable	5 - 10-Point/Other 6 - 10-Point/Compensable/30%		24. Tenure <table border="1" style="margin-left: auto; margin-right: auto;"><tr><td>2</td><td>0 - None 1 - Permanent</td><td>2 - Conditional 3 - Indefinite</td><td></td></tr></table>	2	0 - None 1 - Permanent	2 - Conditional 3 - Indefinite		25. Agency Use	26. Veterans Pref for RIF <table border="1" style="margin-left: auto; margin-right: auto;"><tr><td><input type="checkbox"/> YES</td><td><input checked="" type="checkbox"/> NO</td></tr></table>	<input type="checkbox"/> YES	<input checked="" type="checkbox"/> NO
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40. AGENCY DATA SMD		41. PON# OA 	42.	43.	44.	TDA DATA XA/W6L7AA/051C/12												

45. Remarks

OPF maintained by Civilian Personnel Records Center (CivPRC), 305 Marshall Ave, Fort Riley, KS 66442.

Appointment affidavit executed 31-JAN-2022.

Frozen Service: None

Creditable Military Service: None

Previous retirement coverage: Never Covered.

Employee is automatically covered under FERS, FERS-RAE or FERS-FRAE

You must elect to enroll or not to enroll in Health Benefits within 60 days after the effective date of this action.

You are automatically covered for basic life insurance. You have 60 days from the effective date of this action to elect additional coverage or to decline all coverage.

46. Employing Department or Agency U.S. Army Installation Management Command(ARXA)			50. Signature/Authentication and Title of Approving Official Debbie L. Forrester		
47. Agency Code ARXA	48. Personnel Office ID 2289	49. Approval Date 01-24-2022	SUPV HUMAN RESOURCES SPECIALIST		

TURN OVER FOR IMPORTANT INFORMATION
5-Part

1 - Employee Copy - Keep for Future Reference

Editions Prior to 7/91 Are Not Usable After
6/30/93
NSN 7540-01-333-6236

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45. Remarks

Flexible Spending Account (FSA), you have 60 days from the date of hire but no later than October 01 of the plan year to elect coverage. If hired on or after Oct 01, you are eligible to elect FSA during the FSA open season. Please visit: <https://www.fsafeds.com/GEM> for more information.

You have 60 days from the date of this action to enroll in the Federal Employees Dental or Vision (FEDVIP) plan. Please visit <https://www.benefeds.com/> for more information .

You have 60 days from this appointment date to enroll in the Federal Long Term Care Insurance Program (FLTCIP). More information can be found at <http://www.ltcfeds.com>

Questions regarding this Notification of Personnel Action (SF-50) should be addressed to either your servicing CPAC or first line supervisor

You are automatically enrolled in the Thrift Savings Plan (TSP) at a contribution rate of 5% of your basic biweekly pay. You may change or stop your TSP contributions at any time.

46. Employing Department or Agency U.S. Army Installation Management Command(ARXA)			50. Signature/Authentication and Title of Approving Official Debbie L. Forrester		
47. Agency Code ARXA	48. Personnel Office ID 2289	49. Approval Date 01-24-2022	SUPV HUMAN RESOURCES SPECIALIST		

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40. AGENCY DATA SMD		41. PON# OA	42.	43.	44. TDA DATA XA/W6L7AA/051C/12											

45. Remarks

Appointment is subject to completion of two year initial probationary period beginning 31-JAN-2022.

Service counting toward career tenure from 31-JAN-2022.

Selected from 20211103-CAQK-001, dated 03-NOV-2021.

46. Employing Department or Agency U.S. Army Installation Management Command(ARXA)			50. Signature/Authentication and Title of Approving Official Debbie L. Forrester		
47. Agency Code ARXA	48. Personnel Office ID 2289	49. Approval Date 01-24-2022	SUPV HUMAN RESOURCES SPECIALIST		

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NOTICE TO EMPLOYEE

This is your copy of the official notice of a personnel action. Keep it with your records because it could be used to make employment, pay, and qualifications decisions about you in the future.

The Action

- Blocks 5-B and 6-B describe the personnel action(s) that occurred.
- Blocks 15-22 show the position and organization to which you are assigned.

Pay

- When the personnel action is an award or bonus, block 20 shows the amount of that one-time cash payment. When the action is not an award or bonus, block 12 shows your former total annual salary, and block 20 shows your new total annual salary (block 20C plus 20D). The amount in blocks 12 and 20 do NOT include any one-time cash payments (such as performance awards and recruitment or relocation bonuses) or payments that may vary from one pay period to the next (such as overtime pay), or other forms of premium pay.
- Block 20A is the scheduled amount for your grade and step, including any special salary rate you receive. It does NOT include any locality-based pay. This rate of pay serves as the basis for determining your rate of pay upon promotion, change to a lower grade, or reassignment, and is used for pay retention purposes.
- Block 20B is the annual dollar amount of your Interim Geographic Adjustment or, beginning in 1994, your locality-based comparability payment.
- Block 20C is your Adjusted Basic Pay, the total of blocks 20A and 20B. It serves as the basis for computing your retirement benefits, life insurance, premium pay, and severance pay.
- Block 20D is the total dollar amount of any Retention Allowances, Supervisory Differentials, and Staffing Differentials that are listed in the remarks block. These payments are made in the same manner as basic pay, but are not a part of basic pay for any purpose.

Block 24 - Tenure

- Identifies the nature of your appointment and is used to determine your rights during a reduction in force (RIF). Tenure groups are explained in more detail in subchapter 26 of FPM Supplement 296-33 and RIF is explained in FPM Supplement 351-1; both should be available for review in your personnel office.

Block 26 - Veterans Preference for RIF

- Indicates whether you have preference for reduction-in-force purposes.

Block 30 - Retirement Plan

- FICA - Social Security System
- CS - Civil Service Retirement System
- CS-Spec - Civil Service Retirement System for law enforcement and firefighter personnel
- FS - Foreign Service Retirement and Disability System
- FERS - Federal Employees' Retirement System
- FERS-Reserve - Federal Employees' Retirement System for National Guard Reserve Technicians
- ATC - Federal Employees' Retirement System for Air Traffic Controllers
- FERS-Spec - Federal Employees' Retirement System for law enforcement and firefighter personnel
- FSPS - Foreign Service Pension System

OTHER INFORMATION

- If your appointment entitles you to elect health benefits or life insurance, and you have not been provided materials explaining the programs available and the enrollment forms, contact your personnel specialist.
- Your personnel specialist will also tell you if your position is covered by an agreement between an employee organization (union) and your agency. If you are eligible to and elect to join an employee organization, you can

Block 31 - Service Computation Date (Leave)

- Shows when your Federal service began unless you have prior creditable service. If so, this date is constructed to include your total years, months and days of prior creditable civilian and military service.
- Full-time employees with fewer than 3 years of service earn 4 hours of annual leave each pay period; those with 3 or more years but less than 15 years earn 6 hours each pay period; and those with 15 or more years earn 8 hours each pay period.
- Your earnings and leave statement or your time and attendance card will show the rate at which you earn leave and your current unused leave balance.

Block 32 - Work Schedule

- Your work schedule is established by your supervisor.
- A full-time employee works on a prearranged scheduled tour of duty that is usually 40 hours per week. A part-time employee has a prearranged scheduled tour of duty that is usually between 16 and 32 hours per week. An intermittent employee has no prearranged scheduled tour of duty and works when needed.
- Full-time and part-time employees whose appointments are for 90 days or more are usually eligible to earn annual leave; intermittent employees are not.
- Seasonal employees work on an annually recurring basis for periods of less than 12 months each year; they may have a full-time, a part-time, or an intermittent schedule during their work season.
- On-call employees work during periods of heavy workload and are in pay status for at least 6 months of each year; they may have either a full-time or a part-time schedule when they are in pay status.

Block 33 - Part-time Hours Per Biweekly Pay Period

- Indicates the number of hours a part-time employee is scheduled to work during a two-week pay period.

Block 34 - Position Occupied

- Identifies the employment system under which you are serving -- the Competitive Service, the Excepted Service, or the Senior Executive Service (SES).
- The employment system determines your eligibility to move to other jobs in the Federal service, your rights in disciplinary and adverse actions, and your eligibility for reemployment if you leave Federal service.

Block 35 - FLSA Category

- Exempt employees are not covered by the minimum wage and overtime Law (the Fair Labor Standards Act); nonexempt employees are covered.

Block 37 - Bargaining Unit Status

- Identifies a bargaining unit to which you belong, whether or not you are actually a member of a labor organization. Code "7777" indicates you are eligible but not in a bargaining unit; code "8888" indicates you are ineligible for inclusion in a bargaining unit.

Block 38 and 39 - Duty Station

- Identifies the city, county, and state or the overseas location, where you actually work.

elect to have your dues withheld from your salary.

- If you have questions or need more information about your rights and benefits, ask your supervisor or your personnel office.

- Definitions for any coded data in Blocks 1-24, 27-39 and 45-50 may be found in Federal Personnel Manual Supplement 292-1.

It is your responsibility to read all the information on the front of this notice and tell your personnel office immediately if there is an error in it.

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

Sherman S. Startz,)
)
) Docket No. SF-315H-22-0532-I-1
Appellant,)
)
)
v.)
)
)
Department of the Army,) Administrative Judge: Michael S. Shachat
)
)
Agency.) Date: September 6, 2022

**AGENCY MOTION TO DISMISS FOR UNTIMELINESS AND LACK OF
JURISDICTION**

The Agency, through its designated representative, hereby submits its motion to dismiss for untimeliness and lack of jurisdiction.

I. ARGUMENTS

1. Appellant's Appeal is Untimely by 6 Days and Should be Dismissed.

The deadline to file an appeal under 5 C.F.R. § 1201.22 is 30 days. Appellant's appeal was filed on August 2, 2022, which was thirty-six days after he was terminated during his probationary period. Appellant has not cited any exception that would allow him to file after the statutory deadline, nor does such an exception exist in the instant case under 5 C.F.R. § 1201.22(b) or 5 C.F.R. § 1201.154(b). Since the appeal is untimely, it should be dismissed in its entirety.

2. The Appeal Should be Dismissed for Lack of Jurisdiction Because Appellant was Discharged During His Probationary Period and is not Entitled to an Appeal with the MSPB.

Appellant was hired under a career-conditional appointment into a permanent competitive service, construction control inspector position on January 31, 2022. *See Tab C.* Appellant was terminated from this position during his probationary period on June 27, 2022 for the reasons outlined in the discharge notice dated June 27, 2022. *See Tab B.* The reasons for Appellant's probationary removal include an inability to maintain professional working relationships with coworkers and Contractors resulting in a detrimental effect on the organization. *Id.* There was no unlawful motive behind the Agency's decision to terminate Appellant during his probationary period.

Appellant was a probationary employee at the time he was terminated, and the MSPB has no jurisdiction in the instant case.

II. CONCLUSION

Appellant's appeal should be dismissed as untimely and due to lack of jurisdiction, because the appeal was six days late without a showing of good cause and the appellant was discharged during his probationary period.

FOR THE AGENCY:



Charles R Eiser
Attorney-Advisor, Labor
Fort Wainwright Law Center

CERTIFICATE OF SERVICE

I certify that the attached document was sent as indicated on 6 September 2022 to the following:

MSPB e-Appeal: Hon. Michael S. Shachat
Federal Administrative Judge

MSPB e-Appeal: Sherman S. Startz
Appellant

Charles R Eiser

Charles R Eiser
Fort Wainwright Law Center
ATTN: APVR-WJA (Labor Law)
1046 Marks Road #5700
Fort Wainwright, Alaska 99703-5700
Charles.r.eiser.mil@army.mil
(907) 353-6554 (phone)

NOTIFICATION OF PERSONNEL ACTION

1. Name (Last, First, Middle) STARTZ, JR. SHERMAN S.		2. Social Security Number 572-17-5981	3. Date of Birth 05-31-1961	4. Effective Date 01-31-2022
FIRST ACTION				
5-A. Code 101	5-B. Nature of Action Career-Cond Appointment			
5-C. Code Z5C	5-D. Legal Authority Direct-Hire Authority 5 U.S.C. 9905, 10/15/2021			
5-E. Code	5-F. Legal Authority			

7. FROM: Position Title and Number					15. TO: Position Title and Number CONSTRUCTION CONTROL INSPECTOR						
8. Pay Plan	9.Occ. Code	10.Grade or Level	11.Step or Rate	12. Total Salary	13.Pay Basis	16. Pay Plan	17. Occ. Code	18.Grade or Level	19.Step or Rate	20. Total Salary/Award	21. Pay Basis
12A. Basic Pay		12B. Locality Adj. \$0		12C. Adj. Basic Pay		20A. Basic Pay \$47,097.00	0809	09	01	\$61,424.00	PA
				12D. Other Pay	\$0	20B. Locality Adj. \$14,327.00		20C. Adj. Basic Pay \$61,424.00		20D. Other Pay \$0	

14. Name and Location of Position's Organization					22. Name and Location of Position's Organization US ARMY INSTALLATION MANAGEMENT CMD US ARMY GARRISON ALASKA DIRECTORATE OF PUBLIC WORKS ENGINEERING DIVISION CONTRACT MANAGEMENT BRANCH FORT WAINWRIGHT, AK 99703 4PAAC				
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EMPLOYEE DATA																									
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40. AGENCY DATA SMD	41. PON# OA	42.	43.	44.	TDA DATA XA/W6L7AA/051C/12																				

45. Remarks

OPF maintained by Civilian Personnel Records Center (CivPRC), 305 Marshall Ave, Fort Riley, KS 66442.

Appointment affidavit executed 31-JAN-2022.

Frozen Service: None

Creditable Military Service: None

Previous retirement coverage: Never Covered.

Employee is automatically covered under FERS, FERS-RAE or FERS-FRAE

You must elect to enroll or not to enroll in Health Benefits within 60 days after the effective date of this action.

You are automatically covered for basic life insurance. You have 60 days from the effective date of this action to elect additional coverage or to decline all coverage.

46. Employing Department or Agency U.S. Army Installation Management Command(ARXA)			50. Signature/Authentication and Title of Approving Official Debbie L. Forrester		
47. Agency Code ARXA	48. Personnel Office ID 2289	49. Approval Date 01-24-2022	SUPV HUMAN RESOURCES SPECIALIST		

TURN OVER FOR IMPORTANT INFORMATION
5-Part

1 - Employee Copy - Keep for Future Reference

Editions Prior to 7/91 Are Not Usable After
6/30/93
NSN 7540-01-333-6236

NOTIFICATION OF PERSONNEL ACTION

1. Name (Last, First, Middle) STARTZ, JR. SHERMAN S.		2. Social Security Number 572-17-5981	3. Date of Birth 05-31-1961	4. Effective Date 01-31-2022
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5-A. Code 101	5-B. Nature of Action Career-Cond Appointment	6-A. Code	6-B. Nature of Action	
5-C. Code Z5C	5-D. Legal Authority Direct-Hire Authority 5 U.S.C. 9905, 10/15/2021	6-C. Code	6-D. Legal Authority	
5-E. Code	5-F. Legal Authority	6-E. Code	6-F. Legal Authority	

7. FROM: Position Title and Number						15. TO: Position Title and Number CONSTRUCTION CONTROL INSPECTOR					
						496104 - 4280800					
8. Pay Plan	9.Occ. Code	10.Grade or Level	11.Step or Rate	12. Total Salary	13.Pay Basis	16. Pay Plan	17. Occ. Code	18.Grade or Level	19.Step or Rate	20. Total Salary/Award	21. Pay Basis
S						GS	0809	09	01	\$61,424.00	PA
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27. FEGLI C0 Basic only						28. Annuitant Indicator 9 - Not Applicable	29. Pay Rate Determinant 0		
30. Retirement Plan KF FERS (FRAE) FICA			31. Service Comp. Date (Leave) 01-31-2022			32. Work Schedule F - Full-Time	33. Part-Time Hours Per Biweekly Pay Period		
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45. Remarks

Flexible Spending Account (FSA), you have 60 days from the date of hire but no later than October 01 of the plan year to elect coverage. If hired on or after Oct 01, you are eligible to elect FSA during the FSA open season. Please visit: <https://www.fsafeds.com/GEM> for more information.

You have 60 days from the date of this action to enroll in the Federal Employees Dental or Vision (FEDVIP) plan. Please visit <https://www.benefeds.com/> for more information .

You have 60 days from this appointment date to enroll in the Federal Long Term Care Insurance Program (FLTCIP). More information can be found at <http://www.ltcfeds.com>

Questions regarding this Notification of Personnel Action (SF-50) should be addressed to either your servicing CPAC or first line supervisor

You are automatically enrolled in the Thrift Savings Plan (TSP) at a contribution rate of 5% of your basic biweekly pay. You may change or stop your TSP contributions at any time.

46. Employing Department or Agency U.S. Army Installation Management Command(ARXA)			50. Signature/Authentication and Title of Approving Official Debbie L. Forrester		
47. Agency Code ARXA	48. Personnel Office ID 2289	49. Approval Date 01-24-2022	SUPV HUMAN RESOURCES SPECIALIST		

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40. AGENCY DATA SMD	41. PON# OA	42.	43.	44. TDA DATA XA/W6L7AA/051C/12
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45. Remarks

Appointment is subject to completion of two year initial probationary period beginning 31-JAN-2022.

Service counting toward career tenure from 31-JAN-2022.

Selected from 20211103-CAQK-001, dated 03-NOV-2021.

46. Employing Department or Agency U.S. Army Installation Management Command(ARXA)			50. Signature/Authentication and Title of Approving Official Debbie L. Forrester
47. Agency Code ARXA	48. Personnel Office ID 2289	49. Approval Date 01-24-2022	SUPV HUMAN RESOURCES SPECIALIST

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NSN 7540-01-333-6236

NOTICE TO EMPLOYEE

This is your copy of the official notice of a personnel action. Keep it with your records because it could be used to make employment, pay, and qualifications decisions about you in the future.

The Action

- Blocks 5-B and 6-B describe the personnel action(s) that occurred.
 - Blocks 15-22 show the position and organization to which you are assigned.
- Pay**
- When the personnel action is an award or bonus, block 20 shows the amount of that one-time cash payment. When the action is not an award or bonus, block 12 shows your former total annual salary, and block 20 shows your new total annual salary (block 20C plus 20D). The amount in blocks 12 and 20 do NOT include any one-time cash payments (such as performance awards and recruitment or relocation bonuses) or payments that may vary from one pay period to the next (such as overtime pay), or other forms of premium pay.
 - Block 20A is the scheduled amount for your grade and step, including any special salary rate you receive. It does NOT include any locality-based pay. This rate of pay serves as the basis for determining your rate of pay upon promotion, change to a lower grade, or reassignment, and is used for pay retention purposes.
 - Block 20B is the annual dollar amount of your Interim Geographic Adjustment or, beginning in 1994, your locality-based comparability payment.
 - Block 20C is your Adjusted Basic Pay, the total of blocks 20A and 20B. It serves as the basis for computing your retirement benefits, life insurance, premium pay, and severance pay.
 - Block 20D is the total dollar amount of any Retention Allowances, Supervisory Differentials, and Staffing Differentials that are listed in the remarks block. These payments are made in the same manner as basic pay, but are not a part of basic pay for any purpose.

Block 24 - Tenure

- Identifies the nature of your appointment and is used to determine your rights during a reduction in force (RIF). Tenure groups are explained in more detail in subchapter 26 of FPM Supplement 296-33 and RIF is explained in FPM Supplement 351-1; both should be available for review in your personnel office.

Block 26 - Veterans Preference for RIF

- Indicates whether you have preference for reduction-in-force purposes.

Block 30 - Retirement Plan

- | | |
|----------------|--|
| - FICA | - Social Security System |
| - CS | - Civil Service Retirement System |
| - CS-Spec | - Civil Service Retirement System for law enforcement and firefighter personnel |
| - FS | - Foreign Service Retirement and Disability System |
| - FERS | - Federal Employees' Retirement System |
| - FERS-Reserve | |
| Tech | -Federal Employees' Retirement System for National Guard Reserve Technicians |
| - FERS-ATC | - Federal Employees' Retirement System for Air Traffic Controllers |
| - FERS-Spec | - Federal Employees' Retirement System for law enforcement and firefighter personnel |
| - FSPS | - Foreign Service Pension System |

OTHER INFORMATION

- If your appointment entitles you to elect health benefits or life insurance, and you have not been provided materials explaining the programs available and the enrollment forms, contact your personnel specialist.
- Your personnel specialist will also tell you if your position is covered by an agreement between an employee organization (union) and your agency. If you are eligible to and elect to join an employee organization, you can

Block 31 - Service Computation Date (Leave)

- Shows when your Federal service began unless you have prior creditable service. If so, this date is constructed to include your total years, months and days of prior creditable civilian and military service.
- Full-time employees with fewer than 3 years of service earn 4 hours of annual leave each pay period; those with 3 or more years but less than 15 years earn 6 hours each pay period; and those with 15 or more years earn 8 hours each pay period.
- Your earnings and leave statement or your time and attendance card will show the rate at which you earn leave and your current unused leave balance.

Block 32 - Work Schedule

- Your work schedule is established by your supervisor.
- A full-time employee works on a prearranged scheduled tour of duty that is usually 40 hours per week. A part-time employee has a prearranged scheduled tour of duty that is usually between 16 and 32 hours per week. An intermittent employee has no prearranged scheduled tour of duty and works when needed
- Full-time and part-time employees whose appointments are for 90 days or more are usually eligible to earn annual leave; intermittent employees are not.
- Seasonal employees work on an annually recurring basis for periods of less than 12 months each year; they may have a full-time, a part-time, or an intermittent schedule during their work season.
- On-call employees work during periods of heavy workload and are in pay status for at least 6 months of each year; they may have either a full-time or a part-time schedule when they are in pay status.

Block 33 - Part-time Hours Per Biweekly Pay Period

- Indicates the number of hours a part-time employee is scheduled to work during a two-week pay period.

Block 34 - Position Occupied

- Identifies the employment system under which you are serving -- the Competitive Service, the Excepted Service, or the Senior Executive Service (SES).
- The employment system determines your eligibility to move to other jobs in the Federal service, your rights in disciplinary and adverse actions, and your eligibility for reemployment if you leave Federal service.

Block 35 - FLSA Category

- Exempt employees are not covered by the minimum wage and overtime Law (the Fair Labor Standards Act); nonexempt employees are covered.

Block 37 - Bargaining Unit Status

- Identifies a bargaining unit to which you belong, whether or not you are actually a member of a labor organization. Code "7777" indicates you are eligible but not in a bargaining unit; code "8888" indicates you are ineligible for inclusion in a bargaining unit.

Block 38 and 39 - Duty Station

- Identifies the city, county, and state or the overseas location, where you actually work.

elect to have your dues withheld from your salary.

- If you have questions or need more information about your rights and benefits, ask your supervisor or your personnel office.

- Definitions for any coded data in Blocks 1-24, 27-39 and 45-50 may be found in Federal Personnel Manual Supplement 292-1.

It is your responsibility to read all the information on the front of this notice and tell your personnel office immediately if there is an error in it.



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



revised to sign
Sherman Startz, Jr.
1410hr 27 Jun 22 Rg

27 June 2022
Date

NOTIFICATION OF PERSONNEL ACTION

1. Name (Last, First, Middle) STARTZ, JR, SHERMAN S.						2. Social Security Number 572-17-5981		3. Date of Birth 05-31-1961		4. Effective Date 06-27-2022	
FIRST ACTION						SECOND ACTION					
5-A. Code 385	5-B. Nature of Action Termination During Prob/Trial Period				6-A. Code	6-B. Nature of Action					
5-C. Code L2M	5-D. Legal Authority Reg 315.804				6-C. Code	6-D. Legal Authority					
5-E. Code	5-F. Legal Authority				6-E. Code	6-F. Legal Authority					
7. FROM: Position Title and Number CONSTRUCTION CONTROL INSPECTOR 496104 - 4280800						15. TO: Position Title and Number					
8. Pay Plan GS	9. Occ. Code 0809	10. Grade/Level 09	11. Step/Rate 01	12. Total Salary \$61,424.00	13. Pay Basis PA	16. Pay Plan	17. Occ. Code	18. Grade/Level	19. Step/Rate	20. Total Salary/Award	21. Pay Basis
12A. Basic Pay \$47,097.00	12B. Locality Adj. \$14,327.00	12C. Adj. Basic Pay \$61,424.00	12D. Other Pay \$0	20A. Basic Pay	20B. Locality Adj.	20C. Adj. Basic Pay	20D. Other Pay				
14. Name and Location of Position's Organization US ARMY INSTALLATION MANAGEMENT CMD US ARMY GARRISON ALASKA DIRECTORATE OF PUBLIC WORKS ENGINEERING DIVISION CONTRACT MANAGEMENT BRANCH FORT WAINWRIGHT, AK 99703 4PAAC						22. Name and Location of Position's Organization					
23. Veterans Preference 1	1 - None 2 - 5-Point	3 - 10-Point/Disability 4 - 10-Point/Compensable	5 - 10-Point/Other 6 - 10-Point/Compensable/30%	24. Tenure 2	0 - None 1 - Permanent	2 - Conditional 3 - Indefinite	25. Agency Use	26. Veterans Preference for RIF <input type="checkbox"/> YES <input checked="" type="checkbox"/> X <input type="checkbox"/> NO			
27. FEGLI D0	Basic + Option A					28. Annuitant Indicator 9	Not Applicable	29. Pay Rate Determinant 0			
30. Retirement Plan KF	FERS (FRAE) FICA		31. Service Comp. Date (Leave) 01-31-2022			32. Work Schedule F	Full-Time	33. Part-Time Hours Per Biweekly Pay Period			
POSITION DATA						37. Bargaining Unit Status AR2029					
34. Position Occupied 1			35. FLSA Category N		36. Appropriation Code 131079A0000 						
38. Duty Station Code 020801090			39. Duty Station (City - County - State or Overseas Location) FORT WAINWRIGHT / FAIRBANKS NORTH STAR / ALASKA								
40. Agency Data ZRS	41. PON# OA	42.	43.	44.	TDA DATA XA/W6L7AA/051C/12						
45. Remarks											
Forwarding address: 116 Kelsan Way, Fairbanks, AK 99709-2929.											
Lump-sum payment to be made for any unused annual leave.											
Not entitled to severance pay.											
SF 2819 was provided. Life insurance coverage is extended for 31 days during which you are eligible to convert to an individual policy (nongroup contract).											
Health benefits coverage is extended for 31 days during which you are eligible to convert to an individual policy (nongroup contract). You are also eligible for temporary continuation of your FEHB coverage for up to 18 months.											
46. Employing Department or Agency U.S. Army Installation Management Command(ARXA)						50. Signature/Authentication and Title of Approving Official Debbie L. Forrester SUPV HUMAN RESOURCES SPECIALIST					
47. Agency Code ARXA	48. Personnel Office ID 2289	49. Approval Date 06-27-2022									

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).

Accordingly, this appeal must be dismissed for lack of jurisdiction, without a hearing.⁴

DECISION

The appeal is DISMISSED.

FOR THE BOARD:

/S/
Michael S. Shachat
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on October 14, 2022, 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.

⁴ As this Board lacks jurisdiction over this appeal, it is unnecessary to address the issue of timeliness. In addition, the question of whether the appeal might be premature would have necessitated that the appellant was appealing an otherwise appealable action, which is not the case here.

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. ____, 137 S. Ct. 1975 (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

shelbystartz@outlook.com

From: Info <info@osc.gov>
Sent: Friday, January 6, 2023 11:02 AM
To: 'shelbystartz@outlook.com'
Cc: Kish, Alexander
Subject: OSC Status Update

Categories: MSPB OSC

Good Afternoon,

We received your OSC Form-14 on 12/29/2022. Your case number is MA-23-000527 and is currently being reviewed.

The Attorney assigned to your case is Mr. Kirsh. He can be contacted at: AKirsh@osc.gov. If you have questions about your case or additional documents/information to add to your case file, please contact Kirsh and reference your OSC case number.

For more details about Prohibited Personnel Practices please review our Frequently Asked Questions at
<https://osc.gov/Services/Pages/PPP.aspx>.

NOTICE: This message and any attachments may contain information that is sensitive, confidential, or legally privileged. If you are not the intended recipient, please immediately notify the sender and delete this email from your system; you should not copy, use, or disclose its contents.

Thank you.

shelbystartz@outlook.com

From: Kish, Alexander <AKish@osc.gov>
Sent: Monday, January 9, 2023 12:07 PM
To: Sherman Startz
Subject: Re: OSC to Sherman Startz - request for interview

Hello Mr. Startz,

Would you be free on Thursday at 2pm ET?

Best,

Alex Kish
Attorney
Retaliation and Disclosure Unit
U.S. Office of Special Counsel
1730 M Street, N.W.
Suite 218
Washington, D.C. 20036
202-804-7048
akish@osc.gov

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From: Sherman Startz <shelbystartz@outlook.com>
Sent: Monday, January 9, 2023 2:34 PM
To: Kish, Alexander <AKish@osc.gov>
Cc: AKirsh@osc.gov <AKirsh@osc.gov>
Subject: RE: OSC to Sherman Startz - request for interview

CAUTION: EXTERNAL EMAIL Do not click on links, open attachments, or provide information unless you are sure the message is legitimate and the content is safe.

Anytime is fine with me. Ideally between 0600 and 1800 Alaska time; but honestly I am so ready to talk to someone, I will chat at 0300.

I have teams on my laptop and cell phone.

Respectfully

Sherman S. Shelby
907-231-9270

From: Kish, Alexander <AKish@osc.gov>
Sent: Friday, January 6, 2023 12:22 PM
To: shelbystartz@outlook.com
Subject: OSC to Sherman Startz - request for interview

Dear Mr. Startz,

You recently filed two complaints with the U.S. Office of Special Counsel (OSC), in which you made one or more allegations of a prohibited personnel practice, including retaliation for whistleblowing (OSC File No. MA-23-000527), and you reported one or more instances of gross mismanagement, gross waste of funds, abuse of authority, substantial and specific danger to public health or safety, and/or a violation of a law, rule, or regulation (OSC File No. DI-23-000198). As such, OSC has assigned your complaints to the Retaliation and Disclosure Unit and I will be the main point of contact on both of these matters. At this time, I would like to set up a convenient time for us to go over the facts of the complaints. Please let me know what day and time works best for you this week or next. This will be a Microsoft Teams audio call.

I also ask that you review the attached fact sheet before our call so that I can answer any related questions you may have on the information provided.

Sincerely,

Alex Kish
Attorney
Retaliation and Disclosure Unit
U.S. Office of Special Counsel
1730 M Street, N.W.
Suite 218
Washington, D.C. 20036
202-804-7048
akish@osc.gov

NOTICE: This message and any attachments may contain information that is sensitive, confidential, or legally privileged. If you are not the intended recipient, please immediately notify the sender and delete this email from your system; you should not copy, use, or disclose its contents. Thank you for your cooperation.

shelbystartz@outlook.com

From: Kish, Alexander <AKish@osc.gov>
Sent: Wednesday, March 22, 2023 9:33 AM
To: 'shelbystartz@outlook.com'
Subject: OSC to Sherman Startz - Final decision on PPP, IRA letter
Attachments: OSC to Sherman Startz - Final Decision on PPP - March 22, 2023.pdf; OSC to Sherman Startz - IRA Letter - March 22, 2023.pdf

Mr. Startz,

Attached, please find OSC's final decision into your prohibited personnel practices complaint and a letter explaining the individual right of action (IRA) appeal. Based on what you have told me about your MSPB appeal, it is likely that the Board would dismiss your appeal for lack of jurisdiction. However, with this IRA letter, the Board would have jurisdiction, although you would be more limited in the affirmative defenses that you could raise and the initial burden of proof would be on you to prove retaliation, not on the agency, in an IRA appeal. You would also be limited to bringing your retaliation claim to the Board.

Please let me know if you have any questions, but the Board is in a better position to explain what you should do with your IRA letter given that your appeal is still being considered.

Kind regards,

Alex Kish
Attorney
Retaliation and Disclosure Unit
U.S. Office of Special Counsel
1730 M Street, N.W.
Suite 218
Washington, D.C. 20036
202-804-7048
akish@osc.gov

NOTICE: This message and any attachments may contain information that is sensitive, confidential, or legally privileged. If you are not the intended recipient, please immediately notify the sender and delete this email from your system; you should not copy, use, or disclose its contents. Thank you for your cooperation.



U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 218
Washington, D.C. 20036-4505
202-804-7000

March 22, 2023

VIA ELECTRONIC MAIL

Mr. Sherman Startz
116 Kelsan Way
Fairbanks, AK 99709
shelbystartz@outlook.com

Re: OSC File No. MA-23-000527 – Final Determination

Dear Mr. Startz:

On February 10, 2023, we sent you a letter setting out our preliminary determination to close your prohibited personnel practice complaint. At that time, we notified you that you had 13 days to respond with any additional information for us to consider. That same day, you responded to our letter, stating that you disagreed with our preliminary findings. However, we note that your response did not contain any information or facts that would change our ultimate analysis and conclusions. Accordingly, for all the reasons stated in our February 10, 2023 letter, we are now closing OSC's inquiry into your prohibited personnel practice complaint.

Because you alleged potential violations of 5 U.S.C. § 2302(b)(8) and (b)(9), you may have a right to seek corrective action from the Merit Systems Protection Board (Board) under the provisions of 5 U.S.C. §§ 1214(a)(3) and 1221, also referred to as an individual right of action appeal. You may file a request for corrective action with the Board within 65 days of the date of this letter. The Board regulations concerning rights to file a corrective action case can be found at 5 C.F.R. Part 1209. We have sent you a separate letter on this date regarding your right to file a corrective action case with the Board.

Sincerely,

Alex Kish
Attorney
Retaliation and Disclosure Unit
(202) 804-7048
akish@osc.gov



U.S. MERIT SYSTEMS PROTECTION BOARD

Office of the Clerk of the Board

1615 M Street, N.W.
Washington, D.C. 20419-0002

Phone: 202-653-7200; Fax: 202-653-7130; E-Mail: mspb@mspb.gov

March 23, 2023

Notice to:

Sherman S. Startz
116 Kelsan Way
Fairbanks, AK 99709

Re: Sherman S. Startz v. Department of the Army
MSPB Docket Number: SF-315H-22-0532-I-1

The Board has received your filing dated March 22, 2023 in which you submit an additional pleading.* The Board's regulations do not provide for pleadings other than a petition for review, a cross petition for review, a response to the petition for review or cross petition for review, and a reply to a response to a petition for review. 5 C.F.R. § 1201.114(a)(5). A description of these pleadings and the time limits for filing them are set forth in the Board's regulations. 5 C.F.R. § 1201.114(a), (e). For the Board to consider a party's pleading, other than one of those set forth above, the party must describe the nature and need for the pleading. 5 C.F.R. § 1201.114(a)(5). If a party wishes to submit a pleading after the record has closed, the party must also show that the evidence was not readily available before the record closed. 5 C.F.R. § 1201.114(a)(5), (k).

If you filed your additional pleading by non-electronic means, such as fax or U.S mail, it is being returned to you at this time via U.S. mail. If you submitted your additional pleading through e-Appeal, it has been deleted from the e-Appeal Repository and will be returned to you via separate email. You may submit a motion, as described above, that requests leave to file an additional pleading. Please do not include your additional pleading with your motion. If you choose to submit a motion, you will be informed at a later date of the Board's decision to grant or deny your request. If the

* You submit, without comment, two letters dated March 22, 2023, from the Office of Special Counsel. If you wish to file an individual right of action appeal seeking corrective action with the Board, you should file a new appeal with the appropriate Board regional office. 5 C.F.R. part 1209.

Board grants your request, you will be given 10 days in which to submit your additional pleading to the Board. For more information about the Board's petition for review process, please review the Board's regulations at 5 C.F.R. § 1201.114 - 1201.120.

Jennifer Everling
Acting Clerk of the Board

/s/
Dinh Chung
Case Management Specialist

CERTIFICATE OF SERVICE

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

Appellant

Electronic Mail Sherman S. Startz
 116 Kelsan Way
 Fairbanks, AK 99709

Agency Representative

Electronic Mail Charles Eiser
 Department of the Army
 1046 Marks Road
 Fort Wainwright, AK 99701

Electronic Mail Pacific Region
 Department of the Army
 USARMY IMCOM
 DSN 315-438-2147
 Fort Shafter, HI 96858

March 23, 2023

(Date)

/s/

Dinh Chung
Case Management Specialist

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

Sherman S. Startz,)
Appellant,) Docket No. SF-1221-23-0258-W-1
v.)
Department of the Army,) Administrative Judge: Michael S. Shachat
Agency.) Date: May 5, 2023

AGENCY'S MOTION TO DISMISS FOR LACK OF JURISDICTION

COME NOW, the Agency, by and through undersigned counsel, hereby submits its motion to dismiss for lack of jurisdiction.

I. ARGUMENTS

1. The Appellant was not a government employee when terminated from his contract position with ALEUT Corporation and the MSPB does not have jurisdiction over contract employees.

The Appellant alleges retaliation as a contract worker for the ALEUT Corporation for attempting to disclose fraud, waste and abuse committed by the ALEUT Corporation against the government. He raised his complaints to the Office of Special Counsel which closed its inquiry and issued the closing letter to the Appellant with an indication of right to an Individual Right to Action appeal. *See TAB A.* The disclosure raised by the Appellant allegedly happened during his work as a contract employee. Pursuant to 5 U.S.C. 7511 and 7513, a contract employee is not considered an “employee” of the Federal Government. The

Board's jurisdiction is limited to matters specifically entrusted to it through regulation or statute. *Garcia v. Department of Homeland Security*, 437 F.3d 1322, 1327 (Fed. Cir. 2006) (en banc). Moreover, the Appellant has the burden of proving by a preponderance of the evidence that his case falls within the specific categories and more definitively, that he falls within the class of persons entitled to the appeal to the Board. 5 C.F.R. §§ 1201.56(b)(2)(A), 1201.57(c)(3). The Appellant was not in the competitive or excepted service nor was he ever executed a Standard Form (SF) 50 or SF-52 or its equivalent in his employment with ALEUT Corporation. *See Pflueger v. DOE*, 2015 MSPB LEXIS 7033. The emails in support of the Appellant's appeal are allegations raised while employed by ALEUT Corporation. *See TAB B*. He was not paid through the federal civil-service system. The allegations raised in this appeal are not within the jurisdiction of the MSPB.

2. Appellant was discharged during his probationary period due to his inability to maintain professional working relationships with coworkers and Contractors resulting in a detrimental effect on the organization. The Appellant's termination was not due to retaliation for engaging in whistleblower activity and thus, he is not entitled to an appeal with the MSPB.

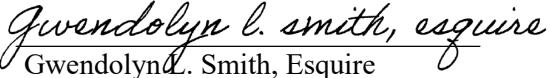
Upon Appellant's termination of employment with the ALEUT Corporation, Appellant was subsequently hired under a career-conditional appointment into a permanent competitive service, construction control inspector position on January 31, 2022. *See Tab C*. The Appellant was terminated from this position during his probationary period on June 27, 2022 for the reasons outlined in the discharge notice dated June 27, 2022. *See Tab D*. The Board previously ruled it lacked jurisdiction over the Appellant's appeal for removal during his probationary

period. See Tab E. The Appellant now seeks to raise retaliation claims for alleged whistleblowing and a hostile work environment as the reasons for his termination. Yet, Appellant did not raise a formal hostile work environment claim with the Equal Employment Opportunity Commission (EEOC). The Appellant arguments fail because he indicated that he raised the whistleblower concerns to the Army while working for the ALEUT Corporation, but the Army proceeded to hire him upon his termination from the ALEUT Corporation. That the Army retaliated against the Appellant by employing him is illogical and inaccurate. The reasons for the Appellant's removal during his probationary period was due to his inability to maintain professional working relationships with coworkers and Contractors resulting in a detrimental effect on the organization. *Id.* There was no unlawful motive behind the Agency's decision to terminate the Appellant during his probationary period. The Appellant was a probationary employee at the time he was terminated, and the MSPB has no jurisdiction in the instant case.

II. CONCLUSION

WHEREFORE, the Agency, by and through undersigned counsel, respectfully ask the Honorable Judge Shachat to dismiss the Appellant's appeal due to lack of jurisdiction. The Appellant was not a federal employee at the time of his alleged disclosures and was subsequently hired as a federal employee despite his alleged disclosures. He was terminated during his probationary period for the aforementioned stated reasons. Neither event falls under the jurisdiction of the MSPB.

FOR THE AGENCY:


Gwendolyn L. Smith, Esquire
Labor and Employment Law Attorney
Consolidated Legal Office
1046 Marks Road #5700

Fort Wainwright Alaska
Gwendolyn.l.smith8.civ@army.mil
(907) 356-6546

CERTIFICATE OF SERVICE

I certify that the attached document was sent as indicated on 5 May 2023 to the following:

MSPB e-Appeal: Hon. Michael S. Shachat
Federal Administrative Judge

MSPB e-Appeal: Sherman S. Startz
Appellant

Gwendolyn L. Smith, Esquire
Gwendolyn L. Smith, Esquire
Labor and Employment Law Attorney
Consolidated Legal Office
1046 Marks Road #5700
Fort Wainwright Alaska
Gwendolyn.l.smith8.civ@army.mil
(907) 356-6546

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 File	e-Appeal / e-Mail
Sherman S. Startz Appellant	Agency File	e-Appeal / e-Mail
Pacific Region Agency Representative	Agency File	e-Appeal / e-Mail