

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

MARTIN AKERMAN,
Appellant,

DOCKET NUMBER
DC-0752-23-0457-I-1

v.

DEPARTMENT OF THE ARMY,
Agency.

DATE: May 29, 2024

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Martin Akerman, Arlington, Virginia, pro se.

Gonzalo Pinacho, Esquire, Arlington, Virginia, for the agency.

BEFORE

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

FINAL ORDER

¶1 The appellant has filed a petition for review of the initial decision, which dismissed his appeal for lack of jurisdiction, finding, among other things, that the appellant did not make a nonfrivolous allegation that his protected activity under the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified as amended at 38 U.S.C. §§ 4301-4335) was a motivating factor in his involuntary retirement. Generally, we grant petitions such as this one only in the

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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 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 and AFFIRM the initial decision, which is now the Board's final decision. 5 C.F.R. § 1201.113(b).

¶2 On review, the appellant clarifies his allegation, stating that the agency retaliated against him for engaging in protected activity by not responding to the Office of Personnel Management (OPM) and interfering with his disability retirement application.² Petition for Review (PFR) File, Tab 2 at 4-5. We need not decide whether the agency's lack of response to OPM constitutes an adverse employment action because we agree with the administrative judge that the appellant did not nonfrivolously allege that his protected activity was a

² The appellant attached to his petition for review multiple documents, including filings from this Board appeal, as well as his filings with the United States Court of Appeals for the Fourth Circuit, the Supreme Court of Nevada, the United States District Court for the Eastern District of Virginia, copies of his Standard Form 50s, the agency's notice of proposed indefinite suspension, the agency's decision on the proposed indefinite suspension, and emails regarding the appellant's request for sick leave. PFR File, Tab 2 at 6-68. The appellant has not shown that these documents were unavailable prior to the close of the record below, nor has he explained the relevance of these documents to the dispositive issues in his appeal. Thus, they provide no basis to disturb the initial decision. *See Russo v. Veterans Administration*, 3 M.S.P.R. 345, 349 (1980) (explaining that the Board will not grant a petition for review based on new evidence absent a showing that it is of sufficient weight to warrant an outcome different from that of the initial decision).

motivating factor in the agency action. Initial Appeal File (IAF), Tab 57, Initial Decision (ID) at 9-10. Specifically, the appellant stated in his initial appeal that the agency refused to respond to OPM beginning in November 2022. IAF, Tab 1 at 4. The appellant's protected activity occurred approximately 6 months later, in or around May 2023, when he submitted a complaint to the Department of Labor, stating that he had "new information" and "new evidence" that led him to believe the rights of a uniformed servicemember had been violated. IAF, Tab 50 at 15-16. Therefore, it is temporally impossible that the appellant's protected activity was a motivating factor in the agency's refusal to respond to OPM. *Cf. Sherman v. Department of Homeland Security*, 122 M.S.P.R. 644, ¶ 8 (2015) (stating that, under whistleblowing statutes, a disclosure that occurs after a personnel action was taken cannot be considered a contributing factor in that personnel action). Accordingly, we discern no basis to disturb the initial decision dismissing the appeal for lack of jurisdiction.³

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

³ On review, the appellant alleges that the administrative judge denied him various procedures, including a hearing and status conferences, and that the administrative judge failed to provide him with clear instructions or a chance to respond. PFR File, Tab 2 at 3. The appellant's claims are incorrect, as the administrative judge gave the appellant ample opportunity to clarify his claims and produce evidence of jurisdiction, as well as responded to the motions filed by the appellant. IAF, Tabs 2-4, 9, 11-12, 14, 20, 25-26, 28, 30, 32, 34, 36-37, 39, 41, 43, 45-48, 51. Furthermore, because the appellant did not make a nonfrivolous allegation of Board jurisdiction, he is not entitled to a hearing. *See, e.g., Ferdon v. U.S. Postal Service*, 60 M.S.P.R. 325, 329 (1994). Accordingly, there is no evidence that the administrative judge abused his discretion in his handling of this appeal. *Lee v. Department of Veterans Affairs*, 2022 MSPB 11, ¶ 9 (explaining that administrative judges have substantial discretion to control the proceedings before them, and the Board will not find reversible error absent a showing of abuse of discretion).

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.

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.

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.caafc.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

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

review within **60 days** of the date of issuance of this decision. 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:

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for the Federal Circuit
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Washington, D.C. 20439

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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.

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.

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.

FOR THE BOARD:

Washington, D.C.

Gina K. Grippando

Gina K. Grippando
Clerk of the Board