

NOTE: This order is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

MATTHEW MCCORMACK,
Petitioner

v.

DEPARTMENT OF THE NAVY,
Respondent

2023-1962

Petition for review of the Merit Systems Protection Board in No. PH-0752-23-0046-I-1.

ON MOTION

Before DYK, CUNNINGHAM, and STARK, *Circuit Judges*.

PER CURIAM.

O R D E R

Matthew McCormack moves for leave to proceed *in forma pauperis*. The Department of the Navy moves to dismiss the petition for lack of jurisdiction. Mr. McCormack has not responded.

Mr. McCormack appealed his suspension to the Merit Systems Protection Board. The administrative judge

issued an initial decision affirming the agency's action. On March 15, 2023, Mr. McCormack filed a timely petition seeking review of that decision at the Board, and that petition remains pending. The following day, this court received his petition to review the same initial decision.

This court does not yet have authority to decide this case. Although this court has jurisdiction to review final orders or final decisions of the Board, *see* 28 U.S.C. § 1295(a)(9); *see also Weed v. Soc. Sec. Admin.*, 571 F.3d 1359, 1361 (Fed. Cir. 2009), Mr. McCormack's pending petition at the Board seeking review renders the initial decision non-final for purposes of our jurisdiction. *See* 5 U.S.C. § 7701(e)(1)(A) (providing that the initial decision does not become final if a party timely petitions the Board for review); 5 C.F.R. § 1201.113(a) ("The initial decision will not become the Board's final decision if within the time limit for filing . . . any party files a petition for review . . .").

Two potential paths to this court's review are available. First, Mr. McCormack may wait to receive a final determination from the Board on his petition, at which point Mr. McCormack may seek this court's review by filing a timely petition here if necessary. Alternatively, Mr. McCormack may file a motion at the Board to withdraw his petition pursuant to the June 2022 policy specified on the Board's website.* Under that policy, the Clerk of the Board may grant requests to withdraw a petition for review when there is no apparent issue of untimeliness with the petition and no other party objects to the withdrawal. When the Clerk grants a request to withdraw, the order granting the

* Merit Sys. Prot. Bd., Policy Regarding Clerk's Authority to Grant Requests to Withdraw Petitions for Review (2022), https://www.mspb.gov/appeals/files/Policy_Regarding-Withdrawal_of_a_Petition_for_Review_1515773.pdf (last visited September 21, 2023).

MCCORMACK v. NAVY

3

request will be the final order of the Board for purposes of obtaining judicial review.

Accordingly,

IT IS ORDERED THAT:

- (1) The motion to dismiss is granted. The petition for review is dismissed.
- (2) All other pending motions are denied as moot.
- (3) Each side shall bear its own costs.

FOR THE COURT

October 19, 2023
Date

/s/ Jarrett B. Perlow
Jarrett B. Perlow
Clerk of Court

ISSUED AS A MANDATE: October 19, 2023