

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

ANDREA HILL,  
Appellant,

DOCKET NUMBER  
AT-315H-21-0430-I-1

v.

DEPARTMENT OF THE NAVY,  
Agency.

DATE: December 23, 2024

**THIS FINAL ORDER IS NONPRECEDENTIAL<sup>1</sup>**

Cameron Bonney, Esquire, Virginia Beach, Virginia, for the appellant.

Grant Jensen, Esquire, Albany, Georgia, for the agency.

**BEFORE**

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

**FINAL ORDER**

The appellant has filed a petition for review of the initial decision, which dismissed the appellant's appeal of her termination during her initial probationary period for lack of jurisdiction. On petition for review, the appellant argues that the agency discriminated against her on the basis of her disability, sex, and race, and in retaliation for prior equal employment opportunity (EEO) activity.

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 A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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 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).

The agency appointed the appellant to a GS-11 Physical Scientist position on May 28, 2019, and it terminated the appellant on May 25, 2021. Initial Appeal File, Tab 5 at 13, 20-21. As noted in the initial decision, the appellant does not dispute that she was hired into a position subject to the National Defense Authorization Act for Fiscal Year 2016 (2016 NDAA). Initial Appeal File, Tab 6, Initial Decision at 3. Congress enacted the 2016 NDAA on November 25, 2015, Pub. L. No. 114-92, 129 Stat. 726. The 2016 NDAA extended the probationary period for an individual appointed to a permanent competitive service position at the Department of Defense to a 2-year probationary period and provided that such individual only qualifies as an "employee" under 5 U.S.C. § 7511(a)(1)(A)(ii) if she has completed 2 years of current continuous service. Pub. L. No. 114-92, § 1105, 129 Stat. 726, 1023-24 (codified as relevant here at 10 U.S.C. § 1599e and 5 U.S.C. § 7511(a)(1)(A)(ii)).<sup>2</sup> As the administrative judge correctly found, the

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<sup>2</sup> The National Defense Authorization Act for Fiscal Year 2022, enacted on December 27, 2021, repealed [10 U.S.C. § 1599e](#) and the 2-year probationary period,

appellant did not meet the statutory definition of an employee and thus did not have a statutory right to appeal to the Board. Similarly, the administrative judge also properly found that the appellant did not raise allegations establishing a regulatory right of appeal. 5 C.F.R. §§ 315.805-806.

In her petition for review, the appellant argues that she has experienced discrimination and that her termination was also based on retaliation for protected EEO activity. Petition for Review File, Tab 1 at 6-7. Such claims are not an independent source of Board jurisdiction. *See, e.g., Garcia v. Department of Homeland Security*, 437 F.3d 1322, 1325 (Fed. Cir. 2006) (stating that the Board may not reach discrimination issues unless jurisdiction is established with respect to the underlying adverse action); *Hurston v. Department of the Army*, 113 M.S.P.R. 34, ¶ 11 (2010) (stating that if the Board lacks jurisdiction over a probationer's termination, the Board has no independent jurisdiction to consider her discrimination claims). Thus, as the administrative judge found, the Board lacks jurisdiction over the appellant's claims.<sup>3</sup>

#### **NOTICE OF APPEAL RIGHTS<sup>4</sup>**

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

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effective December 31, 2022. [Pub. L. No. 117-81, § 1106, 135 Stat. 1541](#), 1950. That change does not affect the outcome of this appeal.

<sup>3</sup> Although the Board lacks jurisdiction over the appellant's claims, such claims may also be within the purview of the EEO process. The Board makes no finding as to the merits or timeliness of such claims.

<sup>4</sup> 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.

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.cafc.uscourts.gov](http://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](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.<sup>5</sup> The court of appeals must receive your petition for

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<sup>5</sup> 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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717 Madison Place, N.W.  
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[http://www.uscourts.gov/Court\\_Locator/CourtWebsites.aspx](http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx).

*Gina K. Grippando*

FOR THE BOARD:

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Gina K. Grippando  
Clerk of the Board

Washington, D.C.