motivated the agency to terminate his appointment, the appellant provided correspondence, dated prior to his November 18, 2002 appointment, concerning his complaints that he was improperly denied priority consideration. It is undisputed that the agency did not provide the appellant with advance notice of the proposed termination and an opportunity to respond, as would be required under 5 C.F.R. § 315.805.

Where an appellant makes a non-frivolous allegation that the Board has jurisdiction, he is entitled to a hearing on the jurisdictional question. *Ferdon v. U.S. Postal Service*, 60 M.S.P.R. 325, 329 (1994). In determining whether the appellant has made a nonfrivolous allegation of jurisdiction entitling him to a hearing, the administrative judge may consider the agency's documentary submissions; however, to the extent that the agency's evidence constitutes mere factual contradiction of the appellant's otherwise adequate *prima facie* showing of jurisdiction, the administrative judge may not weigh evidence and resolve conflicting assertions of the parties and the agency's evidence may not be dispositive. *Id*. In this case, however, the appellant indicated that he did not want a hearing. Hence, it was appropriate for the administrative judge to determine, based on the written record, whether the appellant satisfied his burden of proving jurisdiction by a preponderance of the evidence.

In doing so, the administrative judge dismissed summarily the appellant's allegation that his termination was for pre-appointment reasons:

> While the appellant may suspect improper motives behind the agency's stated reasons for his termination, the fact remains that he was hired subject to a probationary period and, on its face, he was terminated for poor performance in his position—a post appointment reason. Thus, he was not entitled to the procedures attendant to a termination based on pre-appointment reasons.

This language suggests that the administrative judge took the agency's stated reason for the termination as sufficient grounds to dismiss the appellant's claim to a right of review under 5 C.F.R. § 315.806(c), without considering the evidence offered by the appellant that the termination was in fact based on pre-appointment reasons, proper or otherwise. If so, this was error. Where, as here, an appellant has made a nonfrivolous allegation that his probationary termination was for pre-appointment reasons, the agency's claim that the termination was for post-appointment reasons is not dispositive of the jurisdictional issue. As with other agency actions, the Board will look to substance rather than form in determining its jurisdiction. *Cf. Dillingham v. Department of Justice*, 73 M.S.P.R. 538, 541-43 (1997) (finding that the appellant made a nonfrivolous allegation that the agency's withdrawal of an offer was not simply a nonselection, as the agency claimed, but was based on a constructive negative suitability determination within the Board's jurisdiction).

Nevertheless, we find that the appellant's evidence is insufficient to meet his burden of proof, especially when weighed against the evidence indicating that he was, as the agency contends, terminated for post-appointment reasons. This evidence includes the agency's decision letter, dated January 30, 2003, detailing the appellant's performance problems; and the informal counseling letter, dated January 15, 2003, from the appellant's supervisor, J. Michael Cottle, expressing concerns for the appellant's poor performance. Therefore, to the extent that the administrative judge erred in failing to properly weigh the record evidence in assessing the appellant's jurisdictional assertions, his error provides no basis for reversal of the initial decision. *See Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984). Accordingly, we dismiss this appeal for lack of jurisdiction.

6. Defective or Untimely Termination Notice

The probationary employee discharged for unsatisfactory performance or conduct is entitled to a notice stating why he is being terminated. The notice should include at least the agency's conclusions concerning the inadequacies of the employee's performance or conduct. 5 CFR 315.804(a) (2010). A probationary employee terminated for conditions arising prior to appointment is to receive an advance written notice stating the specific reasons for the proposed action, a reasonable time to file a written answer to the notice and to support the answer through affidavits, and consideration of the answer by the agency prior to the issuance of a final decision that the employee is entitled to receive at or before the effective date of the removal action. 5 CFR 315.805 (2010). The probationary supervisor gets a notice of involuntary retreat or return action (unless, perchance, the probationary supervisor is also a probationer under § 315.801; if so, he receives the notice required by that section). 5 CFR 315.907 (2010). [See the preceding discussion on "Preappointment Conditions."]

5 CFR 315.804 (2010) does not provide that an employee is entitled to the advance written notice of termination of a probationary appointment given to a nonprobationary employee under 5 USC 7513. Nevertheless, the plain meaning of the regulatory language indicates that the employee is not terminated until he receives that notice. It is only "by notifying him in writing" that termination of the employee's services is accomplished. Notification does not have to be received by the employee prior to the termination as long as agency attempts to give prior notification are diligent and reasonable under the circumstances. Use of certified mail to communicate to an employee a termination effective on the same day that a termination notice was issued was not a reasonable and diligent attempt to ensure prior service; accordingly, it could not be found that constructive delivery was accomplished. The employee was not terminated until after his probationary period expired; the termination was set aside for harmful procedural error. *Lavelle v. Dept. of Transp.*, 17 MSPR 8, 16 (1983). The Board explained in *Lavelle, id*. at 14–16:

> The governing regulation with respect to the termination of probationary employees in the competitive service for unsatisfactory performance or conduct occurring after their appointment, provides that an agency "shall terminate [the employee's] services by notifying him in writing as to why he is being separated and the effective date of the action." The regulation notes that the reasons for the termination must consist of the agency's conclusions as to the employee's inadequacies in his performance or conduct. 5 CFR § 315.804 does not provide that the employee is entitled to *advance* written notice as is provided for a nonprobationary employee under Section 7513 of Title 5. Nevertheless, the plain meaning of the regulatory language indicates that the employee is not terminated until he receives such notice since it is only "by notifying him in writing" that termination of the employee's services is accomplished.
>
> The courts interpreting this provision have recognized that the rights conferred by 5 CFR § 315.804 are very narrow. "Procedurally, a probationary employee has the right only to be notified prior to the termination of his employment as to the agency's 'conclusions as to the inadequacies of [the probationer's] performance or conduct.'" *See, e.g., Shaw v. United States,* 622 F.2d 520, 527, 223 Ct. Cl. 532, *cert. denied,* 449 U.S. 881, 101 S. Ct. 231, 66 L. Ed.2d 105 (1980), citing *Perlongo v. United States,* 215 Ct. Cl. 982, 566 F.2d 1192 (1977), *cert. denied,* 436 U.S. 944, 98 S. Ct. 2844, 56 L. Ed.2d 785 (1978), and *Horne v. United States,* 190 Ct. Cl. 145, 148, 419 F.2d 416, 418 (1969). Although failure to provide such notification prior to termination has been held to constitute substantial noncompliance with the regulation where the employee did not receive the agency reasons until six months after her discharge *(see Watson v. United States,* 162 F. Supp. 755, 758–759, 142 Ct. Cl. 749 (1958)), such notification does not have to be actually received by the employee prior to the termination where the agency's attempts to give prior notification are diligent and reasonable under the circumstances.
>
> In *Shaw, supra*, at 527–9, the court rejected the employee's argument that he had completed his probationary period because he did

not receive the termination notice until after the expiration of the probationary period. There, shortly after the employee was verbally told that he was going to be terminated during his probationary period, he was admitted to a hospital. Despite the agency's attempts to serve the notice by sending several copies to his home, one of which was personally delivered by an agency employee, as well as sending a telegram with the contents of the notice to the hospital, the employee "curiously enough," did not receive the notice until his discharge from the hospital. *Id*. at 528. The court therefore held that the agency efforts to serve the termination notice on the employee "were all that could be reasonably expected under the circumstances," and that "constructive delivery" of the termination notice was accomplished before the effective date of the action.

> Unlike the situation in *Shaw,* the evidence in these cases does not support a finding that the agency made reasonable and diligent attempts to serve the termination notices on Pierron and Janaes prior to the effective date of the termination actions. Since the agency action as to appellant Pierron was to become effective the same day that the August 6 termination notice was issued, the agency's selection of the mode of service, i.e., "certified mail, restricted delivery" was completely inadequate to ensure prior service. *Cf. Arbachuk v. Department of the Treasury,* 8 MSPB 511 at 512 (1981).

The agency makes reasonable and diligent efforts to communicate the termination under 5 CFR 315.805(c) (2010) by sending an employee personally to serve the appellant with the termination notice at her home and by taping a copy of the decision letter to the front door of the employee's home. The appellant's failure to receive the notice because she did not arrive home, though out on sick leave, did not preclude the notice from becoming effective. *Cephas v. Dept. of Treasury*, 27 MSPR 69, 71–2 (1985); *see Santillan v. Dept. of Air Force*, 54 MSPR 21, 26–27 (1992) (it is sufficient for an agency to attempt certified mail delivery of the termination notice despite the appellant's claim that he was on sick leave and was not obligated to make himself available for mail delivery); *Burke v. Dept. of Justice*, 53 MSPR 372, 377–78 (1992) (the belated delivery of a termination notice to a hospitalized employee is sufficient when the employer was unaware of the hospitalization and attempted timely to serve the employee at home). The Board held in *Rosenbach v. Dept. of Navy*, 9 MSPR 37, 38 (1981), that a probationary termination notice that fails to advise the employee of Board appeal rights does not, on the basis of that defect alone, establish Board jurisdiction over the probationer's appeal. [See earlier discussion of calculation of probation under the subheading "Probationary Classification Problems."]

a. Termination by Unauthorized Official

A challenge arose concerning the authority of an individual to terminate a probationer. The theory was that the probationer continued on in her appointment and became a tenured employee if the official who issued the termination was without authority to do so. After examining the agency delegations of authority, the Board held in *Vandewall v. Dept. of Transp.*, 52 MSPR 150, 155–56 (1991), that further evidence was required to determine if the probationary termination was defective:

> The appellant asserts that the agency may not retroactively ratify the regional manager's decision to terminate the appellant. A principal may ratify by affirmance a prior act which did not bind him but which was done, or professedly done, on his account. In such a situation, the act is given effect as if originally authorized by the principal...and is effective on the date of the original act....
>
> However, if an act depriving a person of a right must be performed before a specific time, an affirmance of the act is not effective unless it is made within that time limit.... A contrary result would deprive the appellant of her appeal rights as a non-probationary employee and would conflict with the rule that ratification may not be used to deprive a person of time-limited rights. Therefore, since the agency did not affirm the notice of termination before the end of the probationary period, we find that an effective ratification did not occur.

Vandewall remanded to the judge the issue of whether a properly designated agency official authorized the appellant's termination. Upon return to the Board following remand, the termination was sustained, *Vandewall v. Dept. of Transp.*, 55 MSPR 561, 563–64 (1992):

> The Board's decision in *Vandewall v. Department of Transportation*, 52 MSPR at 157, remanded the appeal to allow evidence and argument on the agency procedures used to effect the appellant's separation and on the authorities of those involved in the action. Specifically, the *Vandewall* decision stated that remand was necessary to determine "whether the deciding official, Michael Goldstein, a Regional Manager, had the authority to discharge the appellant." 52 MSPR at 155. The appellant contends that the issue of approval was beyond the scope of the remand, and that, once the agency conceded that the deciding official who signed the terminating letter did not have the authority to take all personnel actions, the Board's inquiry on remand was determined.
>
> However, we find that the administrative judge correctly addressed the issue of "approval," as the issue was contemplated by our remand decision. As we specifically stated in that decision, "a subsequent approval by the personnel office does not affect the effective date of the action taken as long as the action is requested and *approved* by an individual with the proper authority." *Vandewall v. Department of Transportation*, 52 MSPR 150, 155 (1991) (emphasis added). Based on this, we found, as stated above, that remand was necessary to determine "whether the deciding official, Michael Goldstein, a Regional Manager, had the *authority to* discharge the appellant." *See id.* (emphasis added). Further, even though we instructed the administrative judge that, if he "finds that Mr. Goldstein had the authority to take all personnel actions, his signature on the termination letter would be sufficient authorization to terminate the appellant," this instruction did not preclude the administrative judge from finding that Goldstein had the authority to terminate the appellant despite having been granted more limited authority than to take "all" personnel actions. *See id.*
>
> As the administrative judge correctly found, Mr. Goldstein had the authority to terminate the appellant based on his finding that Goldstein's action had the prior approval of Mr. Robinson, an official with general termination authority. *See National Treasury Employees Union v. Reagan* (NTEU), 663 F.2d 239, 247 (D.C. Cir. 1981) (the power to remove is inherent in the power to appoint). We find the following principles, generally used to determine if an appointment has taken place, also to be applicable in termination situations. As recognized in NTEU, approval of the SF–52 or SF–50 is not always necessary for a personnel action to take place. *Id.* at 243. Nor does its absence signal with certainty that a personnel action has not transpired. *See Scott v. Department of the Navy*, 7 MSPB 741, 8 MSPR 282, 287 (1981). Moreover, for an appointment to be effective, the notification letter to the appointee need not be signed by an official with appointing authority, so long as it was approved by such an official before it was sent. *Id.* at 246 n.9. *Cf. Horner v. Acosta*, 803 F.2d 687, 693 (Fed. Cir. 1986) (NTEU is not inconsistent with cases requiring a formal writing for appointment because, although no SF–50 or SF–52 was used there, an unequivocal selection letter was sent with knowledge of official appointing authority).
>
> Here, an unequivocal termination letter was issued to the appellant on October 6, 1989, with the knowledge and approval of an official with termination authority. Applying the above-stated principles, we find that, in this instance, the administrative judge correctly found that the appellant's termination was effected on October 6, 1989. Accordingly, we find that the appellant's termination occurred during her probationary period, and thus that the Board has no jurisdiction over her appeal.
>
> To the extent the administrative judge allowed evidence on whether the agency "affirmed" the notice of termination prior to the end of the appellant's probationary period, we find that this review was not clearly within the scope of the remand order. Nevertheless,

this error is non-prejudicial, as only the issue of approval, which was correctly addressed by the administrative judge, is determinative in this case....

On appeal, the Federal Circuit affirmed the Board, holding in *Vandewall v. Dept. of Transp.* (Fed. Cir. 1993 nonprecedential No. 93–3099):

> An agency may terminate a probationary employee by providing her with a written explanation of the reason for the separation and the effective date of the action. 5 CFR 315.804 (1993). The only issue in this appeal is whether the termination letter issued to Ms. Vandewall was defective because the official with the authority to terminate Ms. Vandewall did not sign the letter.
>
> In 1981, the United States Court of Appeals for the District of Columbia Circuit held that selection letters written by officials lacking appointment authority were valid so long as the appointing official had exercised her discretion by approving the issuance of each selecting letter. *National Treasury Employees Union v. Reagan*, 663 F.2d 239, 246 n.9 (D.C. Cir. 1981) *(NTEU)*. This court approvingly referred to this rationale in *Horner v. Acosta*, 803 F.2d 687 (Fed. Cir. 1986), noting that *NTEU* is not inconsistent with cases requiring a formal writing for appointment when the selectees received an unequivocal selection letter sent with the knowledge of an official having appointive authority. *Id*. at 693. We fail to find a viable reason to distinguish between the procedural requirements necessary to issue an effective letter offering a person employment with the federal government and those necessary to issue a letter effectively removing a probationary employee from such employment. The record in this appeal contains substantial evidence that Mr. Robinson was an official with authority to remove employees and that he drafted and approved the issuance of the October 6, 1989, letter given to Ms. Vandewall terminating her employment. In so doing, Mr. Robinson exercised the agency's discretion to remove Ms. Vandewall and rendered effective the October 6, 1989 termination letter signed by Mr. Goldstein.
>
> Furthermore, even if we were to hold that an approving official must sign and issue a termination notice to a probationary employee, we would hold Ms. Vandewall's letter effective because ministerial functions not entailing the exercise of discretion may be delegated from one official to another. *See* Restatement (Second) of Agency 78 (1958). Here, Mr. Goldstein's signature was a ministerial act executed after Mr. Robinson exercised his termination authority by drafting Ms. Vandewall's termination letter and approving its issuance.
>
> For these reasons we agree that the agency terminated Ms. Vandewall's employment during her probationary period and we affirm the Board's dismissal of her appeal for lack of jurisdiction.

See Collins v. MSPB, 978 F.2d 675 (Fed. Cir. 1992) (limiting *Vandewall* to an examination of whether, when the SF–50 documenting the termination was signed, an earlier written decision by an agency official to terminate the employee was invalid for lack of authority of that official).

Hardy v. MSPB, 13 F.3d 1571 (Fed. Cir. 1994), considered the authority of an individual to demote a supervisory probationer. The court affirmed the agency's action, 13 F.3d at 1575:

> Even if his probationary period ended at 5:00 P.M. on May 4, Hardy argues that his removal was not effective until after that time and date. He points to two factors in support—that his Notification of Personnel Action, Standard Form (SF) 50, was not signed by the personnel officer until June 4, 1992, and that he continued to be paid at the rate of the chief position for a period of time after May 4. Neither of these arguments carries.
>
> To remove a probationary employee from an initial supervisory position, an agency official with the proper authority must notify the employee in writing that he or she is being demoted from a supervisory position for reasons of supervisory performance. 5 CFR 315.907(c) (1993). Hardy's notice of termination was signed by McKinley on May 4, 1992, and informed him that he would be demoted as of 4:00 P.M. that day for reasons of supervisory performance. Hardy contends that this did not become effective until it was "ratified" by the SF–50, which was signed by the personnel officer and approved on June 4. Because McKinley had the authority to remove Hardy, however, the SF–50 was not required to render the removal effective.
>
> Authority to demote a probationary supervisory employee was delegated by the agency to that employee's immediate supervisor with concurrence by the next highest official in the organizational structure. Federal Law Enforcement Training Center (FLETC) Directive No. 64–00.A, § 7.d, (February 18, 1981); FPM Ch. 315 § 9–6(c) (1993). McKinley was Hardy's immediate supervisor and the removal letter stated that the Deputy Director, FLETC, concurred in the action. By this writing, the agency, through McKinley, its authorized official, did all it had to do to remove Hardy effective May 4, 1992, at 4:00 P.M. No provision of the relevant statutes or regulations required the issuance of an SF–50 to render the removal effective. The ensuing SF–50 added nothing; it is merely an administrative record of the accomplished action. *See NTEU v. Reagan*, 663 F.2d 239, 243 (D.C. Cir. 1981).
>
> That Hardy continued to be paid at the higher salary is irrelevant. In any large organization, a personnel action triggers many administrative chores, ranging from processing the paperwork to alter an employee's salary, to making appropriate changes to a phone list. These chores likely involve many people and administrative levels. It defies common sense to expect that all such steps will be carried out simultaneously with the personnel action. As with the SF–50, the relevant question is whether the agency has taken all steps required by law to complete a personnel action, not whether every subsequent administrative detail has been fulfilled.

[Refer to the discussion in Chapter 11 under the subheading "Lack of Authority."]

7. Discrimination and Partisan Politics

To obtain Board consideration of a probationary termination, certain narrowly defined allegations must be presented. For an individual terminated for preemployment conditions, the probationer must allege either (1) marital status or partisan political affiliation discrimination, or (2) termination through improper procedures. The probationer fired for postemployment conditions may secure Board consideration only by alleging marital status or partisan political discrimination. The probationer may then add allegations of other forms of prohibited discrimination. The jurisdictional allegations of marital status or partisan political status discrimination must be presented in the appeal to the regional office. Those allegations cannot, without a well–founded claim of new evidence, be raised for the first time in a PFR. *See O'Connor v. Dept. of Navy*, 5 MSPR 338, 339 (1981).

a. Nonfrivolous Allegations

To confer jurisdiction on the Board through allegations of discrimination on the basis of marital status or partisan political reasons, an allegation must be "nonfrivolous." This means that the allegation must, on initial examination by the judge, appear to be made in good faith and supported by some evidence, although it need not succeed on the merits. An appeal based upon marital status discrimination must clearly raise that issue; there should at least be alleged some facts placing a judge on notice that a claim of marital status discrimination is made or implied. *Hurst v. GSA*, 2 MSPR 497, 500, 3 MSPB 21 (1980); *see Stokes v. FAA*, 761 F.2d 682, 685 (Fed. Cir. 1985) ("That burden is not met...upon the mere filing of allegations. Nor is it sustained by allegations shown to have been totally without foundation. To carry his

burden of establishing jurisdiction, the probationary employee must profer sufficient evidence to enable the presiding official reasonably to conclude that the allegations are non-frivolous, i.e., a showing which, if not controverted, would indicate that marital discrimination was the basis for the agency's adverse action."). Jurisdictional allegations of partisan political or marital discrimination must be invoked at the time the appeal is filed with the judge; they cannot be raised belatedly through a PFR. *Guipre v. Dept. of Interior*, 4 MSPR 13, 14–15, 4 MSPB 107 (1980); *Shepard v. Dept. of Agric.*, 2 MSPR 528, 530, 3 MSPB 49 (1980) ("The appellant's attempt to invoke the Board's jurisdiction by adding an allegation that the action was taken due to his marital status, which was not raised to the presiding official, is insufficient."). If there is insufficient jurisdiction to permit review of marital status or political discrimination, there is no jurisdiction to consider other allegations of discrimination. *Cassidy v. DLA*, 8 MSPR 264, 267, 7 MSPB 726 (1981).

The jurisdictional analysis in probationers' appeals was summarized by *Doebele v. Dept. of Treasury*, 46 MSPR 31, 33 n.* (1990):

> When a probationary employee raises an allegation of discrimination based on marital status or on partisan political reasons, he must complete a two–step process to establish jurisdiction. First, the allegation must be supported by factual assertions indicating that the allegation is not *pro forma*. If a nonfrivolous and supported allegation is made, the employee has a right to a jurisdictional hearing. Second, at the hearing the allegation must be supported with a showing of facts which would, if not controverted, require a finding that the alleged discrimination was the basis for the discharge. *Stokes v. Federal Aviation Administration*, 761 F.2d 682, 686 (Fed. Cir. 1985); *Black v. Department of Housing and Urban Development*, 38 MSPR 487, 490 (1988).

See Marrero–Maldonado v. VA, 43 MSPR 566, 568 n.* (1990) (restating the two–step jurisdictional analysis).

Although the quantum of evidence necessary to invoke jurisdiction need not be sufficient to prevail on the merits, a wholly unspecific allegation of marital status or partisan political discrimination is frivolous. If the appellant provides no supporting evidence or argument, the Board need conduct no further inquiry into the merits of the case. The judge is justified in dismissing the appeal for lack of jurisdiction. *Bates v. Dept. of Navy*, 6 MSPR 327, 330, 6 MSPB 279 (1981). A bare allegation of partisan political or marital status discrimination does not confer jurisdiction on the Board. *See Williams v. MSPB* (Fed. Cir. 1998 nonprecedential No. 97–3445) (the argument that termination "could only be for partisan political reasons" because the agency presented no evidence of poor performance did not constitute a nonfrivolous allegation of facts sufficient to raise a reasonable inference of discrimination based on partisan political reasons); *Haskins v. Dept. of Navy*, 15 MSPR 480, 482 (1983) (insufficient to allege only that termination resulted from political party affiliation); *Rogers v. IRS*, 15 MSPR 350, 352 (1983) (a bare allegation of partisan political discrimination does not confer jurisdiction).

The Board explained its approach to nonfrivolous allegations in *Jordan v. Dept. of Air Force*, 61 MSPR 388, 394–95 (1994), involving a probationer discharged for preemployment reasons:

> When an agency terminates an employee entitled to the limited procedural rights under 5 CFR Part 315, for pre-employment reasons, the agency must provide the employee with the following: (1) Advanced notice of the reasons for the proposed action; (2) a reasonable time to answer the charges, including the right to submit affidavits (if the employee does answer the agency must consider the answer in reaching its decision); and (3) written notice of the agency's decision delivered to the employee at or before the time the decision will be made effective. The notice shall inform the employee of the reasons for the action and inform the employee of her right to appeal to the Board, including the time limitation for filing the appeal. *See* 5 CFR 315.805. In the case below, the appellant argued that she was not provided with reasonable time for filing a written answer and further argued that the agency did not notify her in writing of its decision at or before the time the action was effective.
>
> When a probationary employee makes factual assertions under 5 CFR 315.805 that are facially non-frivolous, the employee has the right to a jurisdictional hearing. *See Stokes v. Federal Aviation Administration*, 761 F.2d 682, 685–86 (Fed. Cir. 1985). The appellant's allegations are non-frivolous if such allegations, if true, would establish that the termination was not effected in accordance with the procedures set forth at 5 CFR 315.805. *See Munson v. Department of Justice*, 55 MSPR 246, 251 n.2 (1992), *citing Graham v. Department of Justice*, 50 MSPR 285, 288 (1991). Because the appellant's allegations (insufficient time to answer and an untimely served notice of decision), if deemed true would establish Board jurisdiction under 5 CFR 315.805, we find that she has made non-frivolous allegations that entitle her to a jurisdictional hearing. *See Stokes*, 761 F.2d at 685–86.
>
> In addition, however, the appellant has raised a claim of sex discrimination under 5 CFR 315.806(d). Whether she is also entitled to be heard on it, we find, depends on her ability to support her allegation of procedural impropriety. Specifically, we note that the court in *Stokes* found that if the appellant is entitled to a jurisdictional hearing, he must meet a second test: that is, "he must support his allegation with a showing of facts which would, if not controverted, require a finding that marital discrimination was the basis for the discharge"; or, as applied to this case, that the termination was effected under improper procedure. If such showing is made, then beyond this point the appeal could not be dismissed for lack of jurisdiction:
>
>> [w]hen the Board dismisses a probationary employee's appeal for failure to support the jurisdictional allegation…"lack of jurisdiction" is…an adequate description of the basis for that dismissal. When…the Board goes on to determine that the agency had articulated and supported [the propriety of its action] and the probationary employee had not shown [the rebuttal] to be mere pretext, that description of the basis for dismissal is, for a number of reasons, inappropriate.
>
> *Stokes*, 761 F.2d at 687.
>
> Although, as noted, *Stokes* addresses an allegation under 5 CFR 315.806(b), we find that as applied to one under section 315.806(c), Board jurisdiction attaches to examine the additional claim of sex discrimination pursuant to section 315.806(d) only at [the] point the appellant makes her factual showing. *Cf. Wren v. Dept. of the Army*, 2 MSPB 174, 2 MSPR 1, 2 (1980) (the Board may not consider a claim of discrimination absent a finding of jurisdiction over the matter appealed), *aff'd*, 681 F.2d 867 (D.C. Cir. 1982).

b. Partisan Political Reasons

As the Board observed in *Sweeting v. Dept. of Justice*, 6 MSPR 715, 717, 6 MSPB 598 (1981), 5 CFR 315.806(b) contains no definition of "partisan political reasons." After a review of pertinent court decisions and legislative history, the Board concluded that "partisan political reasons" means discrimination based on affiliation with any political party or candidate. This excludes activism in civil rights organizations or discrimination based upon nonpartisan political beliefs—matters that may be addressed to OSC as prohibited personnel practice allegations. *Sweeting* provided the genesis of the term "partisan political reasons," *id*. at 717–19:

> With regard to the meaning of "partisan political reasons" in 5 CFR § 315.806(b), since the regulation itself provides no hint, we shall look to its evolution. Before the regulation was amended in 1972, it stated that "an employee may appeal under this subparagraph a termination not required by statute which he alleges was based on *political reasons…,"* (emphasis added) and the term "political reasons" in that context was construed in two reported judicial decisions.
>
> In *Peale v. United States,* 325 F. Supp. 193, 194–95 (N.D. Ill. 1971), the district court noted that the former Civil Service Commission (Commission) dismissed the probationer plaintiff's appeal because it found that wearing a black arm band to signify opposition

to a war did not constitute a "partisan political reason" for which termination was prohibited. The court found the Commissioner's equation of "political reasons" with "partisan political reasons" to be a plainly erroneous construction of 5 CFR § 315.806(b) because the Hatch Act prohibits partisan political activity and permits non-partisan political activity.

Similarly, in *Holden v. Finch,* 446 F.2d 1311 (D.C. Cir. 1971), the court of appeals noted that the Commission dismissed the probationer plaintiff's appeal on the grounds that civil rights activity did not constitute a "partisan political reason" because it did not relate to "affiliation with or support of recognized partisan political parties, their candidates for public office, or their political campaign activities." *Id*., 1314. The court strenuously disagreed:

> The Commission has seen fit to interpret its regulation as confined to partisan political activity in the Hatch Act sense. It appears to believe that it has in terms excluded from the concept of political discrimination any conduct which does not fit into the traditional partisan mold of organized contention for elective political office.... We think...that such a reading is at odds with the Congressional purpose, stated in the Hatch Act itself, that the statutory proscription of partisan political activity does not extend to the right of an employee to "express his opinion on political subjects," or to engage in political activity in connection with "a question which is not specifically identified" with political parties. We suggest, finally, that such an interpretation could not, compatibly with the First Amendment, be constitutionally maintained as against any and all activities involving speech and association relating to public policies of essentially political, albeit non-partisan, nature.

Id., 1316.

After these two decisions were rendered, the Commission amended 5 CFR § 315.806(b) in 1972 by adding the word "partisan" before "political reasons" in order to "clarify appeal rights of probationers." 37 Fed. Reg. 26575 (1972). Since there is no question that the Commission acted within its authority in amending the regulations, the word "partisan" must be given full effect. *United States v. Larionoff,* 431 U.S. 864, 873, 97 S. Ct. 2150, 2156, 53 L. Ed.2d 48 (1977); *cf. Zeigler Coal Co. v. Kleppe,* 536 F.2d 398, 406 (D.C. Cir. 1976).

OPM urged in its brief that the proper interpretation of "partisan political reasons" in 5 CFR § 315.806(b) is the same as the Commission's interpretation of "political reasons" in *Holden,* namely:

> [P]olitical influences, specifically as resulting from affiliation with or support of recognized partisan political parties, their candidates for public office, or their political campaign activities.

446 F.2d at 1314. OPM contended that this interpretation is rational when the regulation is viewed as a complement to the Hatch Act, and that discrimination against an employee because of more general nonpartisan political beliefs may be addressed by Special Counsel action under 5 USC § 1206. *See* 5 USC § 2301(b).

The construction of "partisan political reasons" in 5 CFR § 315.806(b) by OPM and its predecessor is entitled to great deference as long as the interpretation is reasonable and consistent with the regulation. *Larionoff,* 431 U.S. at 872, 97 S. Ct. at 2155; *Belco Petroleum Corp. v. Federal Energy Regulatory Commission,* 589 F.2d 680, 685 (D.C. Cir. 1978). We believe that OPM's construction is indeed both reasonable and consistent with the regulation. Moreover, it is consistent with Civil Service Rule IV which specifies the type of political discrimination prohibited in Federal employment:

> No discrimination shall be exercised, threatened, or promised by any person in the executive branch of the Federal Government against or in favor of any employee in the competitive service, or any eligible or applicant for a position in the competitive service because of his race, *political affiliation,* or religious beliefs, except as may be authorized or required by law.

5 CFR § 4.2 (emphasis added). We find, therefore, that discrimination based on "partisan political reasons" under 5 CFR § 315.806(b) means discrimination based on affiliation with any political party or candidate.

The problem of defining partisan political reasons arose again in *Harris v. Dept. of Justice*, 25 MSPR 577, 580 (1985). The appellant alleged he was terminated during probation so that the agency could terminate the nephew of a U.S. senator without acutely embarrassing the senator—the idea being that if several people were dismissed concurrently there would be less focus upon the senator's nephew. The Board found no basis for disturbing the termination, holding that a partisan political reason is personal to the appellant. It must be the appellant, not some other individual, who is terminated for that reason. Under *Harris,* the reason must be one involving political influence, resulting from affiliation with or support of recognized political parties, candidates, or campaign activities. A hearing was ordered, however, for an employee who alleged that her probationary appointment was terminated because of "political influence" used to create a "power play atmosphere," resulting in discrimination against the appellant because of the appellant's political background predating her appointment. *Black v. DHUD*, 38 MSPR 487, 489 (1988).

In *Poorsina v. MSPB*, 726 F.2d 507, 509 (9th Cir. 1984), a probationer complained that the Board improperly refused jurisdiction of his appeal from a dismissal he contended was reprisal for whistleblowing. The appellant contended that his charges of waste and mismanagement stemmed from his political convictions about quality patient care within the Indian Health Service. The court affirmed the Board, holding that the phrase "partisan politics" is "best interpreted in a common-sense way as relating to recognized political parties, candidates for public office, or political campaign activities." The only way the whistleblowing allegations could be addressed by the Board would be through OSC. The court relied upon *Cutts v. Fowler*, 692 F.2d 138 (D.C. Cir. 1982). [Refer to the subsection in Chapter 13, "Proceedings to Compel OSC Action."]

Sawdey v. Dept. of Commerce (Fed. Cir. 1989 nonprecedential No. 89–3070), held that to establish jurisdiction over a probationer's appeal, it was insufficient to assert that the appellant was a zealous advocate of the proper conduct of government affairs and thereby exhibited partisan political beliefs. The term "partisan political reasons" meant discrimination based on affiliation with any political party or candidate. The court cited *Mastriano v. FAA*, 714 F.2d 1152 (Fed. Cir. 1983), providing some of the history behind the interpretation by OPM [at 37 Fed. Reg. 26575 (1972)] of partisan political reasons as political influences resulting from affiliation with or support of recognized partisan political parties, their candidates for public office, or their political activities. *See Montes–Rodriguez v. MSPB*, 65 Fed. Appx. 306 (Fed. Cir. 2003 nonprecedential) (citing *Mastriano* for the proposition that discrimination based on a partisan political reason means discrimination based on affiliation with a political party or candidate; the appellant did not state a covered claim by her contention that "a difference of opinion on a topic on which Democrats and Republicans have varying views does not establish discrimination for partisan political reasons"). *Brown v. MSPB* (Fed. Cir. 1991 nonprecedential No. 91–3257), held that a probationer's claim that her removal was based on appellant's membership in the Federal Women's Program did not raise a sufficient "partisan political reason" to invoke Board jurisdiction. *See Rhodes v. Dept. of Commerce*, 86 MSPR 476, 480 ¶ 9 (2000) ("[T]he intra–office 'politics' about which the appellant complains do not fall within the meaning of 'partisan political reasons' as that phrase is used in the regulation. As the administrative judge pointed out in her initial decision, the phrase 'partisan political reasons' means discrimination based on the employee's affiliation with a political party or candidate."); *Schindler v. GSA*, 53 MSPR 171, 173 (1992) (an alleged termination as reprisal for union membership was not termination for partisan political reasons).

Allegations of political discrimination must be nonconclusory. *See Kennington v. MSPB*, 385 Fed. Appx. 983, 986 (Fed. Cir. 2010 nonprecedential) ("Kennington did not allege, for example, that his termination was a result of his support of, or opposition to, President Obama or because of any affiliation with a particular party or candidate"); *Mowery v. MSPB*, 355 Fed. Appx. 401, 402 (Fed. Cir. 2009 nonprecedential) (jurisdictionally insufficient to assert that "I believe there was other political influence involved in my termination of employment" and "there is a political influence on this case."). If the appellant alleges that his probationary termination occurred because of partisan political reasons, he bears the burden of proving causation at the hearing. *See Miller v. FDIC*, 3 MSPR 334, 335 (1980).

c. Marital Status

Essential to an allegation of marital status discrimination is a difference in treatment of married and unmarried employees. *See Dvortsin v. DHS*, 314 Fed. Appx. 307, 309 (Fed. Cir. 2008 nonprecedential) ("In order to allege marital status discrimination, Ms. Dvortsin must assert facts, which if proven, demonstrate that unmarried employees were treated differently from married employees."); *Collins v. MSPB*, 65 Fed. Appx. 297 (Fed. Cir. 2003 nonprecedential) (a marital status claim was not made out by a contention that the appellant was terminated, as the spouse of an enlisted man, while another woman comparable situation, who was the spouse of an officer, was not terminated); *Lipniarski v. MSPB* (Fed. Cir. 2001 nonprecedential No. 01–3265) ("Because Lipniarski failed to present any evidence that the INS allowed single employees to take lengthy leaves of absence or to fail to report for duty on account of family obligations, we conclude that the Board correctly found that he failed to set forth a nonfrivolous allegation of martial status discrimination, and that the Board therefore lacked jurisdiction to hear his appeal."); *Chase-Baker v. Dept. of Justice*, 198 F.3d 843, 845 (Fed. Cir. 1999) ("The statute is…concerned…only with any difference in treatment of married and unmarried employees."); *Miller v. Dept. of Justice*, 41 MSPR 353, 356 (1989) (no disparity was apparent from an allegation that an employee's supervisor told him that he could have problems because of frequent calls made by the employee's wife to the penitentiary where he worked).

If a probationer alleges that he was the victim of adverse action because he was married to a person of another race, his complaint is one of racial rather than marital status discrimination. *Shah v. GSA*, 7 MSPR 626, 628, 7 MSPB 460 (1981); *cf. Smith v. Dept. of Energy*, 89 MSPR 430, 434 ¶ 9 (2001) (a marital status claim not made out by assertion that the appellant's RIF was tainted by "illegal favoritism" of a personnel specialist's husband), *following remand aff'd on other grounds*, *Smith v. Dept. of Energy*, 73 Fed. Appx. 398 (Fed. Cir. 2003 nonprecedential).

For the employee to obtain a Board hearing, his allegation should be supported by detailed facts identifying the discrimination. *See Goss v. Dept. of Air Force*, 131 Fed. Appx. 721, 724 (Fed. Cir. 2005 nonprecedential) (marital status discrimination: to assert a nonfrivolous claim an employee must at a minimum make factual allegations that support the elements of the claim, citing *Hayes v. USPS*, 390 F.3d 1373, 1376 (Fed. Cir. 2004)); *Herring v. VA* (Fed. Cir. 1998 nonprecedential No. 97–3443) (a bare allegation of martial status discrimination, unaccompanied by any supporting factual allegations, is insufficient to support MSPB jurisdiction); *Vandewall v. Dept. of Transp.*, 52 MSPR 150, 157 (1991) (appellant did not present specific nonfrivolous allegations that married persons were treated less harshly for similar misconduct). There must be a connection alleged between marital status and the termination. *See Kennington v. MSPB*, 385 Fed. Appx. 983, 986 (Fed. Cir. 2010 nonprecedential) ("His allegations that his supervisor and President Obama are able to marry while he is not able to marry someone of the same sex are devoid of any hint of causation").

Jurisdiction is not established by unsworn and unsupported allegations amounting to conjecture about the motivation of the action against the appellant. *See Bedynek–Stumm v. Dept. of Agric.*, 57 MSPR 176, 179 (1993) ("assertions he made to support his contention all regard disputes over work-related matters, and are completely unrelated to his marital status except for his conjectures that this coworker sought to dominate him because of her negative feelings toward him as an unmarried male"); *cf. Batchelder v. MSPB*, 71 Fed. Appx. 67 (Fed. Cir. 2003 nonprecedential) (allegations pertaining to the appellant's status as single and as a conservative dresser did not rise to the level of nonfrivolous allegations of martial status discrimination in a probationary termination appeal). *But cf. Edem v. Dept. of Commerce*, 64 MSPR 501, 503–06 (1994) (allegations need not be sworn to advance to a jurisdictional hearing).

Assuming a nonfrivolous allegation of marital status discrimination, the Board applies the analytical model of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973): the employee has the initial burden of establishing a *prima facie* case; the agency may rebut that case by articulating a legitimate nondiscriminatory reason for the termination; and the employee may then attempt to establish that the "legitimate reason" was pretextual. *See Carmichael v. DHHS*, 13 MSPR 135, 138 (1982); *Craighead v. Dept. of Agric.*, 6 MSPR 159, 162, 6 MSPB 142 (1981) (applying *McDonnell Douglas* to a marital status discrimination claim). A probationer alleging marital status discrimination has the same burden of proof as an individual alleging discrimination under Title VII of the Civil Rights Act [discussed in Chapter 12, subheading "Probationary Employees"]. *See McClintock v. VA*, 6 MSPR 475, 478, 6 MSPB 402 (1981) (describing shifting burden of proof).

Ney v. Dept. of Commerce, 115 MSPR 204, ___ ¶ 11, 2010 MSPB 219 (2010), provided a synopsis of some of the circumstances that would warrant a hearing on the basis of a martial status discrimination case arising from a probationer's appeal:

> In particular, the appellant specifically alleged that (1) she had good performance reviews and no one explained her termination; (2) her supervisor regularly raised questions about her marital status; (3) she was assigned menial tasks not assigned to single employees; (4) married employees were subjected to harsher standards; (5) married employees were objects of ridicule; (6) her responsibilities were given to an inexperienced single employee; and (7) single employees received better treatment and preferences for telework. The Board has found similar allegations sufficient to entitle an appellant to a jurisdictional hearing. *See, e.g., Smirne v. Department of the Army*, 115 M.S.P.R. 51, ¶ 11 (2010) (the appellant alleged that her purported performance problems were fabrications, she was the only single, pregnant, newly hired secretary, and she was the only new secretary terminated); *Strausbaugh*, 111 M.S.P.R. 305, ¶ 8 (the appellant alleged that his supervisor made derogatory remarks about his marital status, told him he would not be having "problems" if he was married, and excluded his fiancée and young child from an official function); *Kiser v. Department of Education*, 66 M.S.P.R. 372, 379-81 (1995) (the appellant alleged that his supervisor made repeated comments about his marriage and social life, he was terminated despite a superior performance review, and single employees were treated less harshly for the same conduct); *Edem v. Department of Commerce*, 64 M.S.P.R. 501, 504-505 (1994) (the appellant alleged that her supervisor questioned her three times about her relationship with her husband (from whom she was separated) and children); *Paine v. Department of Health & Human Services*, 32 M.S.P.R. 135, 137 (1987) (the appellant alleged that the agency overlooked more serious acts of misconduct and performance deficiencies for married employees than single employees). Thus, the appellant presented facially nonfrivolous allegations regarding her marital status discrimination claim, and the administrative judge erred in dismissing her case without holding a jurisdictional hearing. *See Stokes v. Federal Aviation Administration*, 761 F.2d 682, 686 (Fed. Cir. 1985) (if a probationary employee presents a facially nonfrivolous allegation of marital status discrimination, she is entitled to a hearing).

Marital status discrimination is not implicated by an employee's allegation that she was fired during her probationary period because