

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

RAKSHAN S. PASHAYEV,
Appellant,

DOCKET NUMBER
DA-315H-11-0616-I-1

v.

DEPARTMENT OF THE INTERIOR,
Agency.

DATE: August 17, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL*

John Lawrence, Esquire, Prairieville, Louisiana, for the appellant.

Martin R. Steinmetz, Esquire, Tulsa, Oklahoma, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us

* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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\(c\)](#).

that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)).

On review, the appellant does not dispute that he was a probationary employee with less than 1 year of current continuous service. Initial Appeal File (IAF), Tab 1; Petition for Review (PFR) File, Tab 1 at 8. As such, the appellant does not meet the statutory definition of an “employee” as set forth in [5 U.S.C. § 7511\(a\)\(1\)](#). See [5 U.S.C. § 7511\(a\)\(1\)\(A\)](#); *McCormick v. Department of the Air Force*, [307 F.3d 1339](#), 1341-43 (Fed. Cir. 2002). Such a probationer can only appeal his termination to the Board if he alleges that: (1) the termination was based on partisan political affiliation or marital status; or (2) the termination was based (in whole or in part) on pre-appointment reasons and the required procedures were not followed. *Blount v. Department of the Treasury*, [109 M.S.P.R. 174](#), ¶ 5 (2008); [5 C.F.R. §§ 315.805](#), 315.806.

In order to establish Board jurisdiction under [5 C.F.R. § 315.806\(b\)](#), the appellant must first make an allegation of partisan political discrimination supported by factual assertions indicating that the allegation is not merely a *pro forma* pleading. *Bante v. Merit Systems Protection Board*, [966 F.2d 647](#), 649 (Fed. Cir. 1992). Non-frivolous allegations of Board jurisdiction are allegations of fact which, if proven, could establish a prima facie case that the Board has jurisdiction over the matter at issue. *Deines v. Department of Energy*, [98 M.S.P.R. 389](#), ¶ 11 (2005). If the appellant makes such a facially non-frivolous allegation, then the administrative judge conducts a hearing on the factual issues of whether such discrimination existed and was the basis for the probationary employee’s termination. *Bante*, 966 F.2d at 649. If jurisdiction is established, the probationer must carry the burden of proving the discrimination by a preponderance of the evidence. *Id.*

On review, the appellant reasserts his argument below that he was discriminated against because of his perceived membership in the Communist Party, claiming to have been called a “Russian Communist,” a “Communist,” and a “Russian KGB spy” on various occasions. PFR File, Tab 1 at 23-25; IAF, Tab 12, Initial Decision (ID) at 4-5. However, we discern no error by the administrative judge in his characterization of the appellant’s allegations as “*pro forma* and conclusory.” ID at 7. As the administrative judge properly noted, the appellant’s complaints concerning his treatment by co-workers were related to his Russian national origin. *Id.* The appellant did not cite any examples where an agency supervisor or any individuals in a position of authority at the agency referenced his actual or perceived partisan political affiliation, or raised it as a factor in the decision to terminate him – and in fact, it was the appellant’s stated belief that his supervisors were “very happy with [him].” PFR File, Tab 1 at 9. Further, to the extent the appellant is arguing that the agency discriminated against him due to his national origin, such a claim is not an independent source of Board jurisdiction, and is unreviewable by the Board absent an otherwise appealable action. [5 U.S.C. § 7702\(a\)](#); [5 C.F.R. § 315.806\(d\)](#); *see Wren v. Department of the Army*, [2 M.S.P.R. 1](#), 2 (1980), *aff’d*, [681 F.2d 867](#), 871-73 (D.C. Cir. 1982).

With regard to the appellant’s claims that the administrative judge erred in finding that the appellant failed to raise non-frivolous allegations of jurisdiction that would entitle him to a hearing, we find that the administrative judge properly advised the appellant of the correct standard for establishing entitlement to a jurisdictional hearing in an acknowledgment order, and properly applied this standard in the initial decision to find that the appellant did not raise non-frivolous allegations of jurisdiction. PFR File, Tab 1 at 2; IAF, Tab 3 at 2-4; ID at 1 n.1; *see Briscoe v. Department of Veterans Affairs*, [55 F.3d 1571](#), 1573 (Fed. Cir. 1995) (although an appellant need not prove his entire case before he is entitled to a jurisdictional hearing, the Board may request sufficient evidence to

determine if there is any support for what otherwise might be no more than bald allegations).

Finally, the appellant argues the merits of the agency's decision to terminate him in his petition for review. PFR File, Tab 1 at 1-2, 4-5. The Board need not consider the appellant's arguments regarding the merits of his appeal because they fail to show that he is an employee with adverse action appeal rights, and thus are not relevant to the Board's review of the administrative judge's findings. *See Fassett v. U.S. Postal Service*, [76 M.S.P.R. 137](#), 139 (arguments on review that address the merits of the agency's removal action, rather than the Board's jurisdiction over the appeal, do not meet the criteria for review), *dismissed*, 132 F.3d 49 (Fed. Cir. 1997) (Table).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. [5 C.F.R. § 1201.115](#)(d). Therefore, we DENY the petition for review. The initial decision of the administrative judge is final.

**NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS**

This is the Board's final decision in this matter. [5 C.F.R. § 1201.113](#). You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court

no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>.

Additional information 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, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board

Washington, D.C.