

NOTE: This order is nonprecedential.

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

TAFOYA L. SUTTON,
Petitioner

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent

2022-2231

Petition for review of the Merit Systems Protection Board in No. DC-0841-22-0513-I-1.

ON MOTION

Before LOURIE, PROST, and WALLACH, *Circuit Judges*.

PER CURIAM.

O R D E R

In response to the court's January 25, 2023, order to show cause, the Merit Systems Protection Board urges dismissal of this petition as premature. Tafoya L. Sutton moves for leave to proceed *in forma pauperis* but has not responded to the order to show cause.

Mr. Sutton appealed to the Board challenging the Office of Personnel Management's calculation of a deposit for obtaining credit for his military service. On August 19, 2022, the administrative judge issued an initial decision dismissing the appeal for lack of jurisdiction. Mr. Sutton has filed a timely petition seeking review of that decision at the Board, which remains pending. He has also filed a petition seeking judicial review of the decision here.¹

This court does not yet have authority to decide this case. Although this court has jurisdiction to review a final decision of the Board, *see* 28 U.S.C. § 1295(a)(9); 5 U.S.C. § 7703(b)(1)(A), Mr. Sutton's timely filing at the Board of a petition for review of the initial decision renders the initial decision non-final for purposes of our review. *See* 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. Sutton may receive a final determination from the full Board on his petition for Board review, at which point Mr. Sutton may seek this court's review by filing a timely petition for court review. Alternatively, Mr. Sutton may file a motion at the Board to withdraw his petition pursuant to the June 2022 policy specified on the Board's

¹ Because Mr. Sutton suggested he raised a discrimination claim before the Board, this court directed the parties to address whether this is a mixed case that should be brought in a United States district court rather than this court. *See* 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Sys. Prot. Bd.*, 137 S. Ct. 1975, 1985 (2017); *Ash v. OPM*, 25 F.4th 1009, 1011 (Fed. Cir. 2022). The Board responds without contradiction that Mr. Sutton did not raise a discrimination claim before the Board.

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website.² 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 of the petition and no other party objects to the withdrawal. When the Clerk grants a request to withdraw, the order granting the request will be the final order of the Board for purposes of obtaining judicial review.

Accordingly,

IT IS ORDERED THAT:

(1) The petition is dismissed as premature.

(2) The motion for leave to proceed *in forma pauperis* is denied as moot.

FOR THE COURT

March 28, 2023
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

² 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 March 15, 2023).