

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

JEFFREY R. ABRAHAM,
Appellant,

DOCKET NUMBER
DC-1221-21-0642-W-1

v.

DEPARTMENT OF HOMELAND
SECURITY,
Agency.

DATE: March 13, 2024

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Jeffrey R. Abraham, Mercer, Pennsylvania, pro se.

Ownie Eng and Susan Reutter, Washington, D.C., for the agency.

BEFORE

Cathy A. Harris, Vice Chairman
Raymond A. Limon, Member

FINAL ORDER

The appellant has filed a petition for review of the initial decision, which dismissed his individual right of action (IRA) appeal for lack of jurisdiction. On review, the appellant argues that his barments may be overturned if found to be arbitrary or capricious, the agency violated a requirement that he be notified of the reasons for his barments, and the agency was allowed to control the outcome

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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).

of the appeal by concealing or controlling information based on assertions of classification. Petition for Review (PFR) File, Tab 1 at 7, 9.² The appellant also filed a motion for leave to submit new evidence, which he describes as a 2018 agency report of investigation (ROI) into his whistleblower reprisal complaint, an agency letter to his Senator’s office stating that the ROI could not be released, and a letter from his employing agency “exonerating” him of the agency’s classified information spillage allegation.³ PFR File, Tab 7. 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

² In support, he cites language from an Air Force legal reference guide, which itself is not a policy statement, rule, regulation, or other legal authority, *The Military Commander and the Law*, 193 (The Judge Advocate General’s School, U.S. Air Force, 17th ed. 2021), that appears to have been taken from the following language in *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886, 898 (1961): “[w]e may assume that [the petitioner] could not constitutionally have been excluded from the [military installation] if the announced grounds for her exclusion had been patently arbitrary or discriminatory—that she could not have been kept out because she was a Democrat or a Methodist.” Because the grounds for the appellant’s barment orders were not patently arbitrary or discriminatory, the Board need not address the constitutional limits of the Mount Weather Executive Director’s barment authority.

Regarding the appellant’s assertion that the agency violated a requirement that he be notified of the reasons for his barments, the Air Force publication is not in itself, nor does it cite, a legal authority for such a requirement. *The Military Commander and the Law*, 194. In any event, even assuming that such a notice requirement existed, the agency sent both barment decisions, with supporting justifications, to the appellant’s employing agency, Initial Appeal File (IAF), Tab 16 at 87-88, Tab 19 at 42-44, and the pleadings demonstrate that the appellant was informed of the agency’s reasons for his barments. IAF Tab 16 at 63, Tab 19 at 38-40. Finally, the appellant’s assertion that the agency was allowed to control the outcome of the appeal by concealing or controlling information based on assertions of classification is unpersuasive. The administrative judge, to whom this appeal was reassigned because he possessed the requisite security clearance, IAF, Tab 14 at 1, was prepared to review the agency’s classified documents, but determined that such was not necessary to adjudicate this appeal at the jurisdictional stage. IAF, Tab 25, Initial Decision at 2 n.1.

³ Because the appellant’s proffer as to what this new evidence establishes would, even if true, fail to cure the Board’s jurisdictional defect, we deny the motion.

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; 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. Therefore, we DENY the petition for review. Except as expressly MODIFIED to VACATE the administrative judge's finding that the appellant nonfrivolously alleged that his barments from the agency's Mount Weather facility constituted "personnel actions" under 5 U.S.C. § 2302(a)(2)(A), we AFFIRM the initial decision.⁴

NOTICE OF APPEAL RIGHTS⁵

The initial decision, as supplemented by this Final Order, constitutes the Board's final decision in this matter. 5 C.F.R. § 1201.113. 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

⁴ The administrative judge correctly found that the Board lacked jurisdiction over the appellant's IRA appeal because it could not review the merits of his barments from Mount Weather. However, to the extent the administrative judge determined that those barments constituted "personnel actions," any such finding was incorrect under the circumstances. See *Scoggins v. Department of the Army*, 123 M.S.P.R. 592, ¶ 28 & n.9 (2016) (upholding the administrative judge's finding that the denial of an appellant's access to restricted areas of a military installation and classified documents did not constitute personnel actions).

⁵ 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.

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.

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.⁶ The court of appeals must receive your petition for

⁶ 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.

review within **60 days** of the date of issuance of this decision. 5 U.S.C. § 7703(b)(1)(B).

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http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

FOR THE BOARD:

Washington, D.C.

Gina K. Grippando

Gina K. Grippando
Clerk of the Board