

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

CARGILL C. KELLY, II,
Appellant,

DOCKET NUMBER
DE-315H-13-0022-I-1

v.

DEPARTMENT OF VETERANS
AFFAIRS,
Agency.

DATE: November 14, 2013

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Cargill C. Kelly, II, Chandler, Arizona, pro se.

Dana C. Heck, Esquire, Phoenix, Arizona, 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, which dismissed the appellant's appeal of his probationary termination for lack of

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

jurisdiction. Generally, we grant petitions such as this one only when: 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 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. *See* 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, and based on the following points and authorities, 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 issued by the administrative judge, which is now the Board's final decision.

BACKGROUND

On September 23, 2012, the agency appointed the appellant to a competitive service position as a Legal Administrative Specialist, subject to a 1-year probationary period. Initial Appeal File (IAF), Tab 7 at 9. Less than 1 month later, on October 4, 2012, the agency terminated the appellant. IAF, Tab 4 at 10-11. The agency's action was based on the appellant's "failure to adjust to the federal worksite and failure to follow supervisory direction." *Id.* at 10. The appellant timely filed an appeal. IAF, Tab 1.

In his appeal, the appellant argued that the agency improperly terminated him when: (1) it failed to utilize the "probationary period as fully as possible" in violation of [5 C.F.R. § 315.803](#)(a), (2) his supervisors did not inform him prior to his termination that he was not following their instructions in violation of [5 C.F.R. § 315.804](#)(a), and (3) the agency removed him because of a

pre-appointment condition, which he identifies as “personal challenges” arising out of his prior military service, in violation of [5 C.F.R. § 315.805](#).² IAF, Tab 4 at 7-8.

In the initial decision, the administrative judge found that not utilizing the “probationary period as fully as possible” and not informing the appellant of his inadequate performance are not independent sources of Board jurisdiction. IAF, Tab 10, Initial Decision (ID) at 3 n.2.

On petition for review, the appellant repeats his arguments. Petition for Review (PFR) File, Tab 4 at 3.

ANALYSIS

The administrative judge properly found that the Board lacks jurisdiction over this appeal.

A probationary employee is not an “employee” as defined by [5 U.S.C. § 7511\(a\)\(1\)](#). Thus, an employee may not appeal a probationary termination except under certain limited circumstances, which are when: (1) the employee was discriminated against on account of marital status, (2) the employee was discriminated against based on partisan political affiliation, or (3) the agency action was based (in whole or part) on issues that arose pre-appointment and the required procedures were not followed. [5 C.F.R. §§ 315.805-.806](#); *see Pierce v. Government Printing Office*, [70 F.3d 106](#), 108 (Fed. Cir. 1995) (per curiam). The probationary employee bears the burden of establishing that his appeal is within the jurisdiction of the Board. *See Stokes v. Federal Aviation Administration*, [761 F.2d 682](#) (Fed. Cir. 1985).

² The administrative judge interpreted the appellant’s language as raising a claim under the Uniformed Services Employment and Reemployment Rights Act (USERRA), [38 U.S.C. § 4301](#)-4333, and docketed a separate appeal. IAF, Tab 6 at 3. After the appellant failed to submit any evidence in response to the Board’s order on jurisdiction, the administrative judge dismissed the case. *See Kelly v. Department of Veterans Affairs*, MSPB Docket No. DE-4324-13-0052-I-1, Initial Decision (Jan. 8, 2013).

The appellant has not alleged that the agency discriminated against him on the basis of partisan politics or his marital status. His arguments that the agency did not use the probationary period “as fully as possible” and that the inadequacies in his performance were not specifically expressed, PFR File, Tab 4; *see* IAF, Tab 9 at 14-16, do not provide an independent basis for Board jurisdiction. *See* [5 C.F.R. §§ 315.804-806](#). They constitute mere disagreement with the administrative judge’s well-reasoned findings and, as such, provide no basis for disturbing the initial decision. *Broughton v. Department of Health & Human Services*, [33 M.S.P.R. 357](#), 359 (1987).

The appellant also alleges that the agency terminated him for being a disabled veteran because his termination letter refers to “general character traits” as a basis for termination. PFR File, Tab 4; *see* IAF Tab 4 at 10, ¶ 1. Nonetheless, our reviewing court has held that the pre-appointment conditions contemplated by section 315.805 do not include pre-appointment medical conditions. *See Cohen v. United States*, [384 F.2d 1001](#), 1004 (Ct. Cl. 1967) (holding that pre-appointment conditions include such reasons as errors in the appointment process and falsification of a pre-appointment document or statement).

Furthermore, an agency is not required to comply with the procedures set forth in section 315.805 where the separation was proposed for performance deficiencies after the employee started working at the agency. *Pierce*, 70 F.3d at 108. The record shows that the appellant was not separated because of his status as a disabled veteran, but rather for failure to qualify during his probationary period and, specifically, for failure to adjust to the federal worksite and failure to follow supervisory direction—conduct that occurred after his appointment. IAF, Tab 4 at 10. The appellant did not submit contradictory evidence.

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).

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

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit. 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 the date of this order. See [5 U.S.C. § 7703](#)(b)(1)(A) (as rev. eff. Dec. 27, 2012). 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](#)) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, <http://www.mspb.gov/appeals/uscode/htm>. 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.