

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

SHERMAN S. STARTZ, JR.,

Petitioner,

v.

25-1375

DEPARTMENT OF THE ARMY,

Respondent.

**RESPONDENT'S INFORMAL BRIEF
AND SUPPLEMENTAL APPENDIX**

Pursuant to Federal Circuit Rule 28(g), respondent, the Department of the Army, respectfully submits this informal brief and supplemental appendix in response to the informal brief filed pro se by petitioner, Sherman S. Startz, Jr.

STATEMENT OF THE CASE

This is an appeal from a final decision of the Merit Systems Protection Board (MSPB or board). In that decision, the board denied corrective action in an individual right of action (IRA) appeal filed by petitioner Sherman S. Startz, Jr. alleging that the Department of the Army retaliated against him in violation of the Whistleblower

Protection Act of 1989 and the Whistleblower Protection Enhancement Act of 2012 (WPA). SAppx1.¹

I. Background

On January 31, 2022, Mr. Startz was appointed as a Construction Control Inspector at the United States Army Garrison in Fort Wainwright, Alaska. SAppx2. Mr. Startz's SF-50 form noted that his appointment was subject to a two-year probationary period starting on the date of his appointment. *Id.* Mr. Startz's duties generally involved monitoring construction contracts and working with contractors on quality assurance. *See* SAppx2-3. One construction project Mr. Startz monitored was a re-roofing project conducted by Aleut Federal LLC, with Patrick Constructors working on the project as a subcontractor. SAppx3. Mr. Startz previously worked for Patrick Constructors in a similar role in 2021 and was terminated by the company that same year. SAppx3-4.

On June 27, 2022, the Army informed Mr. Startz that it was terminating him during his probationary period based on his inability to "maintain working professional relationships" with coworkers and Army contractors, which caused a "detrimental effect on the organization." SAppx4. Mr. Startz was terminated that same day. *Id.*

¹ Pursuant to Federal Circuit Rule 30(e), the Department of the Army includes a supplemental appendix with this informal response brief. The designation "SAppx__" refers to the pages in the attached supplemental appendix.

In January 2023, Mr. Startz filed a whistleblower complaint with the Office of Special Counsel (OSC). SAppx4. OSC responded on February 10, 2023, describing Mr. Startz's complaint 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.

SAppx36. The letter noted that OSC made the preliminary determination to close its investigation into these prohibited personnel practice allegations but would provide Mr. Startz the opportunity to submit additional evidence. *Id.*

Separately, on February 10, 2023, Mr. Startz filed a whistleblowing complaint with the Department of Defense Office of Inspector General (OIG) through its hotline. SAppx4. However, there was no record evidence that OIG took any action with respect to Mr. Startz's hotline complaint. *Id.*

On March 22, 2023, OSC notified Mr. Startz that, because he did not produce any additional evidence, it was closing its investigation into his prohibited personnel practice allegations. SAppx41. OSC informed Mr. Startz of his right to seek corrective action from the board, which Mr. Startz did on the same day. *Id.*; SAppx5.

II. MSPB Proceedings

1. Initial Decision

On May 12, 2023, the board found that Mr. Startz met his burden to establish the board's jurisdiction over his IRA appeal. SAppx5. Because Mr. Startz did not request a hearing, SAppx32, the board issued an order that provided the parties with an opportunity to submit evidence and argument. SAppx6.

On June 15, 2023, Mr. Startz filed a motion to compel discovery, alleging that the Army was not adequately responding to his discovery requests. SAppx42. Mr. Startz did not include a copy of the relevant requests with the motion. SAppx42-46. On July 17, 2023, the board granted Mr. Startz's motion to compel, directed the Army to provide responses by July 31, 2023, and extended the deadline for record submissions. SAppx47-48. The Army provided its responses as directed. SAppx68-69. Mr. Startz did not file further motions to compel. SAppx24. The board issued its initial decision on January 8, 2024, denying Mr. Startz's request for corrective action. SAppx1.

The board first concluded that Mr. Startz's principal job functions did not require him to "regularly investigate and disclose wrongdoing," and therefore that 5 U.S.C. § 2302(b)(9)(f)(2), which sets out heightened disclosure requirements for employees in such positions, did not apply to Mr. Startz's IRA appeal. SAppx7. The board therefore applied the generally applicable disclosure requirements set forth in 5 U.S.C. § 2302(b)(8). Specifically, the board considered whether Mr. Startz disclosed

information that he “reasonably believed” evidenced one of the situations specified in 5 U.S.C. § 2302(b)(8)(A)(i)-(ii). SAppx8. The board explained that a belief is reasonable when “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” wrongdoing under 5 U.S.C. § 2302(b)(8). *Id.* (citing *Mithen v. Dep’t of Veterans Affairs*, 119 M.S.P.R. 215, ¶ 13 (2013)).

The board then concluded that Mr. Startz did not prove by a preponderance of the evidence that he made a protected disclosure under the WPA. SAppx8. Specifically, the board concluded that (1) Mr. Startz did not prove that, on June 24, 2022, he disclosed to Chief Zrna that federal contractors, Aleut Federal and Patrick Constructors, were defrauding the Government by falsifying the provision or valuation of flooring materials for a construction project, SAppx9-10, and (2) even assuming Mr. Startz did make such a disclosure, he did not prove that the disclosure would have been protected, SAppx11-12.

First, in finding that Mr. Startz had not met his burden to prove that he made a disclosure, the board acknowledged the limited evidentiary record. SAppx2. The board noted that Mr. Startz did not allege that his disclosure to Chief Zrna was witnessed by anyone else and that he did not offer any other evidence that it occurred beyond his own OSC filings. SAppx9. In its interrogatory responses, the Army stated that Chief Zrna was “unaware of [the] incident” underlying the alleged protected disclosure. *Id.* Mr. Startz admitted that this was a “[h]e said she said” situation.

SAppx9, 54. The board observed that the agency did not admit that Mr. Startz made any disclosures, SAppx72-73, though the board “recognize[d] that [Mr. Startz’s] allegations in his [b]oard 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.” SAppx9. However, the board concluded that Mr. Starz’s allegations, without more, were insufficient to show by a preponderance of the evidence that he made a protected disclosure to Chief Zrna. *Id.*

Second, in finding that Mr. Startz had not met his burden to prove the disclosure would have been protected, the board found relevant Mr. Startz’s own admission to OSC “that he had no actual evidence” that the contractors were submitting fictitious specification numbers as he had alleged. SAppx10 (citing SAppx54 (Mr. Startz’s admission to OSC that “until[] my allegations are proven the evidence is my word”)). The administrative judge also found probative the fact that, despite being afforded the opportunity to conduct discovery, Mr. Startz failed to submit any evidence supporting his belief that Aleut or Patrick Contractors were defrauding the Army. *Id.* Rather, Mr. Startz only submitted daily inspection reports for the relevant project, which the board concluded “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.” *Id.* Although Mr. Startz alleged that his prior retaliatory termination by Patrick Constructors was

evidence of the fraud, the board rejected this theory because, even assuming a retaliatory termination occurred, such a termination would not be evidence of the specific alleged fraud. *Id.* The board further rejected Mr. Startz's argument that the Department of Justice's antitrust charges against a different flooring subcontractor for other projects at Fort Wainwright showed that Patrick Constructors was defrauding the Government. SAppx11. Additionally, the board concluded Mr. Startz had not shown that alleged wrongdoing by the contractor implicated the Government's interests and good name, applying *Miller v. Dep't of Homeland Security*, 99 M.S.P.R. 175 (2005). *Id.*

Finally, the board concluded that, while Mr. Startz's OSC and OIG complaints were protected whistleblower activities under 5 U.S.C. § 2302(b)(9)(D), they were not a contributing factor in the Army's decision to terminate him because they occurred after his termination. SAppx13.

Therefore, the board denied Mr. Startz's request for corrective action because he failed to meet his *prima facie* burden of proof. SAppx14. Mr. Startz petitioned the full board for review of the initial decision. SAppx24.

2. Petition for Review

On January 17, 2025, the board denied Mr. Startz's petition for review, concluding that he had not established any basis for granting review under 5 C.F.R. § 1201.115. SAppx23-25. Mr. Startz complained that he did not waive his right to a hearing. SAppx24. The board concluded that the administrative judge's decision to

decide the appeal on the written record alone was not error because Mr. Startz clearly indicated on his initial appeal form that he did not want a hearing. *Id.*; SAppx32.

Mr. Startz also alleged that the Army's failure to respond to his discovery requests precluded him from proving his case. *Id.* The board found no basis to remand or reverse the initial decision based on this allegation. *Id.* The board noted that Mr. Startz filed a motion to compel without a copy of his original discovery request, but the administrative judge granted the motion anyway. *Id.* Although Mr. Startz indicated that he was unhappy with the agency's subsequent response, the record did not show that "he subsequently filed a renewed motion to compel, a motion for sanctions, or otherwise asked the administrative judge to intervene." *Id.*

The board denied Mr. Startz's petition for review and affirmed the initial decision, which became the final decision. SAppx25. On the same day, Mr. Startz's appeal in this Court was docketed. ECF No. 1.

JURISDICTIONAL STATEMENT

The Court possesses jurisdiction to entertain Mr. Startz's petition for review of the board decision pursuant to 28 U.S.C. § 1295(a)(9), because he timely filed a petition for review within 60 days of the board's final decision in accordance with 5 U.S.C. § 7703(b)(1)(A).

In his Federal Circuit Rule 15(c) Statement Concerning Discrimination, Mr. Startz stated that he does not wish to abandon his discrimination claims. But that assertion alone does not bar this Court's jurisdiction. Because an IRA appeal to the

board cannot involve a Title VII discrimination claim, such an IRA appeal is never a “mixed case” that is precluded from this Court’s jurisdiction by 5 U.S.C. § 7703(b). *See Young v. MSPB*, 961 F.3d 1323, 1328 (Fed. Cir. 2020). Therefore, any discrimination claims do not deprive this Court of jurisdiction over Mr. Startz’s IRA appeal.

Additionally, although Mr. Startz notes that he has filed a discrimination case in a United States District Court, the case number he lists (SF-1221-23-0258-W-1) is the MSPB case number for the present appeal, not a district court case. *Compare* Pet. Statement Concerning Discrimination at 2 (ECF No. 4) *with* SAppx1. We are not aware of any pending discrimination case in a United States District Court filed by Mr. Startz.

For these reasons, this Court possesses jurisdiction to entertain Mr. Startz’s petition.

STANDARD OF REVIEW

The Court must affirm the board’s decision unless it is “(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence[.]” 5 U.S.C. § 7703(c). The Court reviews the board’s legal determinations *de novo* and its underlying findings of fact for substantial evidence. *See, e.g., Welshans v. United States Postal Serv.*, 550 F.3d 1100, 1102 (Fed. Cir. 2008). Under this standard, the Court considers whether the

board's decision is "supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Haebe v. Dep't of Justice*, 288 F.3d 1288, 1298 (Fed. Cir. 2002) (cleaned up). "The question . . . is not how the court would rule upon a *de novo* appraisal of the facts of the case, but whether the administrative determination is supported by substantial evidence in the record as a whole." *Id.* The board's credibility determinations are "virtually unreviewable." *Gibson v. Dep't of Veterans Affs.*, 160 F.3d 722, 725 (Fed. Cir. 1998) (cleaned up).

Additionally, "[p]rocedural matters relative to discovery and evidentiary issues fall within the sound discretion of the board and its officials" and may only be overturned by this Court where the petitioner shows an abuse of discretion and proves "that the error caused substantial harm or prejudice to [the petitioner's] rights which could have affected the outcome of the case." *Curtin v. Off. of Pers. Mgmt.*, 846 F.2d 1373, 1378–79 (Fed. Cir. 1988) (citations omitted).

QUESTIONS AND ANSWERS

- 1. Are you aware of any related cases currently or previously before this court? If yes, identify the title and number of each case.**

No. We are not aware of any related cases currently or previously before this Court.

- 2. Do you believe this court has jurisdiction in this case. If no, why not?**

Yes. We believe the Court has jurisdiction in this case for the reasons stated in our "Jurisdictional Statement," above.

3. What are your arguments in response to the petitioner/appellant?

Our arguments in response to those raised in Mr. Startz's informal brief are as follows:

a. Did the MSPB incorrectly decide or fail to take into account any facts?

No. The MSPB correctly decided and accounted for all the facts in denying Mr. Startz's request for corrective action, and substantial evidence supports the board's finding that Mr. Startz failed to prove that he made a protected disclosure. Specifically, the board correctly considered all relevant evidence in reaching its two conclusions: (i) that Mr. Startz did not prove that he made a disclosure, and (ii) that, even if he did make a disclosure, Mr. Startz did not prove that it was protected.

(i) The Alleged Disclosure

First, substantial evidence supports the board's conclusion that Mr. Startz did not prove he made a disclosure. As the board found, there was little evidence for it to consider because Mr. Startz did not request a hearing, so it applied the board's standards for evaluating hearsay evidence. SAppx2 (citing *Borninkhof v. Dep't of Justice*, 5 M.S.P.R. 77, 87 (1981)). The administrative judge considered the only evidence in the record that Mr. Startz made the alleged protected disclosure to his supervisor, Chief Zrna: Mr. Startz's own statements. SAppx9. Mr. Startz did not allege that the disclosure was witnessed by anyone else, and he provided no corroborating evidence. *Id.* The board considered that piece of evidence against the Army's interrogatory

response that Chief Zrna was “unaware of [the] incident” underlying Mr. Startz’s alleged protected disclosure. *Id.*; SAppx72. The board also acknowledged that Mr. Startz made his claim under oath, while the agency did not submit a sworn statement from Chief Zrna disputing Mr. Startz’s allegations. SAppx9. Nonetheless, taken together, the board weighed the evidence and concluded that it was insufficient to show by a preponderance of the evidence that a disclosure occurred. *Id.*

Mr. Startz does not allege that there was any additional or corroborating record evidence that the board failed to consider. Rather, he challenges the board’s conclusions after weighing the available evidence. However, this Court “does not reweigh evidence on appeal,” *In re NTP, Inc.*, 654 F.3d 1279, 1292 (Fed. Cir. 2011), including in cases where the board “weighed documents in the record,” *White v. Off. of Pers. Mgmt.*, No 24-2052, 2025 WL 429788, at *2 (Fed. Cir. 2025); *see also Jones v. Dep’t of Health and Human Servs.* 834 F.3d 1361, 1369 (Fed. Cir. 2016) (applying this standard to the Court’s review of MSPB decisions).

Therefore, Mr. Startz has not shown why the board’s conclusion on this point was unsupported by substantial evidence.

(ii) Whether The Alleged Disclosure Was Protected

Second, substantial evidence supports the board’s conclusion that, even if Mr. Startz made a disclosure to Chief Zrna, he did not prove that it was protected.

Mr. Startz alleges in response to this question that “the EEO Directorate^[2] was found to be compromised and demonstrated gross abuse of power, fraud, conspiracy to obstruct civil rights, Sherman Act and Anti Trust violations in collusions with other senior federal officials[] and an Native Corporation; criminal conduct.” Pet. Br. (ECF No. 16) at Q. 2. We understand this response as repeating the factual allegations Mr. Startz made before the board. He also notes numerous disagreements with the board’s recount of the facts—the same disagreements he raised in his petition for review of the board’s decision. *See id.* at 7-28. However, the board considered these claims and concluded that Mr. Startz lacked direct evidence that the contractors at issue were defrauding the Government. SAppx10. The board further concluded that his only documentary evidence—daily inspection reports—“shed no light whatsoever on his allegations.” *Id.* Mr. Startz does not identify any record evidence that the board did not consider nor does he demonstrate why these conclusions are unsupported by substantial evidence.

Mr. Startz further alleges in response to this question that the Army “failed to follow court orders and ultimately did not produce the necessary discovery to prove all my allegation[s].” Pet. Br. at Q. 1; *see also id.* at 16. However, the board granted Mr. Startz’s motion to compel discovery and directed the Army to respond to

² We are unaware of an “EEO Directorate” in this appeal. To the extent Mr. Startz seeks to challenge a related EEOC decision, that decision may not be challenged in the present IRA appeal. *See Young*, 961 F.3d at 1327.

Mr. Startz's requests. *See* SAppx47. In denying Mr. Startz's petition for review, the board observed he failed to include a copy of his discovery request with his motion to compel. *See id.*; SAppx24. And Mr. Startz does not identify anywhere in the record where he requested the board to again intervene, so he never made the board aware of what discovery Army allegedly failed to produce. Because the board granted him the relief he sought, Mr. Startz cannot show that the board abused its discretion. *See Curtin*, 846 F.2d at 1378-79.

Further, although Mr. Startz alleges that he was denied "basic project files, prime and subcontractor information and supporting billing information for all of the buildings and project," Pet. Br. at 16, he does not explain how this information would have supported his claim. Therefore, even assuming the board committed error, Mr. Startz has not proven "substantial harm or prejudice to" his rights that "could have affected the outcome of the case." *See Curtin*, 846 F.2d at 1379.

In sum, Mr. Startz does not identify any record evidence the board failed to consider, and he has not shown that the board abused its discretion during discovery because the board granted him all of his requested relief. Therefore, Mr. Startz has not shown that there was clear error in any of the board's factual conclusions.

b. Did the MSPB or arbitrator apply the wrong law?

No. The MSPB applied the correct law in concluding that Mr. Startz failed to prove a *prima facie* IRA case because he did not show by a preponderance of the

evidence that he made a protected disclosure. Therefore, he was not entitled to corrective action.

Pursuant to the Whistleblower Protection Act, an employee may bring an IRA appeal to the MSPB, alleging that a “personnel action” was taken, or not taken, in retaliation for whistleblowing. 5 U.S.C. § 1221; *see Caddell v. Dep’t of Justice*, 96 F.3d 1367 (Fed. Cir. 1997). If the challenged personnel action is not otherwise directly appealable to the board, *e.g.*, pursuant to 5 U.S.C. § 7513, the employee must first seek corrective action from OSC and exhaust those procedures. *Ellison v. MSPB*, 7 F.3d 1031, 1035-36 (Fed. Cir. 1993). To establish a *prima facie* case of reprisal for whistleblowing, the employee must establish by a preponderance of the evidence that he made a protected disclosure or engaged in protected activity, which was a “contributing factor” in the agency’s decision to take a personnel action. 5 U.S.C. § 1221(e)(1); 5 C.F.R. §§ 1209.4(c), 1209.7; *see Yunus v. Dep’t of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001).

A disclosure is protected if the employee reasonably believes that it involves (i) any violation of law, rule or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or substantial and specific danger to public health or safety. 5 U.S.C. § 2302(b)(8); 5 C.F.R. § 1209.4(b); *see Frederick v. Dep’t of Justice*, 73 F.3d 349, 353 (Fed. Cir. 1996) (concluding the WPA protects employees who report genuine violations of law and is not intended to encourage employees to report minor or inadvertent miscues). The test for establishing the reasonableness of the

employee's belief is, "could a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee reasonably conclude that the actions of the government evidence gross mismanagement?" *LaChance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999). "[T]his review . . . start[s] with a 'presumption that public officers perform their duties correctly, fairly, in good faith and in accordance with the law.'" *Id.* (citation omitted). The board correctly applied this law. *See SAppx8-13.*

Mr. Startz does not dispute that the board applied the correct law in evaluating his whistleblower allegations. In response to this question, Mr. Startz alleges that he has a "civil right and also judicial rights to discovery, which have been denied thus not allowing for a fair and just ruling." Pet. Br. at Q. 3. For the reasons discussed above, Mr. Startz has not demonstrated that the board abused its discretion in its handling of his discovery requests, and he has not shown that any alleged error was prejudicial. *See Curtin*, 846 F.2d at 1378-79. Therefore, Mr. Startz has not shown that the board applied the wrong law.

c. Did the MSPB or arbitrator fail to consider important grounds for relief?

No. The MSPB did not fail to consider any important grounds for relief. The board considered all relevant grounds and applied the correct law in reaching its conclusion. In response to this question, Mr. Startz alleges that the board did not recognize a variety of claims, including his claims for back pay, civil rights damages

and EEO reasonable accommodations, punitive damages, antitrust violations, and False Claims Act violations. Pet. Br. at Q. 4.

However, the board did not have authority to order any of this relief; it had jurisdiction only to consider Mr. Startz's individual right of action. *See Bosley v. MSPB*, 162 F.3d 665, 668 (Fed. Cir. 1998) (noting that the Back Pay Act does not provide the board with jurisdiction to consider claims for back pay where "that claim is not cognizable under the WPA."); *Young*, 961 F.3d at 1327 ("[T]he [b]oard's review is limited to allegations of violations of the [WPA]. Discrimination claims may not be raised in that context."); *Prehoda v. Dep't of Homeland Sec.*, 157 F. App'x 311, 314 (Fed. Cir. 2005) ("There is . . . no basis under any law or regulation for an award of punitive damages in cases before the Board."); *Marrese v. Am. Academy of Orthopaedic Surgeons*, 470 U.S. 373, 379 (1985) ("[F]ederal antitrust claims are within the exclusive jurisdiction of the federal courts."); *LeBlanc v. United States*, 50 F.3d 1025, 1031 (Fed. Cir. 1995) (citing 31 U.S.C. § 3732(a) for the proposition that False Claims Act "*qui tam* suits may only be heard in district courts.").

d. Are there other reasons why the MSPB's or arbitrator's decision was wrong?

No. As explained above, the MSPB's factual findings are supported by substantial evidence in the record, and the MSPB applied the correct law to those facts in denying Mr. Startz's challenge to the agency's decision to remove him from his position.

In his response, Mr. Startz alleges that he is “lacking the DoD OIG investigation,” which shows “hundreds of millions of dollars stolen by federal employees and civilian contractors” as indicated in “congressional reports.” Pet. Br. at Q. 5. However, Mr. Startz does not identify any of this information in the record or provide it on appeal. Rather, as the board found, “[t]here is no record evidence that the DoD’s OIG has to date taken any action with respect to” Mr. Startz’s complaint he filed with the office. SAppx4. Because “[e]vidence that was not presented to the [b]oard is not part of the record on appeal and is not properly before [this Court],” any results of the investigation may not be considered in this appeal.

Collins v. Dep’t of the Army, No. 24-1390, 2024 WL 4234718, at *2 (Fed. Cir. Sept. 19, 2024) (citing *Turman-Kent v. MSPB*, 657 F.3d 1280, 1283 (Fed. Cir. 2011)). Therefore, Mr. Startz has not shown that the board’s decision was unsupported by substantial evidence. *See* 5 U.S.C. § 7703(c).

4. Are there other arguments you wish to make? If yes, please state them.

No. Respondent has no further arguments in response to Mr. Startz’s informal brief.

5. What action do you want this court to take in this case?

We respectfully request that the Court affirm the MSPB’s decision.

Respectfully submitted,

YAAKOV M. ROTH
Acting Assistant Attorney General

PATRICIA M. McCARTHY
Director

/s/ TARA K. HOGAN
TARA K. HOGAN
Assistant Director

/s/ BLAKE W. COWMAN
BLAKE W. COWMAN
Trial Attorney
United States Department of Justice
Civil Division, Commercial Litigation Branch
P.O. Box 480 | Ben Franklin Station
Washington, DC 20044
(202) 353-2494
Blake.W.Cowman@usdoj.gov

March 17, 2025

CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2025, I caused the foregoing document to be electronically filed with the Clerk of the Court using CM/ECF. The filing will also be served by U.S. Mail at the following address:

Sherman S. Startz, Jr.
550 Lebo Boulevard
Bremerton, WA 98310

/s/ BLAKE W. COWMAN

BLAKE W. COWMAN

INDEX TO SUPPLEMENTAL APPENDIX

MSPB Initial Decision, dated 1/8/2024 (Tab 37).....	SAppx1
MSPB Final Order, dated 1/17/2025 (Petition for Review Tab 4)	SAppx23
Initial Appeal, dated 3/22/2023 (Tab 1)	SAppx31
Letter From OSC to Mr. Startz, dated 2/10/2023 (Tab 4).....	SAppx36
Letter From OSC to Mr. Startz, dated 3/22/2023 (Tab 4).....	SAppx41
Appellant's Motion to Compel, dated 6/15/2023 (Tab 24)	SAppx42
Order Granting Motion to Compel, dated 7/17/2023 (Tab 27)	SAppx47
Mr. Startz's Response to OSC Letter, dated 2/12/2023 (Tab 4)	SAppx50
Portion of Evidence Submitted by Mr. Startz, dated 8/17/2023 (Tab 34)	SAppx60

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

SHERMAN S. STARTZ JR.,
Appellant,

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

v.

DEPARTMENT OF THE ARMY,
Agency.

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 evidence² that he had exhausted his administrative remedies before OSC and timely filed his Board appeal, and that he had nonfrivolously³ alleged that he made a protected

¹ Although an appellant bringing an individual right of action (IRA) appeal to the Board must show that he or she 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.

Michael Shachat

FOR THE BOARD:

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

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

SHERMAN S. STARTZ, JR.,
Appellant,

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

v.

DEPARTMENT OF THE ARMY,
Agency.

DATE: January 17, 2025

THIS FINAL ORDER IS NONPRECEDENTIAL¹

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

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

BEFORE

Cathy A. Harris, Chairman
Raymond A. Limon, Vice Chairman
Henry J. Kerner, Member*

*Member Kerner recused himself and
did not participate in the adjudication of this appeal.

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. See 5 C.F.R. § 1201.117(c).

FINAL ORDER

The appellant has filed a petition for review of the initial decision, which denied his request for corrective action in his individual right of action (IRA) appeal on the grounds that he failed to show that he made a protected disclosure under 5 U.S.C. § 2302(b)(8) or engaged in protected activity under 5 U.S.C. § 2302(b)(9). On petition for review, the appellant argues that the administrative judge made various erroneous findings and that the agency refused to provide him the requested discovery necessary to prove his claims.² Generally, we grant petitions such as this one only in the following circumstances: the initial decision contains erroneous findings of material fact; 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 administrative 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

² Although the appellant argues on review that he did not waive his right to a hearing, he clearly indicated on his initial appeal that he did not want a hearing. Petition for Review (PFR) File, Tab 1 at 4; Initial Appeal File (IAF), Tab 1 at 2. We discern no error in the administrative judge's decision to decide this case on the written record. The appellant also broadly asserts that the agency's failure to respond to his discovery requests resulted in his inability to prove his case. PFR File, Tab 1 at 12-13. However, the appellant did not include a copy of his original discovery request with his motion to compel; the administrative judge nevertheless granted the appellant's motion; and although the appellant expressed dissatisfaction with the agency's discovery response, there is no indication that he subsequently filed a renewed motion to compel, a motion for sanctions, or otherwise asked the administrative judge to intervene. See IAF, Tab 27, Tab 32 at 9, Tab 33 at 7, Tab 34 at 5. Accordingly, the appellant's allegations regarding discovery do not warrant remand or otherwise disturbing the initial decision. Cf. *Bedynek-Stumm v. Department of Agriculture*, 57 M.S.P.R. 176, 178-79 (1993) (finding that the employee's motion to compel discovery was defective when it was not accompanied by copy of his original discovery request or affidavit or sworn statement supporting his assertion that he had not received a response to request); *Rana v. Department of Defense*, 27 M.S.P.R. 678, 679-80 (1985) (finding that the presiding official did not abuse her discretion in failing to impose sanctions on the agency for failing to produce certain documents requested by the employee when the employee had not requested a formal order of the Board on discovery, and the requests for documents were overbroad, of limited relevance and unduly burdensome).

outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115). After fully considering the filings in this appeal, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review.³ Therefore, we DENY the petition for review and AFFIRM the initial decision, which is now the Board's final decision. 5 C.F.R. § 1201.113(b).

NOTICE OF APPEAL RIGHTS⁴

You may obtain review of this final decision. 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 final decision, 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.

³ To the extent that the appellant's allegations of adjudicatory error have merit, they are immaterial and do not otherwise warrant a different outcome in this appeal. See *Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984) (finding that an adjudicatory error that is not prejudicial to a party's substantive rights provides no basis for reversal of an initial decision); *Cortright v. Department of Transportation*, 37 M.S.P.R. 565, 568-69 (1988) (explaining that mere disagreement with the administrative judge's findings does not warrant disturbing the initial decision).

⁴ Since the issuance of the initial decision in this matter, the Board may have updated the notice of review rights included in final decisions. As indicated in the notice, the Board cannot advise which option is most appropriate in any matter.

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 of issuance of this decision. 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 you receive** this decision. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. 420 (2017). If you have a representative in this case, and your representative receives this decision before you do, then you must file with the district court no later than **30 calendar days after your representative receives** this decision. 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 you receive** this decision. 5 U.S.C. § 7702(b)(1). If you have a representative in this case, and your representative receives this decision before you do, then you must file with the EEOC no later than **30 calendar days after your representative receives** this decision.

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 either with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction.⁵ The court of appeals must receive your petition for review within **60 days** of the date of issuance of this decision. 5 U.S.C. § 7703(b)(1)(B).

⁵ The original statutory provision that provided for judicial review of certain whistleblower claims by any court of appeals of competent jurisdiction expired on December 27, 2017. The All Circuit Review Act, signed into law by the President on July 7, 2018, permanently allows appellants to file petitions for judicial review of MSPB decisions in certain whistleblower reprisal cases with the U.S. Court of Appeals for the Federal Circuit or any other circuit court of appeals of competent jurisdiction. The All Circuit Review Act is retroactive to November 26, 2017. Pub. L. No. 115-195, 132 Stat. 1510.

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.

Gina K. Grippando

FOR THE BOARD:

Gina K. Grippando
Clerk of the Board

Washington, D.C.

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

01/17/2025

(Date)

John Hayes

John Hayes



MERIT SYSTEMS PROTECTION BOARD

Appeal Form--Appellant and Agency Information

Please type or print legibly.

OMB No. 3124-0009

1. Name (last, first, middle initial)

Startz, Sherman, S.

2. Present Address (number and street, city, state, and zip code)

Address: 116 Kelsan Way

City, State, Zip Code: Fairbanks, Alaska, 99709, United States of America

3. Telephone numbers (include area code) and E-Mail Address

You must notify the Board in writing of any change in your telephone number(s) or e-mail address while your appeal is pending.

Home: (907) 231-9270

Work:

Fax:

Cell: (907) 231-9270

E-mail Address: shelbystartz@outlook.com

Other Phone Type: Mobile

4. Do you wish to designate an individual or organization to represent you in this proceeding before the Board? (You may designate a representative at any time. However, the processing of your appeal will not normally be delayed because of any difficulty you may have in obtaining a representative.)

Yes

No

5. Name, address, and telephone number of the agency that took the action or made the decisions you are appealing (include bureau or division, street address, city, State and Zip code)

Agency Name: Office of Special Counsel

Bureau: OFFICE OF SPECIAL COUNSEL

Address: Retaliation and Disclosure Unit

City, State, Zip code: Washington , DC, District of Columbia, 20036, United States of America

Agency Phone: (202) 804-7048

6. Your Federal employment status at the time of the decision or action you are appealing:

Temporary Permanent Applicant
 Term Retired Seasonal
 None

7. Type of appointment (if applicable):

NOT APPLICABLE

8. Your occupational series, position title, grade, and duty station at the time of the decision or action you are appealing (if applicable):

NOT APPLICABLE

9. Are you entitled to veteran's preference? See 5 U.S.C. 2108.

Yes No

10. Length of Government Service (if applicable):

Years Months

11. Were you serving a probationary, trial, or initial service period at the time of the action or decision you are appealing?

NOT APPLICABLE



MERIT SYSTEMS PROTECTION BOARD

Appeal Form--Appellant and Agency Information

Please type or print legibly.

HEARING: You may have a right to a hearing before an administrative judge. If you elect not to have a hearing, the administrative judge will make a decision on the basis of the submissions of the parties. Do you want a hearing?

12. Do you want a hearing? Yes No

E-Filing: Registration as an e-filer enables you to file any or all of your pleadings with the Board in electronic form. Registration also means you consent to accept service of all pleadings filed by other registered e-filers and all documents issued by the Board in electronic form. You will receive these as PDF documents at the e-mail address you provided the Board. If registered as an e-filer, you may file any pleading, or portion of a pleading, by non-electronic means. You can withdraw your registration as an e-filer at any time.

13. Do you wish to register as an E-Filer in this appeal?

I elect to E-File I decline to E-File

14. I certify that all of the statements made in this form and all attached forms are true, complete, and correct to the best of my knowledge and belief.

Sherman Shelby Startz, Appellant

Date:

e-Appeal Attachment Transmittal

Appeal Number: 202301325
Appellant Name: Mr Sherman Shelby Startz
Agency Name: Office of Special Counsel

Please check the box for each document included with this transmittal.

<input checked="" type="checkbox"/>	Name of Attachment	Attachment Processing Status	File Name/Delivery Method
<input checked="" type="checkbox"/>	Drafted Appeal File	Upload with e-Appeal	OSC to Sherman Startz - IRA Letter - March 22, 2023.pdf

2 copies must be submitted of all documents submitted in hardcopy.

Send documents to be submitted in paper form to:

Washington DC Regional Office
1901 S. Bell Street, Suite 950
Arlington, Virginia 22202
United States of America

Phone: (703) 756-6250
Fax: (703) 756-7112



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

Dear Mr. Startz:

The U.S. Office of Special Counsel (OSC) terminated its inquiry into your allegations of prohibited personnel practices under 5 U.S.C. § 2302(b)(8) and (b)(9) on March 22, 2023. The purpose of this letter is to notify you that you may file an “individual right of action” (IRA) appeal seeking corrective action from the Merit Systems Protection Board (Board).

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.

In your IRA appeal, you may seek corrective action from the Board under 5 U.S.C. §§ 1214(a)(3) and 1221 for any personnel action taken or proposed to be taken against you because of a protected disclosure or activity that was the subject of your OSC complaint. You may file the IRA appeal with the Board within 65 days after the date of this letter. The regulations concerning rights to file an IRA appeal with the Board can be found at 5 C.F.R. Part 1209. If you choose to file an IRA appeal with the Board, you should include this letter as part of your submission.

U.S. Office of Special Counsel

Sherman Startz

Page 2

Although an individual bringing an IRA appeal to the Board must show that he or she has exhausted OSC procedures, our decision to end the investigation may not be considered in an IRA appeal. See 5 U.S.C. § 1221(f)(2); *Bloom v. Dep't of the Army*, 101 M.S.P.R. 79, 84 (2006). The Board may order an individual to submit a copy of OSC's determination letter, but the order must contain an explanation of why the letter is necessary and give the individual the opportunity to consent. See 5 U.S.C. § 1214(a)(2)(B); *Bloom*, 101 M.S.P.R. at 84.

Sincerely,

A handwritten signature in black ink, appearing to read "AK".

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



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

February 10, 2023

BY ELECTRONIC MAIL

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

Subject: Final Determination on DI-23-000198
Preliminary Determination on MA-23-000527

Dear Mr. Startz,

This letter is in response to the information you submitted to the U.S. Office of Special Counsel (OSC) involving the U.S. Department of the Army (Army), Army Installation Management Command, Headquarters, U.S. Army Garrison Alaska. We have carefully reviewed your allegations. However, based on our evaluation of the facts and applicable law, we have made the final decision to close your disclosure file (DI-23-000198) and the *preliminary* decision to close your prohibited personnel practice file (MA-23-000527).

I. Background

You were a construction control inspector for the Army at Fort Wainwright, Alaska between January 31, 2022 and June 27, 2022. You were also a probationary employee. You allege that during this period of time, 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.

U.S. Office of Special Counsel

Sherman Startz

Page 2

II. Disclosure

OSC is authorized by law to determine whether a disclosure should be referred to the involved agency for investigation or review and a report. OSC may refer allegations of violations of law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety. In making this determination, OSC considers a number of factors, including the sufficiency and specificity of the information provided and whether the whistleblower has reliable information to support their allegation, such as first-hand knowledge or documentation. Information based on assumptions or speculation does not provide OSC with a sufficient basis to refer allegations to the head of an agency. If we cannot make a substantial likelihood determination, OSC will determine whether there is sufficient information to exercise its discretion to refer the allegations. OSC does not have the authority to investigate disclosures. Consequently, we base our review of a disclosure mainly on the information the whistleblower provides to OSC.

In your disclosures, you alleged that Army officials 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 Aleut Federal, and instructing you to sign for materials that were not delivered.¹

First, while you assert that Army officials committed fraud by instructing you to sign for materials that were not delivered and that they violated laws, rules, or regulations by mismanaging construction projects on Fort Wainwright, you stated that you have no evidence to support your allegations. Accordingly, we will take no further action on these allegations.

Second, gross mismanagement is defined as “more than *de minimis* wrongdoing or negligence; it means a management action or inaction that creates a substantial risk of significant adverse impact on the agency’s ability to accomplish its mission.” *Swanson v. Gen. Servs. Admin.*, 110 M.S.P.R. 278, 285 (2008). To show gross mismanagement, a whistleblower must disclose such serious errors that undermine the agency’s ability to perform its mission in a manner that is not debatable among reasonable people. *See White v. Dep’t of the Air Force*, 391 F.3d 1377, 1382 (Fed. Cir. 2004); *Wood v. Dep’t of Def.*, 100 M.S.P.R. 133, 139 (2005). A gross waste of funds is defined as “more than merely a debatable expenditure [but one] that is significantly out of proportion to the benefit reasonably expected to accrue to the government.” *Carolyn v. Dep’t of the Interior*, 63 M.S.P.R. 684, 691 (1994). The Merit Systems

¹ You also alleged that Army officials violated 18 U.S.C. §§ 241, 242, and 245 by subjecting you to a hostile work environment and terminating you. We evaluated these allegations as prohibited personnel practices and address them in the corresponding section below.

U.S. Office of Special Counsel

Sherman Startz

Page 3

Protection Board (Board), OSC's deciding authority, has defined an abuse of authority as the "arbitrary or capricious exercise of power by a Federal official or employee that affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons." *D'Elia v. Dep't of Treasury*, 60 M.S.P.R. 226, 232 (1993) (overruled on other grounds by *Thomas v. Dep't of the Treasury*, 77 M.S.P.R. 224 (1998)).

Based on the information that you provided, we have insufficient evidence to establish that there is a substantial likelihood that Army officials engaged in gross mismanagement, gross waste of funds, or abused their authority. Accordingly, we will take no further action on these allegations.

Should you wish to pursue this issue further, you may contact the U.S. Department of the Army, Office of the Inspector General's hotline at 1-800-752-9747. More information about the Department of the Army OIG, including how to report your allegations online, can be found on their website at <https://www.daig.pentagon.mil/default.aspx#complaint>.

III. Prohibited personnel practices

You alleged that, in retaliation for your raising concerns about Army officials not properly overseeing contractor work, accepting fictitious specification numbers, instructing you to sign for materials that were not delivered, and your refusing to sign for those materials, Mr. Zrna subjected you to a hostile work environment and terminated you. OSC is authorized to receive and investigate allegations of fourteen prohibited personnel practices, defined at 5 U.S.C. § 2302(b). 5 U.S.C. § 1214. Based on the information provided, we analyzed your allegations concerning retaliation under 5 U.S.C. § 2302(b)(8) and (b)(9). To establish a prima facie case of whistleblower retaliation, OSC must demonstrate before the Board that: (1) an employee made a protected disclosure or engaged in protected activity; (2) the agency official had knowledge of the protected disclosure or activity; (3) a personnel action was taken or threatened; and (4) the protected disclosure or activity was a contributing factor in the personnel action at issue. If OSC establishes these elements, the agency may defend with clear and convincing evidence that it would have taken the same personnel action in the absence of the protected disclosure or activity by showing, for example, the strength of the evidence in support of the personnel action and the lack of a motive to retaliate against the employee.

Here, we do not believe that we can establish retaliation. First, you allege that Mr. Zrna subjected you to a hostile work environment. The legal bar to establishing a hostile work environment is high. The Board recently clarified that "only agency actions that, individually or collectively, have practical and significant effects on the overall nature and quality of an employee's working conditions, duties, or responsibilities will be found to constitute a

U.S. Office of Special Counsel

Sherman Startz

Page 4

personnel action covered by section 2302(a)(2)(A)(xii)." *Skarada v. Dep't of Veterans Affairs*, 2022 M.S.P.B. 17, P16 (June 22, 2022). In that case, the Board found that exclusions from a leadership retreat, subjection to workplace investigations, unresponsiveness to requests, untimeliness in providing guidance, three incidents of yelling by a superior, including being told to "shut up" during a meeting, "collectively and individually, while perhaps indicative of an unpleasant and unsupportive work environment," did not establish a significant change in working conditions under the Whistleblower Protection Act. *Id.* at P29.

You alleged that Mr. Zrna subjected you to a hostile work environment by telling your co-workers that you were a "spy" and instructing them to "not get along" with you. You have provided no evidence to support this allegation and, without more, we do not believe we could show that what you have described rises to the level of a hostile work environment.

Second, you alleged that the agency terminated your employment in retaliation for your disclosures and protected activity. However, even if we could establish a *prima facie* case of retaliation, we believe the agency would be able to meet its burden to show by clear and convincing evidence that it would have taken the same action against you in the absence of any protected disclosures or activities. More specifically, the agency contends that you did not get along with your co-workers or with Aleut Federal employees. This is a legitimate, non-discriminatory basis for taking such action. Accordingly, we believe that the agency can meet its burden to prove by clear and convincing evidence that it would have taken the same action against you in the absence of any protected disclosures or activities.

Moreover, the agency terminated you during your trial or probationary period. Under the federal civil service laws and regulations governing probationary employment, an agency may remove a probationary employee without showing cause, but merely by presenting its conclusions as to an employee's inadequate performance or conduct. *See, e.g.*, 5 U.S.C. § 3321; 5 C.F.R. § 315.804. In these circumstances, it is not OSC's role to second guess whether the agency's stated reasons actually show inadequacy, but rather to determine only whether the agency conducted the removal in the manner required by law, rule, or regulation, and not for a reason that would constitute any other prohibited personnel practice.

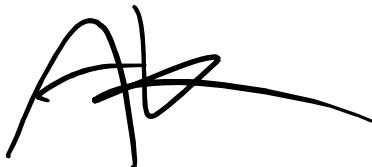
U.S. Office of Special Counsel

Sherman Startz

Page 5

As stated above, our determination regarding your prohibited personnel practice complaint is preliminary. You have the opportunity to provide written comments in response to this letter. You have 13 days from the date of this letter to submit your comments to my attention. If we do not receive any comments by the end of the thirteen-day period, we anticipate closing your prohibited personnel practice file. We will then send you a letter terminating our inquiry and advising you of any additional rights you may have.

Sincerely,



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



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

SAppx41

SHERMAN S. STARTZ v. DEPARTMENT OF THE ARMY
Docket # SF-1221-23-0258-W-1
MOTION TO COMPEL DISCOVERY
Summary Page

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

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

Pleading Title : MOTION TO COMPEL DISCOVERY

Filer's Name : Sherman S. Startz

Filer's Pleading Role : Appellant

Details about the supporting documentation

N/A

Table of Contents

Pleading Interview	3
Uploaded Pleading Text Document	4
Certificate of Service	5

SHERMAN S. STARTZ v. DEPARTMENT OF THE ARMY
Docket # SF-1221-23-0258-W-1
MOTION TO COMPEL DISCOVERY
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

Come now, on this day **PRO SE Appellant SHERMAN SHELBY STARTZ** appears with a Pleading; **“MOTION TO COMPEL DISCOVERY”** in the Appeal, SF -1221-23-0258-W-1 SHERMAN S STARTZ VS THE UNITED STATES ARMY.

MERITS

On May 16th, 2023; **PRO SE Appellant SHERMAN SHELBY STARTZ** sent the **“FIRST ROUND OF WRITTEN INTERROGETORIES, AND REQUEST FOR PRODUCTION AND DOCUMENTS, AND REQUEST FOR ADMISSIONS, AND DEPOSITIONS”** in compliance with timelines set in the COURTS **“ORDER OF JURISDICTION.”** **PRO SE Appellant SHERMAN SHELBY STARTZ** has properly presented to the Agency this first round of discovery requesting specific documentation, statement, admissions as customary during discovery. **PRO SE Appellant SHERMAN SHELBY STARTZ** has provided the Agency and Defendant with sufficient notice; along with repeated attempts of communication via telephone and email. The agency has continually ignored Pro Se and the **“Courts Orders”** which includes the threats of sanctions.

It is for this reason **PRO SE Appellant SHERMAN SHELBY STARTZ** approaches the court with this **“MOTION TO COMPEL DISCOVERY”**

CLOSING and PRAYER

PRO SE Appellant SHERMAN SHELBY STARTZ ask the **Honorable Administrative Judge Michael Shachat** to consider and impose economic sanctions against the agency for a lack of responsiveness. **PRO SE Appellant SHERMAN SHELBY STARTZ** prays the **Honorable Administrative Judge Michael Shachat** will grant this MOTION TO COMPEL DISCOVERY and Order the agency to produce all requested items from the First Round of Discovery. **PRO SE Appellant SHERMAN SHELBY STARTZ** prays for immediate relief.

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

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

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

Executed on (6-15-2023). *Sherman Shelby Startz*

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

Executed on (6-15-2023).

Sherman Shelby Startz

Certificate Of Service

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

Following is the list of the Parties in the case:

Name & Address	Documents	Method of Service
MSPB: Western Regional Office	MOTION TO COMPEL DISCOVERY	e-Appeal / e-Mail
Gwendolyn L. Smith, Esq. Agency Representative	MOTION TO COMPEL DISCOVERY	e-Appeal / e-Mail
Pacific Region Agency Representative	MOTION TO COMPEL DISCOVERY	e-Appeal / e-Mail

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
INFORMATION RESOURCES MANAGEMENT**

SHERMAN S. STARTZ,
Appellant,

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

v.

DEPARTMENT OF THE ARMY,
Agency.

DATE: July 17, 2023

ORDER GRANTING MOTION TO COMPEL AND SUSPENDING APPEAL

On June 15, 2023, the appellant filed a Motion to Compel responses to his discovery requests to the agency. Initial Appeal File, Tab 24. In his motion, the appellant asserts that he served the agency with his discovery requests on May 16, 2023, but did not receive any responses, either to those discovery requests or to his efforts to communicate with the agency by telephone and email. *Id.* at 4. The agency to date has not filed a response to the appellant's Motion to Compel.

As it appears from the record that the agency has failed to meet its obligation to timely respond to the appellant's discovery requests, I GRANT the appellant's motion to compel. The agency is ORDERED to respond to the appellant's discovery requests no later than July 31, 2023. If the agency fails to respond as ordered, I may impose sanctions in accordance with 5 C.F.R. § 1201.43, which includes drawing an adverse inference in favor of the requesting party with respect to the information sought.

Because the appellant has not been given the opportunity to complete discovery in preparation for his close of record submissions, I am reopening the record to provide sufficient time for the parties to complete discovery and for the parties to provide any additional evidence or argument not already submitted into

the record. The record in this appeal will now close on August 18, 2023. All evidence and argument must be filed by that date. Evidence and related argument filed after that date will not be accepted unless the party submitting the evidence shows that it is new and material evidence that was not available before the record closed. Notwithstanding the close of the record, however, pursuant to 5 C.F.R. § 1201.59(c), a party must be allowed to respond to new evidence or argument submitted by the other party just before the close of the record.

ORDER SUSPENDING CASE PROCESSING

The Board's regulations grant an administrative judge the discretion to issue an order suspending case processing for up to 30 days and to grant a second suspension for another 30-day period. 5 C.F.R. § 1201.28. I find it appropriate to suspend case processing of the appeal beginning on July 17, 2023. Case processing will resume on August 16, 2023. This case suspension does NOT extend any deadline set forth in this appeal, including the agency's deadline to respond to the appellant's discovery requests and for the parties to file their close of record submissions.

FOR THE BOARD:

/S/
Michael S. Shachat
Administrative Judge

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 Gwendolyn L. Smith, Esq.
 Department of the Army
 Fort Wainwright Law Center
 Attn: APVR-WJA (Labor Law)
 1046 Marks Road, #5700
 Fort Wainwright, AK 99703-5700

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

July 17, 2023

(Date)

/S/

Stacy Abbott
Paralegal Specialist

BY ELECTRONIC MAIL

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

Subject: RESPONSE and OBJECTION to "Final Determination on DI-23-000198

RESPONSE to "Preliminary Determination on MA-23-000527

Dear Mr. Alexander Kish

The purpose of this letter is to provide a response to the letter sent to me on February 10, 2023 via email. In this letter a final determination has been made on DI-23-000198. I would like to formally object to this determination on the grounds the conclusion has been made prematurely. Now, understanding the agency inability to provide investigative resources and knowing the importance of verifiable evidence to support such allegations and disclosure I am convinced this decision has been made prematurely and I ask the decision be delayed until further investigation and supporting information can be provided in a reasonably amount of time. In the spirit of caution for the ARMY and most especially for the good leaders of Fort Wainwright I have moved very cautiously to avoid the negative attention and potentially risking publicly exposing this lending itself to potential security risks for the Army. I am one who is very mindful of the importance of not giving our enemy any edge. I do hope my caution has not actually caused an even bigger problem for the Army and me.

RESPONSE I. Background

In an effort to better understand the complexion of the harassing treatment; why and who was involved in this unsettling conduct; it is first important to understand and include the history of construction projects and myself on Fort Wainwright. My work with Patrick Constructors (a new 8a Prime Contractor formed by Aleut Corporation) and my role as Quality Control and ultimately Safety on FTW 435 Barrack Renovation; a project intended to improve quality of life in the barracks in an effort to speak to improving the needs of the soldier's mental health and welfare as a result of increasing suicide on Fort Wainwright. Without including the fact that I recognized some concerns early on regarding safety on Fort Wainwright and ultimately addressed this properly (including verbally reporting to Thomas Thorton with USACE)

4 hours before being terminated for reporting serious safety violations to the USACE and ARMY Installation Command on Fort Wainwright. This ultimately earned me a reputation with Aleut that I was going to turn them in. I even in good faith attempted to salvage a situation with Aleut Corporation that was a waste of time; a fact proven in the email exchange with Melanie Morris with Aleut Corporation. This carried forward with ALEUT FEDERAL whom David Zrna and others are involved in defrauding the government.

Throughout this process I have tried to move most cautiously with what I considered sensitive information and that being there is deliberate and calculated fraud taking place and after a time I began to recognize who all was involved within the Federal Government and employees of two distinct companies; Aleut Federal and Patrick Constructors. This caution may have led to events happening out of order such as me contacting MSPB first, then OCS, and now ArmyOIG. Nevertheless, you are the first person to come close to asking anything about this event and what fraud, where, how and so on. Be it my over caution I reported to MSPB and waited to be contacted. I certainly tried to get through to folks on Fort Wainwright with the ARMY but it was always the same ,” Probationary period guy, sorry.” SO I waited, then when the FBI and DOJ filed on the Flooring Company here and my exchange prior to this with MSPB included recognizing flooring fraud on my projects (specifically Building 1555 re-model) I figured my information is being used. I mean I don’t know how these things role because I do my job correctly and know nothing of how secretive a fraud investigation might be. Still no contact, until I hear about OSC. Now, Ideally the OIG will investigate and I can prove the connection to my complaint, concerns about flooring issues at Building 1555, Roofing Materials at 3415, the Former Project FTW 435 and how these individuals in the Government conspired against me and worked collaboratively with ALEUT employees to commit fraud. How it is all connected to the Flooring Fraud Case in Fairbanks announced in September 2022. How the individuals in that case, Subcontractors were distinctly told not to talk to me and one individual point blank asked me, “are you a Fed” and I said yes, we all are meaning Department of Army Federal Employees. (Ask Virginia with MARIMANN Construction). Looking back on this I am inclined to think she meant FBI. Ultimately proving large scale fraud and conspiracy against me to commit fraud. All of this is the motivation of David Zrna to actively work to harass , and cause conflict for me and ultimately fire me with malice and intent.

RESPONSE II. Disclosure

I firmly disagree on the decision to dismiss my disclosure claim as stated above in section I; Background, on the ground it is a premature decision based on a lack of evidence. I would like to point out, simply the lack of evidence at this time may not be obviously present and is purposely weak it does exist and can be found in the billing irregularities. First off it exists in the already exposed flooring fraud case, which only adds to my suspicions of flooring fraud on my projects as well as the roofing material fraud discovered on Building 3415 Construction Project. It is my hope the Army OIG will take action and with simple guidance I can point them to exactly where fraud is occurring.

In your response you site several cases describing specific criteria for meeting gross mismanagement.

defined as "more than de minimis wrongdoing or negligence; it means a management action or inaction that creates a substantial risk of significant adverse impact on the agency's ability to accomplish its mission." Swanson v. Gen.Servs. Admin., 110 M.S.P.R. 278, 285 (2008). To show gross mismanagement, a whistleblower must disclose such serious errors that undermine the agency's ability to perform its mission in a manner that is not debatable among reasonable people. See White v. Dep't of the Air Force, 391 F.3d 1377, 1382 (Fed. Cir. 2004); Wood v. Dep't of Def., 100 M.S.P.R. 133, 139 (2005). A gross waste of funds is defined as "more than merely a debatable expenditure [but one] that is significantly out of proportion to the benefit reasonably expected to accrue to the government." Carolyn v. Dep't of the Interior, 63 M.S.P.R. 684, 691 (1994).

I would argue your decision; based on the following definition of "Mission Critical"

What Is the Difference Between Mission Critical and Mission Essential?

Within the U.S. military, mission critical refers to any job functions that are identified as critical to the performance of the agency's (specifically, the U.S. Air Force's) mission.³

In addition, some U.S. military defense contractors have a clause in their contracts that designate their role as having "mission-essential" functions. This stipulation requires that, even during hazardous weather conditions or a pandemic, they must perform essential contractor services that support mission-essential functions.

This point was clearly brought up by me at the end of my employment with Patrick Constructors and same would apply for ALEUT FEDERAL. I recognized early in the Pandemic a deterioration in integrity and products being provided to the Army by Government Contractors (many) and how using the pandemic the situation was out of control. When quality is compromised in the form of poor workmanship or inferior products with the intent to gain profit; well, that is stealing from the government. Further, the Whistleblower outcry and ultimate termination by Patrick Constructor directly exposed Contract workers and Soldiers alike. The matter was brought forward in good faith, properly reported and handled and I was still terminated. This whistleblower action carried forward and was held against me with compromised federal workers (ex. David Zrna and Dennis Kennedy) and Aleut Federal employees.

Providing inferior products such as flooring. Installing the flooring not following proper specifications. Ultimately the life expectancy, warranty and general benefit of the new products, renovation, remodel that is intended to benefit the mission via hard assets or the general moral and mental health and welfare of a soldier; that's mission critical.

I beg you recognize what the ARMY has to say about the importance of Quality of Life and Mission Readiness

Introduction

Quality of Life programs promote the health and well-being of the Army's people, increasing recruiting and retention and reducing overall stress and uncertainty. Increased quality of life for Soldiers, Army civilians, and families is directly tied to increased Army readiness. For more follow the link. <https://www.army.mil/qualityoflife/>

Also; for example, the Army expects a specific type of flooring. This is clearly specified in the contract presented to the prime contractor ALEUT FEDERAL for Building 1555. The contract says use UFC 1-200 ; the specification for flooring is 09 65 00 (<https://www.wbdg.org/FFC/DOD/UFGS/UFGS%2009%2065%2000.pdf>) this flooring meeting this specification can range price \$3.50 per foot to \$5.00 per foot and more if it is installed by the proper installer according to the specification. However, the Prime Contractor (working collaboratively with the Government Workers / DAVID ZRNA for one) allow for cheap .50 Per Square foot in its place, Charging the government the approved specified material and installing sub grade and providing kickbacks in many different forms. Look at the total number of square foot of flooring on FTW 435; I have the plans and can figure it out exact nut an off the cuff guess would be 200,000 total square foot. An offset of \$3.00 to \$5.00 per square foot. Thomas Thorton never saw it, but if you look at the individuals involved its all connected and when I turned in Patrick Constructors, I started a problem, attracted attention. Then when I landed my GS 9 role with DPW, I fell right into the lap of the primary organizers of this fraud. The more I looked at the "consistent inconsistencies" I followed the patterns and my observations proved true. They were very cleaver keeping the billing under close guard, yet when I would bring up and point out these irregularities and also how and what I was being asked to do; literally, :sign documentation" attesting materials were being provided correctly or in some case not at all. Knowingly falsify documentation. Also, point out to David Zrna specifics on my Job Description and how what I was being asked to do was very inconsistent with what my job description said. It would fall on deaf ears and I would simply be told you need to get along with the Contractors. So this leaves me with violate my Job description and the law or get fired yet both are terminating offenses. Knowing I was already told " I do not need a reason to fire you under you 52 weeks."

No, I beg the Disclosure remain open until after the OIG investigation; provided it is done. My complaint was filed into their system 2-10-2023

RESPONSE III. Prohibited personnel practices.

Paragraph 1 of Section III to your response the following was provided

To establish a prima facie case of whistleblower retaliation, OSC must demonstrate before the Board that: (1) an employee made a protected disclosure or engaged in protected activity; (2) the agency official had knowledge of the protected disclosure or activity; (3) a personnel action was taken or threatened; and (4) the protected disclosure or activity was a contributing factor in the personnel action at issue.

The establishment of Prima Facie was established as follows

- (1) an employee made a protected disclosure or engaged in protected activity.** Shortly after going to work at DPW I noticed any irregularities that were similar in nature to other construction companies I had worked for on Fort Wainwright and ultimately; I sent a general complaint / concern to the government (ARMY) about the deterioration of integrity amongst the Prime and Sub Contractors on Fort Wainwright especially since the pandemic had hit; mainly the expectation to sign off on government documentation that goods were being offered to the government in proper order; the goods were submitted, approved then delivered and when that was not the case refusing to sign without first informing the Government; which always got me terminated. This earned me a reputation of being a problem. Now as a government employee I 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. Knowing better and not wanting to be conflictive with my co workers I spoke to David Zrna about this unusual request. This was when I really began to notice his and my co-workers posture change towards me. At times actually saying to me that Chief David Zrna thinks you're a Mole, informant and Steve Emerson actually told me "The Chief thinks you going to turn us in." It began to clearly look like some very improper things were going on. When I simply stopped signing blank documents, and was clearly "being tested and set up" at events where some very unusual stuff had already happened. So, it's against the law to commit fraud and sign for goods not received. Sounds like you're asking for a piece of paper that doesn't exist; I refused to falsify a document. In any event as a Government Construction Control Inspector, I am required to Attest goods and materials are received, when that was not happening, I did not sign anything. Therefore until; my allegations are proven the evidence is my word.
- (2) the agency official had knowledge of the protected disclosure or activity;** I certainly reported it to David Zrna, I was having issue with Aleut and most especially Benjamin Plumely and David Brown, both of whom were asking me to sign blank documents. I even told him something was definitely going on; with all the disconnected specifications, empty files, nothing supportive in the way of Construction Verification and it clearly looks different than what the government thinks they are buying. Now at the end of the day this gets down to He said she said; however, this unusual treatment is documented in exchanges between myself and David Zrna and others on more than one occasion. Ultimately it is my hope the OIG will get hold of my emails and files of my jobs, see my original Daily Reports because my allegations of unusual materials arriving and disappearing as well as ALEUT asking we sign for all the roofing materials (i.e. 7 preparatory at once with no materials on site. Ronnie Hunt signed but I refused. See Mobilization Preparatory paperwork for Building 3415 Re-Roof 2022, and all of it pointing to the QA is documented in my Daily reports – On the Server and current to the

day I was unfairly terminated by David Zrna with malice and Intent to cause me harm and further commit fraud.

- (3) a personnel action was taken or threatened;** I was fired, wrongfully terminated with malice and intent. An effort brought forth by the hate and greed of David Zrna, Mathew Schaffer, Tanya Clooten , Dennis Kennedy, Mathew Taylor and Jason Webb and others, all of the Department of Army and in collusion with Benjamin Plumely, David Brown. Aaron Wahl of Aleut Federal along with repeated threats by Patrick Constructors and ultimately the ALEUT CORPORATION in an effort to continue to carry out fraud against the United States Army.
- (4) the protected disclosure or activity was a contributing factor in the personnel action at issue.** When I refused to participate in the fraud and sign off on materials and goods not received, I was terminated. My work was good and I met every person like I always do, with respect and dignity. A person nor I, cannot be bullied into signing and falsifying documentation and be expected to simply maintain a normal work environment. I was a problem, that was made clear to David Zrna by the Aleut personnel early on and David Zrna perpetuated that to make me out to be an informant, mole, spy. That is a hostile work environment if there ever was one. Whistleblower retaliation and in an effort of caution for their fraud I was set up and terminated.

Further, found in Section III; Prohibited Practices, paragraph 2, *Skarada v. Dep't of Veterans Affairs*, 2022 M.S.P.B. 17, P16 is used as an example.

While this may seem similar and, in your opinion, relevant; it is not. It is a rare occasion these days we are all not learning more about the negative consequences of maliciously labeling someone for the intended benefit of causing harm. It is a Prohibited Personnel Practice too; an agency official shall not retaliate against an employee for whistleblowing.

5 U.S.C. 2302 (b) (8) This PPP prohibits agency officials from taking, failing to take, or threatening to take a personnel action because of an employee's whistleblowing. To prove whistleblower retaliation, one must show:

1. The employee must have disclosed what he or she reasonably believes to be:
 - o a violation of law, rule, or regulation;
 - o gross mismanagement;
 - o gross waste of funds;
 - o an abuse of authority; or
 - o a substantial and specific danger to public health or safety.
2. The personnel action in question must have been taken (or not taken, such in the case of a promotion), threatened, or influenced by an official who knew of the employee's disclosure; and

3. The employee's disclosure was a contributing factor in the personnel action.

In this instance I told David Zrna about having a history of Whistleblower retaliation with Patrick Constructors and ALEUT CORPORATION. I told him. It is Definity not "hear say" or "I am thinking Aleut told him." He knew because I told him. He knew and he still retaliated against me even more and then perpetuated that with the false allegations I was a mole, a spy, an informant. I am not making it up, and all the OIG has to do is ask individuals like Tammy Sprague who know better. Individuals like Steven Emerson and Troy Stoneking, and Mathew Taylor (all co-workers and involved in the fraud). Further, unless you have something to hide, who cares if I am a informant for the FBI, who cares? Nevertheless, the actions and unusual treatment are merely a symptom of a greater problem which is a desire to keep stealing and not get caught; and I obviously was a problem that needed to be handled. That says "Motive," they had a motive. Now in an effort to get support for my case I need proof; evidence. Going back to where we started and that is; I began to recognize unusual activity associated with the conduct of a government contractor, a type of behavior consistent with fraud. In considering my job duties as a Construction Control Inspector and the fact it's a crime, I refused to sign for materials and services that were not being provided. That clearly means the evidence does not exist; which is what the bad guys needed and wanted in an effort to hang blame on the QA. This is exactly how their elaborate plan exists. Put the blame on the unwitting and get that documented, multiple layers of disconnect begging with Submittal Specification Numbers , Submittal Approval, QA Acceptance – it is all the consistent inconsistencies that are necessary for thieves to cover up and blame others.

I am and have been convinced of my observations, "there is wide spread fraud taking place on Fort Wainwright." It is happening in a collaborative method which involves key government employees with the Department of Army. This conduct involves collaborative efforts by Federal Employees and Prime Government Contractors (Mainly companies owned by ALEUT CORPORATION). This Fraud and the individuals involved violated more than 1 and less then 6 PPP's; which all apply directly to me and prove gross harassment and obstruction to my rights.

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

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

(1)

*If executed without the United States: "I **SHERMAN SHELBY STARTZ**, declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).(Signature)".*

(2)

If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (2-12-2022).

Sherman Shelby Startz

While this may seem weak; my signature accepting my job with the Army meant something to me just like I believe when the Army asked me to take this job that they presented to me – it means something to them; my job. As does my signature performing my job. I expect to be able to do this without reprisal and retaliation because I refuse to participate in illicit and fraudulent activity. Hence no evidence – I refuse to create it. So, I ask; how can I produce evidence that does not exist? How can I get you rebuttal regarding conduct. This means David Zrna can lie and get away with it on paper – no supporting evidence and I must produce evidence that does not exist. I must rely on the ARMY OIG to sort this out and I am confident they will.

Until the OIG gets evidence, which that will be hard considering it does not exist, as this document trail is intended to be very fragmented and broken. All I can do is say go look at the billed materials of goods for Roof Repair of Building 3415 / 2022 and Building 3417 / 2021 – Both Aleut Projects – Both performed by A&A Roofing. Aleut Charged the Government for DENSE DECK (<https://buy.nbhandy.com/product/dens-deck-prime-5-8-4x8/2689>) which is what I saw delivered to 3415 (with a delivery ticket for another job) / DENSEDECK 5/8 4x8 sheet is \$65.24 (a cost of approximately \$2.00 per square foot) then it disappeared and ultimately used 7/16 OCB Sheathing Panel at a cost of \$17.60 Per Sheet at a cost of .55 cents a square foot (<https://www.homedepot.com/p/OSB-7-16-in-Sheathing-Panel-Application-as-4-ft-x-8-ft-386081/202106230>). That's an offset of \$1.50 per square foot on an entire roof of a barracks. Ultimately limiting the life span warranty offered by Firestone. The OCB was actually likely purchased on David Zrna Contractor PRO account at HOMEDEPOT which is yet another layer of fraudulent activity and illicit income.

Response to SECTION III. Prohibited Personnel Practices Paragraph 4

My relationship with my co-workers not involved with this activity was fine. I take pride in getting along with people and being a problem solver not a problem causer. The treatment by some of my co-worker (for instance Steven Emerson) was calculated and malicious in nature intended to get a negative response from me and I refused to participate. More than one ridiculous occasion arose with an obvious effort to get me to respond in negative manner, not only with my co-workers but Ben Plumely and Dave Brown as well. I would not comply with this, anywhere. Hit me, be rude, anything you want, I will not quit. I already knew this is my last hope for employment in the area as this small environment of Construction of Fort Wainwright is infected badly with corruption. An honest person does not fit into this environment. I never, not once demonstrated poor conduct with my work, or failed on my duties. Not once. Ask Tammy Sprague (whom was kept away from Aleut yet I was forced to only work with them).

Lastly, my termination in my probationary period is only relevant if my basic civil rights are not considered. Along with the protection lent me (regardless of tenure) by the PPP's and as previously stated, 18 USC 241, 242 and 245. My position on this has not changed. I am in process of opening a line of dialogue with the Army OIG and it is my hope they will at least look at the billing of Building 3415 and 3417 reroof jobs. I am fully aware of the difficulty of tracking down the money; I already know sample items left over and proving wrong flooring is likely to difficult to actually prove. The roofing material (Densedeck) is trackable as it was never used and my daily reports and pictures in my daily reports prove everything, provided they are not destroyed or deleted. Ask Tammy Sprague for my Dash Board Spreadsheet – it will make verifying these allegations easier.

Your consideration in this matter is appreciated.

Respectfully submitted

Sherman S. Startz

907-231-9270

2-12-2023

NOTE: I have informed the Army OIG that we have a line of dialogue and you are connected to this case. I do feel there is relevant information in this response that could be helpful. I understand they may not inform me if they are actually intervening, so I would like to ask, if it is acceptable feel free to forward this to them should they ask.

SHERMAN S. STARTZ v. DEPARTMENT OF THE ARMY
Docket # SF-1221-23-0258-W-1
SUMMARY and FINAL EVIDENCE
Summary Page

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

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

Pleading Title : SUMMARY and FINAL EVIDENCE

Filer's Name : Sherman S. Startz

Filer's Pleading Role : Appellant

Details about the supporting documentation

#	Title/ Description	Mode of Delivery
1	ATTACMENT 1 ADDITIONAL EVIDENCE	Uploaded
2	ATTACHMENT 2 Daily 5-5-2022	Uploaded
3	ATTACHMENT 3 Daily 5-6-2022	Uploaded
4	ATTACHMENT 4 Daily 5-9-2022	Uploaded
5	ATTACHMENT 5 Daily 5-10-2022	Uploaded
6	ATTACHMENT 6 Daily 5-11-2022	Uploaded
7	ATTACHMENT 7 Daily 5-12-2022	Uploaded
8	ATTACHMENT 8 Daily 5-13-2022	Uploaded
9	ATTACHMENT 9 Daily 5-16-2022	Uploaded
10	ATTACHMENT 10 Daily 5-17-2022	Uploaded
11	ATTACHMENT 11 Daily 5-18-2022	Uploaded
12	ATTACHMENT 12 Daily 5-19-2022	Uploaded
13	ATTACHMENT 13 Daily 5-20-2022	Uploaded
14	ATTACHMENT 14 Daily 5-23-2022	Uploaded
15	ATTACHMENT 15 Daily 5-24-2022	Uploaded

16	ATTACHMENT 17 Daily 5-26-2022	Uploaded
17	ATTACHMENT 18 Daily 5-27-2022	Uploaded
18	ATTACHMENT 19 Daily 5-31-2022	Uploaded

Table of Contents

Pleading Interview	8
Uploaded Pleading Text Document	9
ATTACHMENT 1 ADDITIONAL EVIDENCE	12
ATTACHMENT 2 Daily 5-5-2022	19
QA Daily Report - v.2018 - Copy	19
QA Daily Report - Final	19
Sheet1	19
ATTACHMENT 3 Daily 5-6-2022	30
QA Daily Report - v.2018 - Copy	30
QA Daily Report - Final	30
Sheet1	30
Photo document to marry - revised	31
QA Daily Report - v.2018	32
Photo document to marry - revised	32
QA Daily Report - v.2018 - Copy	33
Photo document to marry - revised	33
QA Daily Report - v.2018	34
Photo document to marry - revised	34
QA Daily Report - v.2018 - Copy	35
Photo document to marry - revised	35
QA Daily Report - v.2018	36
Photo document to marry - revised	36
ATTACHMENT 4 Daily 5-9-2022	37
QA Daily Report - v.2018 - Copy	37
QA Daily Report - Final	37
Sheet1	37
Photo document to marry - revised	38
QA Daily Report - v.2018	39
Photo document to marry - revised	39
QA Daily Report - v.2018 - Copy	40
Photo document to marry - revised	40
QA Daily Report - v.2018	41
Photo document to marry - revised	41
QA Daily Report - v.2018 - Copy	42
Photo document to marry - revised	42
QA Daily Report - v.2018	43
Photo document to marry - revised	43
ATTACHMENT 5 Daily 5-10-2022	44
QA Daily Report - v.2018 - Copy	44
QA Daily Report - Final	44
Sheet1	44
Photo document to marry - revised	45
QA Daily Report - v.2018	46
Photo document to marry - revised	46
QA Daily Report - v.2018 - Copy	47
Photo document to marry - revised	47
QA Daily Report - v.2018	48
Photo document to marry - revised	48
QA Daily Report - v.2018 - Copy	49
Photo document to marry - revised	49

Table of Contents

QA Daily Report - v.2018_	50
Photo document to marry - revised_	50
ATTACHMENT 6 Daily 5-11-2022_	51
QA Daily Report - v.2018 - Copy_	51
QA Daily Report - Final_	51
Sheet1_	51
Photo document to marry - revised_	52
QA Daily Report - v.2018_	53
Photo document to marry - revised_	53
QA Daily Report - v.2018 - Copy_	54
Photo document to marry - revised_	54
QA Daily Report - v.2018_	55
Photo document to marry - revised_	55
QA Daily Report - v.2018 - Copy_	56
Photo document to marry - revised_	56
QA Daily Report - v.2018_	57
Photo document to marry - revised_	57
ATTACHMENT 7 Daily 5-12-2022_	58
QA Daily Report - v.2018 - Copy_	58
QA Daily Report - Final_	58
Sheet1_	58
Photo document to marry - revised_	59
QA Daily Report - v.2018_	60
Photo document to marry - revised_	60
QA Daily Report - v.2018 - Copy_	61
Photo document to marry - revised_	61
QA Daily Report - v.2018_	62
Photo document to marry - revised_	62
QA Daily Report - v.2018 - Copy_	63
Photo document to marry - revised_	63
QA Daily Report - v.2018_	64
Photo document to marry - revised_	64
ATTACHMENT 8 Daily 5-13-2022_	65
QA Daily Report - v.2018 - Copy_	65
QA Daily Report - Final_	65
Sheet1_	65
Photo document to marry - revised_	66
QA Daily Report - v.2018_	67
Photo document to marry - revised_	67
QA Daily Report - v.2018 - Copy_	68
Photo document to marry - revised_	68
QA Daily Report - v.2018_	69
Photo document to marry - revised_	69
QA Daily Report - v.2018 - Copy_	70
Photo document to marry - revised_	70
QA Daily Report - v.2018_	71
Photo document to marry - revised_	71
ATTACHMENT 9 Daily 5-16-2022_	72
QA Daily Report - v.2018 - Copy_	72
QA Daily Report - Final_	72
Sheet1_	72

Table of Contents

Photo document to marry - revised	73
QA Daily Report - v.2018	74
Photo document to marry - revised	74
QA Daily Report - v.2018 - Copy	75
Photo document to marry - revised	75
QA Daily Report - v.2018	76
Photo document to marry - revised	76
QA Daily Report - v.2018 - Copy	77
Photo document to marry - revised	77
QA Daily Report - v.2018	78
Photo document to marry - revised	78
ATTACHMENT 10 Daily 5-17-2022	79
QA Daily Report - v.2018 - Copy	79
QA Daily Report - Final	79
Sheet1	79
Photo document to marry - revised	80
QA Daily Report - v.2018	81
Photo document to marry - revised	81
QA Daily Report - v.2018 - Copy	82
Photo document to marry - revised	82
QA Daily Report - v.2018	83
Photo document to marry - revised	83
QA Daily Report - v.2018 - Copy	84
Photo document to marry - revised	84
QA Daily Report - v.2018	85
Photo document to marry - revised	85
ATTACHMENT 11 Daily 5-18-2022	86
QA Daily Report - v.2018 - Copy	86
QA Daily Report - Final	86
Sheet1	86
Photo document to marry - revised	87
QA Daily Report - v.2018	88
Photo document to marry - revised	88
QA Daily Report - v.2018 - Copy	89
Photo document to marry - revised	89
QA Daily Report - v.2018	90
Photo document to marry - revised	90
QA Daily Report - v.2018 - Copy	91
Photo document to marry - revised	91
QA Daily Report - v.2018	92
Photo document to marry - revised	92
ATTACHMENT 12 Daily 5-19-2022	93
QA Daily Report - v.2018 - Copy	93
QA Daily Report - Final	93
Sheet1	93
Photo document to marry - revised	94
QA Daily Report - v.2018	95
Photo document to marry - revised	95
QA Daily Report - v.2018 - Copy	96
Photo document to marry - revised	96
QA Daily Report - v.2018	97

Table of Contents

Photo document to marry - revised	97
QA Daily Report - v.2018 - Copy	98
Photo document to marry - revised	98
QA Daily Report - v.2018	99
Photo document to marry - revised	99
ATTACHMENT 13 Daily 5-20-2022	100
QA Daily Report - v.2018 - Copy	100
QA Daily Report - Final	100
Sheet1	100
Photo document to marry - revised	101
QA Daily Report - v.2018	102
Photo document to marry - revised	102
QA Daily Report - v.2018 - Copy	103
Photo document to marry - revised	103
QA Daily Report - v.2018	104
Photo document to marry - revised	104
QA Daily Report - v.2018 - Copy	105
Photo document to marry - revised	105
QA Daily Report - v.2018	106
Photo document to marry - revised	106
ATTACHMENT 14 Daily 5-23-2022	107
QA Daily Report - v.2018 - Copy	107
QA Daily Report - Final	107
Sheet1	107
Photo document to marry - revised	108
QA Daily Report - v.2018	109
Photo document to marry - revised	109
QA Daily Report - v.2018 - Copy	110
Photo document to marry - revised	110
QA Daily Report - v.2018	111
Photo document to marry - revised	111
QA Daily Report - v.2018 - Copy	112
Photo document to marry - revised	112
QA Daily Report - v.2018	113
Photo document to marry - revised	113
ATTACHMENT 15 Daily 5-24-2022	114
QA Daily Report - v.2018 - Copy	114
QA Daily Report - Final	114
Sheet1	114
Photo document to marry - revised	115
QA Daily Report - v.2018	116
Photo document to marry - revised	116
QA Daily Report - v.2018 - Copy	117
Photo document to marry - revised	117
QA Daily Report - v.2018	118
Photo document to marry - revised	118
QA Daily Report - v.2018 - Copy	119
Photo document to marry - revised	119
QA Daily Report - v.2018	120
Photo document to marry - revised	120
ATTACHMENT 17 Daily 5-26-2022	121

Table of Contents

QA Daily Report - v.2018 - Copy_	121
QA Daily Report - Final_	121
Sheet1_	121
Photo document to marry - revised_	122
QA Daily Report - v.2018_	123
Photo document to marry - revised_	123
QA Daily Report - v.2018 - Copy_	124
Photo document to marry - revised_	124
QA Daily Report - v.2018_	125
Photo document to marry - revised_	125
QA Daily Report - v.2018 - Copy_	126
Photo document to marry - revised_	126
QA Daily Report - v.2018_	127
Photo document to marry - revised_	127
ATTACHMENT 18 Daily 5-27-2022_	128
QA Daily Report - v.2018 - Copy_	128
QA Daily Report - Final_	128
Sheet1_	128
Photo document to marry - revised_	129
QA Daily Report - v.2018_	130
Photo document to marry - revised_	130
QA Daily Report - v.2018 - Copy_	131
Photo document to marry - revised_	131
QA Daily Report - v.2018_	132
Photo document to marry - revised_	132
QA Daily Report - v.2018 - Copy_	133
Photo document to marry - revised_	133
QA Daily Report - v.2018_	134
Photo document to marry - revised_	134
ATTACHMENT 19 Daily 5-31-2022_	135
QA Daily Report - v.2018 - Copy_	135
QA Daily Report - Final_	135
Sheet1_	135
Photo document to marry - revised_	136
QA Daily Report - v.2018_	137
Photo document to marry - revised_	137
QA Daily Report - v.2018 - Copy_	138
Photo document to marry - revised_	138
QA Daily Report - v.2018_	139
Photo document to marry - revised_	139
QA Daily Report - v.2018 - Copy_	140
Photo document to marry - revised_	140
QA Daily Report - v.2018_	141
Photo document to marry - revised_	141
Certificate of Service_	142

SHERMAN S. STARTZ v. DEPARTMENT OF THE ARMY
Docket # SF-1221-23-0258-W-1
SUMMARY and FINAL EVIDENCE
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

Come now, **PRO SE Appellant SHERMAN SHELBY STARTZ** appearing with a Pleading; "SUMMARY and ADDITIONAL FINAL EVIDENCE" in the Appeal SF -1221-23-0258-W-1, SHERMAN S STARTZ VS THE UNITED STATES ARMY.

PRO SE Appellant SHERMAN SHELBY STARTZ, having approached the court with a MOTION TO COMPEL DISCOVER, and having received and ORDER GRANTING MOTION TO COMPEL; Appellant continued an exhaustive effort to pursue more evidence in preparation for the CLOSE of RECORD and to facilitate the courts efforts to a means of justice, the agency produced yet another discovery packet entitled "**AGENCY SECOND DISCOVERY RESPONSE.**"

This response was in fact similarly weak as the First Round Response and in no way can be considered suitable and Appellant further objects to the lack of responsiveness and incomplete work product. Nevertheless, the second round provides actual documentation of one construction project I was on; Building 3415 Re-Roof and where the Alleged issues with the AHA and where the Dense Deck disappeared. Consistent with my allegations and timelines of events as it relates to Building 3415 and the disappearing materials and daily events on this one project. Submitted as **ATTACHMENT 2 - 38** are those reports; completed by Appellant while working as a Construction Control Inspector for the Department of ARMY. While these "Daily Reports" are relatively mundane, there are some specific dates called out and commented too below:

5-5-2023 – Basic daily; This was a Mobilization meeting, the extra paper work provided is what I produced for the meeting because ALEUT already had a problem not showing up with any documentation. It was this meeting Aaron Wahl of Aleut held a Preparatory for 7 Submittal items (a suspicious move) while there was literally no material on site. I refused to sign that; Ronnie Hunt Signed. He was unwittingly signing for the "Dense Deck" which ultimately made it and the disappeared.

5-10-2023 – Dense Deck Arrived and noted.

5-12-2023 – Normal Day – A&A doing great work – no PPE issues at all then the trickery starts.

5-13-2023 – Normal complimentary Daily

5-17-2023 – Normal work day; no laborers, just materials received and checked in

5-20-2023 – No Work, Dense Deck still on site.

6-1-2023 – Initial Phase

6-2-2023 – Normal day, a few things noted. Dense Deck is gone.

6-6-2023 – Normal Daily showing reroofing job evolutions.

6-7-2023 - Initial Phase – this is the day Tammy Sprague went with me so David Zrna could use her ass an unwitting negative witness against me. All the extra documentation was what I took in preparation because Dave Brown never brought anything but blank documents to sign.

The Agency "**AGENCY SECOND DISCOVERY RESPONSE,**" is still considered woefully inadequate and in no way allows Appellant the full benefit in efforts to a means of Justice. However, during the First Round of Discovery respondent asked for clarity on 3 specific Interrogatories; respondent responded to these questions, allowing for a suitable time line response of the allowable time line of July 31st, 2023. The

Second Round of Discovery did have responses to Interrogatories found as **ATTACHMENT 1**, which is submitted from the Agency and described as EXHIBIT I, J & K.

While the Response is provided is several responses; Appellant will respond to these 3 Interrogatories from David Zrna, Tanya Clooten and Dennis Kennedy in one single response found below:

DAVID ZRNA Response to responses. Completely expected response, David Zrna is a liar and thief whom obviously either has some real cognitive issues or he is being coached with his response; nevertheless, Appellant objects respondents response.

TANYA CLOOTEN Response to responses; Appellant objects to respondents' response. Appellant would like to share with the court my extensive solution-oriented safety career background; which is in fact award winning. Appellant is a Board of Certified Safety Professional "SAFETY MANAGEMENT SPECIALIST" #963 (**ATTACHMENT 37**) as well as having sat and successfully passed the EM 3851-1 40 (**ATTACHMENT 38**) hour training course and many certifications building a solid career in Safety Health Environmental Quality; including ARMY CORP of Engineers "Construction Quality Management for Contractors (**ATTACHMENT 39**). I am proud of these accomplishments in my career and displayed these certificates in my cubical, and my cubical was very near Tanya Clooten office and I am confident she knew of my peripheral qualifications; yet at no point every even asked my opinion on the Hard Hat issue. More interesting is the fact this Contracting Officer Representative knew full well ALEUT FEDERAL did not even have; or had not had for some time, a Safety Professional on Staff; a contractual requirement of 48 CFR and most specifically the JOC (Job Order Contract). Also, it was common knowledge ALEUT FEDERAL paid no regard to Safety Compliance anywhere else and it seemed to only be an issue with me, rather than including me in a viable solution I was purposely excluded in an effort to create a problem, illusion to distract from the real event; "Stealing the Dense Deck" without notice. In any event,

DENNIS KENNEDY Response to responses; First, let me point out I was purposely taken to this job as well as another Job (KEMISH MEDICAL FACILITY) by Matt Taylor (a coconspirator) for no apparent reason other than creating an excuse to accuse me falsely of things I did not do. While at the "Job" Dennis Kennedy refers too; I did speak with one person; an Electrician named "Joe"; a young fellow I had known and worked beside for about 3 years; since he was an apprentice. We worked a job over winter of 2019 with the re-model of the old shopette on Neely. I knew him; and I did say "hi Joe" and did not feel I needed to tell him my name as we were friends already. That said Joe was an electrician with the company I had turn in on FTW 435 after I was immediately terminated after exposing Non-Compliant Safety Hazards (22 examples of Lock Out Tag Out in 10 different occupied barracks remodel). Literally all persons described in Dennis Kennedy (Major Hammet) response, including him; knew and were aware of all these events; as well as Major Hammet. All of this was a calculated attempt to create something, and even if the Major asked "why I was interviewing workers on his job" ; say "hey dude, how are you doing," does not constitute an interview. I had a positive professional reputation with the Major. I would like to refresh an email sent to the Major. Mr. Kennedy response is all intended to cover up his malicious and nefarious conduct. See **ATTACHMENT 40**.

Appellant would like add; at no point throughout this entire extended discovery process has the Agency made any attempt to admit or deny any wrong doing or dispute any or all allegations made; and there is no point in rearguing what appears to be gross knowing and willful malicious criminal conduct by Senior Federal Civilian workers representing the Department of Army, Senior Civilian employees representing a

Prime Contractor working for the Government; in direct collusion with Senior Officials from a NATIVE CORPORATION; ALEUT CORPORATION.

Lastly, without re-presenting all the arguable points presented throughout this lengthy IRA exchange, representing all of the negativity, all for greed. A greed so strong that there was absolutely no regard to what I may lose, my home, my car, a career; all in a place I was so excited to be and retire. This level of greed, this appetite, so addictive that a complete disregard to human rights, civil rights, laws, have gotten these individuals lost in the blindness, and it extends at every level of these nefarious characters and it did not just happen overnight. This Collaborative Criminal Conduct is mature and likely not isolated to just the ARMY and Fort Wainwright. Unlike ALEUT, Their Workers, Their Contractors and the Senior Government Civilian Workers who fall into to the "WE ARE ONE;" I am only one. I am the one who wants no mercy extended to these criminals and punishments that appears to be with vengeance and will have lasting consequences.

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

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

(1) If executed without the United States: "*I, SHERMAN SHELBY STARTZ, declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (8-17-2023).* Sherman Shelby Startz

(2) If executed within the United States, its territories, possessions, or commonwealths: "*I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (8-17-2023).* Sherman Shelby Startz

Exhibit I

Dave Zrna Interrogatories

1. Provide a written explanation for the reason I was terminated less than 8 working hours after I refused to sign for good and services not being provided to the Government for the remodeling of Building 1555.

Answer: Mr. Zrna is unaware of an incident in which Appellant refused to sign for goods.

2. Provide a written explanation which DOUGLAS FACTOR PRINCIPLES you used to conclude that termination was the only solution for me trying to not commit fraud while Page 2 of 11 performing a protected activity.

Answer: Please refer to Agency Exhibits A and B.

3. Provide a written explanation why you felt it was important to tell me "I don't need a reason to fire you under 52 weeks."

Answer: Mr. Zrna denies making the above statement. For clarity, all newly hired federal employees are subject to a probationary period.

1. Provide a written explanation why you failed to respond to a request for accommodations of not being attached to any ALEUT FEDERAL PROJECT even after I disclosed to you I had a previous whistleblower outcry.

Answer: Mr. Zrna denies being aware of a reasonable accommodation or any prior whistleblower activity of Appellant.

2. Provide a written explanation why your failure to respond to the request for accommodations resulted in direct retaliation from another ALEUT COMPANY; PATRICK CONSTRUCTORS.

Answer: Mr. Zrna denies Appellant requested a reasonable accommodation from him and is unaware of any attempts by Appellant to request a reasonable accommodation.

3. Provide a written explanation of how the failure to respond to the request for accommodations is not to be considered a form of direct or indirect retaliation.

Answer: Mr. Zrna denies Appellant requested a reasonable accommodation from him and is unaware of any attempts by Appellant to request a reasonable accommodation.

4. Provide a written explanation of how I was attached to an ALEUT FEDERAL PROJECT, but not Tammy Sprague.

Dave Zrna Interrogatories

Answer: All QA's are assigned their work based on work load. Mr. Zrna states that he does not assign more than one QA to a project. All CMB QA's have been assigned to ALEUT project one time or another.

5. Provide a written explanation of how attaching me to an ALEUT FEDERAL PROJECT, but not Tammy Sprague, was not retaliatory.

Answer: All QA's are assigned their work based on work load. Mr. Zrna states that he does not assign more than one QA to a project. All CMB QA's have been assigned to ALEUT project one time or another.

1. Provide a written explanation for your hypersensitivity about me asking questions.

Answer: Mr. Zrna denies being hypersensitive to anyone asking questions.

2. Provide a written explanation for why you felt it necessary for me to apologize to the entire department about asking questions.

Answer: Mr. Zrna denies ever asking Appellant to apologize to anyone.

3. Provide a written explanation for why you felt it necessary for me to individually apologize to my coworkers about asking questions.

Answer: Mr. Zrna denies ever asking Appellant to apologize to anyone.

4. Provide a written explanation for why you insisted I promise to not ask questions.

Answer: Mr. Zrna denies ever insisting Appellant or anyone make any promises.

5. Provide a written explanation for how a reasonable person in their new job would not find it odd that you insist they promise to not ask questions.

Answer: Mr. Zrna denies ever insisting Appellant or anyone in Contract Management Office (CMB) make any promises.

6. Provide a written explanation why you felt it necessary to tell me and the group after being called a mole by Steve Emerson at a lunch outing, that you "had me checked out by your buddy at the PENTAGON where you used to work."

Answer: Mr. Zrna denies hearing Mr. Steve Emerson call Appellant a mole at the CMB luncheon and denies making the above statement.