UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JANE L. GALLO,
Appellant,

v.

DEPARTMENT OF TRANSPORTATION,
Agency.

DOCKET NUMBER
AT-0353-00-0909-M-1

DATE: November 16, 2012

THIS ORDER IS NONPRECEDENTIAL*

William L. Bransford, Esquire, Washington, DC, for the appellant.

Theresa Dunn, Esquire, Fort Worth, Texas, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

REMAND ORDER

The Board previously denied the appellant's request for corrective action in this restoration appeal. *Gallo v. Department of Transportation*, 116 M.S.P.R. 1 (2011). The U.S. Court of Appeals for the Federal Circuit has reversed that

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* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

decision in part and remanded the appeal for determination of the "rights and benefits based on length of service" to which the appellant is entitled. *Gallo v. Department of Transportation*, 689 F.3d 1294, 1303 (Fed. Cir. 2012). For the reasons set forth below, we REMAND the appeal to the regional office for further adjudication consistent with this Order.

In this appeal, the appellant seeks additional pay and other benefits she would have received had she not suffered a compensable injury in 1995. A majority of the Board held that the appellant was not entitled to relief because she did not "resume[] employment with the Federal Government." *Gallo*, 116 M.S.P.R. 1, ¶¶ 9-11; *see* 5 U.S.C. § 8151(a). The Board further held that, even if the appellant did resume employment with the government, she was not entitled to the additional pay or retirement credit she sought because those were not "rights and benefits based on length of service." *Gallo*, 116 M.S.P.R. 1, ¶¶ 12-19. In a dissenting opinion, Vice Chairman Wagner agreed with the majority that the appellant was not entitled to the additional retirement credit she sought. *Id.*, Dissenting Opinion, ¶ 15. However, the Vice Chairman disagreed with the majority with respect to whether the appellant was entitled to additional pay based on her length of service in the operational Air Traffic Control Specialist (ATCS) position she occupied prior to her compensable injury. *Id.*

The Federal Circuit reversed the Board's decision in part, finding that the appellant did "resume[] employment with the Federal Government" and that the appellant was entitled to have her service time as an automation specialist credited to her for the purposes of determining her appropriate rating or "grade" when she was restored to her ATCS position and subsequently promoted. *Gallo*, 689 F.3d at 1302. The court therefore remanded the appeal for the Board to

> (1) reinstate Gallo's creditable service time as an automation specialist; (2) determine Gallo's appropriate seniority level and corresponding pay under the AT compensation system based upon her creditable service time, including her time spent serving as an automation specialist . . .; and (3) award Gallo any additional

> compensation to which she was entitled, effective to the date of her restoration to the supervisory ATCS position.

Id. The court agreed with the Board that the appellant was not entitled to the retirement credit she sought. *Id.* at 1302-03 (citing *True v. Office of Personnel Management*, 926 F.2d 1151, 1155-56 (Fed. Cir. 1991)).

The Federal Circuit noted that the AT compensation system was not part of the record and that it was therefore unclear from the existing record whether additional creditable service time would actually affect the appellant's compensation level in the AT pay system. *Gallo*, 689 F.3d at 1302. We therefore REMAND the appeal to the regional office for further adjudication consistent with the instructions from the Federal Circuit. On remand, the administrative judge shall give both parties an opportunity to address what specific relief is appropriate in this case in light of the Federal Circuit's decision. The administrative judge shall then issue a new initial decision granting the appellant the appropriate pay and benefits.

ORDER

For the reasons discussed above, we REMAND this case to the regional office for further adjudication in accordance with this Remand Order.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board

Washington, D.C.