UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOSEPH TRAMBLEY, Appellant, v. DEPARTMENT OF VETERANS AFFAIRS, Agency.	DOCKET NUMBER AT-0752-12-0186-I-1 DATE: September 21, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL*

Thomas F. Muther, Esquire, Denver, Colorado, for the appellant.

Johnston B. Walker, Jackson, Mississippi, 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. We grant petitions such as this one only when significant new evidence is presented to us

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* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

On review, the appellant contends that the administrative judge erred by issuing the initial decision prior to the close of the record. Petition for Review (PFR) File, Tab 1. The appellant's argument in this regard has merit. The administrative judge issued an acknowledgment order advising the parties that the Board may not have jurisdiction over the appeal and ordered the appellant to file evidence and argument within 15 calendar days of the date of the order. Initial Appeal File (IAF), Tab 2. The order also afforded the agency the opportunity to submit a response within 25 days of the date of the December 22, 2011 order, which would have been January 16, 2012, and the order stated that the record will close on that date. *Id*. However, the initial decision dismissing the appeal for lack of jurisdiction was issued on January 13, 2012. IAF, Tab 6. We therefore agree with the appellant that the initial decision was issued prior to the close of the record and that its premature issuance was error. *See Tan v. Department of Veterans Affairs*, 89 M.S.P.R. 15, ¶ 5 (2001).

Where such a procedural error appears, the Board will determine whether the affected party's substantive rights were harmed. *Edeburn v. U.S. Postal Service*, 95 M.S.P.R. 486, ¶ 7 (2004). The proponent of the alleged error bears the burden of demonstrating that the error adversely affected those rights. *Karapinka v. Department of Energy*, 6 M.S.P.R. 124, 127 (1981). Absent an adverse effect on substantive rights, the error is harmless and of no legal consequence. *Gala v. U.S. Postal Service*, 38 M.S.P.R. 474, 477-78 (1988), *aff'd*, 878 F.2d 1445 (Fed. Cir. 1989) (Table). For the following reasons, the appellant's arguments on review are of insufficient weight to warrant an outcome different from that ordered by the administrative judge on the issue of jurisdiction. Thus, the premature closing of the record by the administrative

judge did not denigrate the appellant's rights and constituted harmless error. *See Karapinka*, 6 M.S.P.R. at 127.

Specifically, the initial decision was issued only after the appellant had filed his jurisdictional response on January 4, 2012, and the agency filed its response to the appellant's submission on January 11, 2012. IAF, Tabs 4-6. Thus, the initial decision was not issued until after both parties had responded on the jurisdictional issue. IAF, Tab 6. Furthermore, the acknowledgment order issued on December 22, 2011, clearly advised the appellant what he would need to show to make a nonfrivolous allegation of jurisdiction. IAF, Tab 2. Specifically, the order advised the appellant that he had to make a nonfrivolous allegation that: (1) He complied with the agreement; (2) he did not knowingly and voluntarily enter into the agreement; (3) the agency materially breached the agreement; or (4) the agreement resulted from fraud or mutual mistake. *Id*. The order also advised the appellant that breach may be shown both where the agency failed to comply with a provision of the agreement in a way that was material, regardless of its motive, and where it acted in bad faith. *Id*. Yet, outside of the appellant's bare assertions that the agency breached the last chance agreement (LCA), the appellant failed to raise any of these allegations in his January 4 response. IAF, Tab 4. Nevertheless, because the initial decision was prematurely issued, we have addressed the appellant's arguments that he raises for the first time on review.

Specifically, the appellant argues that the agency's November 15, 2011 Decision on Last Chance Agreement (removal notice) did not provide adequate detail for him to ascertain the factual basis of his charged misconduct that allegedly violated the LCA. PFR File, Tab 1. In this connection, the appellant contends that the names of the patients and the details of the incidents involving the alleged misconduct were nonspecific. The appellant also asserts that he did not retain a copy of the LCA and that, as a result, he was uncertain if his alleged

misconduct, even if true, violated the LCA that he had not seen or reviewed in several years. *Id*.

The appellant appears to be arguing that it was the agency's responsibility to provide him with a copy of the LCA at the time of the removal notice because he did not retain his original copy of the LCA. PFR File, Tab 1. However, because there is no evidence in the record that the appellant ever requested a copy of the LCA from the agency, there is no indication that the agency was even aware that the appellant no longer had his original copy of the LCA. Further, the appellant has provided no legal support for his argument that the agency was required to include a copy of the 2009 LCA with the removal notice. Although the appellant now claims he was "uncertain" of how he allegedly violated the LCA until after the agency filed its January 11 response on jurisdiction, the appellant testified before an Administrative Investigation Board Hearing on August 15, 2011. IAF, Tab 5. The transcript of this hearing, included in the agency's January 11 response below, reflects that the appellant was aware of the specificity of the misconduct being investigated and the names of the individuals involved. IAF, Tab 5 at 14-33. Moreover, the appellant, who was represented during the hearing by a union representative, was afforded the opportunity to make corrections to his testimony, which he did on September 15, 2011. *Id*. at 14, 33. Thus, even though it is unclear from the record whether the appellant received a copy of the October 13, 2011 summary of the report of the investigation prior to the agency's January 11, 2012 response below, the appellant was aware of the specificity of the charged misconduct, and he could have filed a more detailed response to the administrative judge's jurisdictional order but chose not to do so. Finally, even if the appellant was unaware of the specificity of the charges as he claims, the appellant has made no showing as to why he was unable to argue in his January 4, 2011 response to the jurisdictional order that the agency failed to provide him with adequate notice of the

misconduct rather than raising this argument for the first time on review. IAF, Tab 4.

The appellant also argues that the administrative judge did not allow him adequate time to pursue discovery. PFR File, Tab 1. However, the appellant was on clear notice that the record on the jurisdictional issue would close on January 16, 2012, yet there is no indication in the record that the appellant ever requested an extension of time for discovery on the jurisdictional issue. IAF, Tab 2. Rather, the appellant filed a bare response that simply stated that it was the agency that breached the LCA. IAF, Tab 4.

In addition, the appellant argues that the agency removed him based on an "incorrect interpretation of the LCA" which constituted a "clear breach of the LCA on the part of the Agency." PFR File, Tab 1 at 7. In this regard, the appellant appears to be arguing that the agency should be found in breach of the LCA because the language in the agency's removal decision is not the exact language that is used in the LCA. Specifically, the appellant contends that the agency's removal decision indicates that the appellant understood that his removal would be reinstated if he committed "one incident similar to those upon which the removal was proposed or other misconduct," while the LCA states his removal will be immediately reinstated if he engages in any misconduct for which a penalty of an admonishment or higher is within the agency's table of penalties. *Id*. at 2. However, even though the agency did not use the exact words that are in the LCA, we see no problem with the agency's characterization of the terms. The terms of the LCA explicitly state that <u>any</u> misconduct that would warrant discipline of at least an admonishment will cause his removal to be reinstated. *See* IAF, Tab 5 at 11. Although the agency's removal decision states that one incident similar to the underlying conduct of the earlier removal would cause his removal to be reinstated, the agency's decision letter also states that "any misconduct (commits an offense)" and "other misconduct" would cause the reinstatement of the removal action. IAF, Tab 1. Thus, we see no merit to the

appellant's claim that the agency's "incorrect interpretation of the LCA" constituted a "clear breach of the LCA." PFR File, Tab 1 at 7.

To the extent the appellant is arguing that the agency's submission of the 2009 executed LCA is new evidence which he did not have the opportunity to address prior to the close of the record, the fact that the appellant did not retain a copy of the LCA does not make it new evidence. Moreover, the appellant has made no showing that he was unable, despite his due diligence, to obtain another copy of the LCA from the agency prior to submitting his jurisdictional response below. As to the agency's submission of his August 15, 2011 Administrative Investigation Board Hearing testimony, because the appellant had knowledge of the written transcript of his testimony, there is also no merit to the appellant's argument that the transcript is new evidence and that he did not have the opportunity to address it in his January 4 response. IAF, Tab 5 at 33.

The appellant also claims that the agency materially breached the LCA. For an appellant to prove Board jurisdiction over an appealable matter on the basis that an agency breached a last-chance settlement agreement waiving his right to an appeal of that matter, he must establish that the agency breached the agreement in a material way, regardless of motive, or otherwise breached the agreement by acting in bad faith. *Link v. Department of the Treasury*, 51 F.3d 1577, 1582-83 (Fed. Cir. 1995). As the administrative judge found, the appellant provided no affidavits or underlying facts to support his claims. IAF, Tab 4; Initial Decision at 4. Further, the initial decision and the agency's jurisdictional response both provided the appellant with clear notice as to what is necessary to make a nonfrivolous allegation of jurisdiction entitling him to a hearing and the evidence the agency relied on in removing him, i.e., the investigative summary and testimony from the agency's Administrative Investigation Board Hearing. Nevertheless, on review, the appellant continues to merely reassert his general denial of the charged misconduct without providing any specification of the

underlying facts, affidavits, or any evidence to support his claims. PFR File, Tab 1.

Finally, the appellant contends that his denial of the misconduct in his January 4 submission constituted nonfrivolous allegations that warranted a jurisdictional hearing. PFR File, Tab 1 at 9. The appellant also argues for the first time that it is clear from his testimony before the agency's Administrative Investigation Board Hearing on August 15, 2011, "that he disputes doing anything wrong . . . in his professional relationships with his clients and coworkers." *Id*. at 10. However, there is no statutory authority requiring the Board to hold a hearing on the threshold issue of jurisdiction. *Manning v. Merit Systems Protection Board*, 742 F.2d 1424, 1427 (Fed. Cir. 1984). In order to receive a jurisdictional hearing, the appellant must set forth a nonfrivolous allegation of fact which, if proven, could establish a prima facie case that the Board had jurisdiction over his appeal. *Briscoe v. Department of Veterans Affairs*, 63 M.S.P.R. 137, 140 (1994), *aff'd*, 55 F.3d 1571 (Fed. Cir. 1995). Because the appellant's bare assertions do not constitute any factual contradiction of the agency's evidence that he was removed for misconduct, the appellant has failed to show that the administrative judge erroneously weighed the evidence and resolved conflicting assertions. Thus, the administrative judge correctly found that the appellant failed to provide an adequate prima facie showing of jurisdiction that would warrant a jurisdictional hearing. *See Dick v. Department of Veterans Affairs*, 290 F.3d 1356 (Fed. Cir. 2002) (nonfrivolous jurisdictional allegations supported by affidavits or other evidence confer Board jurisdiction).

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). Therefore, we DENY the petition for review. Except as expressly modified by this Final Order, we AFFIRM the initial decision issued by the administrative judge.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

The initial decision, as supplemented by this Final Order, constitutes the Board's final decision in this matter. 5 C.F.R. § 1201.113. You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. 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 your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. 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). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. 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:

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William D. Spencer
Clerk of the Board

Washington, D.C.