

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

DAWNA LOHR,
Appellant,

DOCKET NUMBER
DC-3330-12-0153-I-1

v.

DEPARTMENT OF HEALTH AND
HUMAN SERVICES,
Agency.

DATE: December 7, 2012

THIS ORDER IS NONPRECEDENTIAL¹

Dawna Lohr, Scranton, Pennsylvania, pro se.

Emily Lerner, Esquire, Washington, D.C., for the agency.

BEFORE

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

REMAND ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge, which denied the appellant's request for corrective action under the Veterans Employment

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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\(c\)](#).

Opportunities Act of 1998 (VEOA). Generally, we grant petitions such as this one only when: the initial decision contains erroneous findings of material fact; the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. *See* Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)).² For the reasons discussed below, we GRANT the appellant's petition for review, VACATE the initial decision, and REMAND the case to the regional office for further adjudication in accordance with this Order.

DISCUSSION OF ARGUMENTS ON REVIEW

In her petition for review, the appellant challenges the initial decision, which found that the Board has jurisdiction over her appeal under the VEOA but denied her request for corrective action. Petition for Review File, Tab 1 at 3. The appellant renews her argument that the agency violated her veterans' preference rights when it did not select her for a GS-0610-9/11/12 Nurse position under vacancy announcement HHS-CM-2011-0009. In that regard, she challenges the agency's claim that it filled over 20 positions under that vacancy announcement using direct hiring authority and that veterans' preference does not apply when using that authority. *Id.*; Initial Appeal File (IAF), Tab 1 at 3, 5-7, Tab 3 at 3, Tab 5 at 7-8, Tab 10 at 6, 31-37, 53-61.

² Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

We find it necessary to remand this case for further adjudication. In her appeal, the appellant requested a hearing. IAF, Tab 1 at 2. The administrative judge issued an acknowledgment order in which she informed the parties that initial discovery requests must be served on the other party within 25 days of December 8, 2011, and that responses to initial discovery must be served no later than 20 days after the date of service of the other party's discovery request or the Board's order. *Id.*, Tab 2 at 3. She informed the appellant that, "[i]f the Board has jurisdiction, I will adjudicate your appeal and will schedule a hearing if one has been requested." *Id.* at 2.

On December 22, 2011, the agency moved to suspend the appeal for 30 days and "Stay the Agency File, Discovery and the Agency's Response to Jurisdiction." IAF, Tab 5 at 4. The agency submitted evidence showing that the appellant did not object to a 30-day suspension. *Id.* at 7. On December 22, 2011, the administrative judge granted the agency's request for a stay of its response to the jurisdictional order, the production of the agency's response file, and the "initiation of discovery." IAF, Tab 6 at 1. The administrative judge suspended case processing until January 22, 2012; notified the agency that its jurisdictional response was due no later than February 6, 2012; and indicated that, "[i]f I determine jurisdiction exists over this appeal, I will issue a subsequent order with the appropriate discovery and production due dates." *Id.* The administrative judge issued a second December 22, 2011 order noting that she had the discretion under the Board's regulations to suspend case processing for up to 30 days to allow the parties additional time to pursue discovery. IAF, Tab 7 at 1.

On January 17, 2012, the appellant filed a motion to compel discovery. IAF, Tab 8 at 3. The appellant asserted that she had filed her initial discovery request on December 13, 2011, before the administrative judge suspended case processing, and indicated in correspondence with the agency's representative that she had interpreted the various orders from the administrative judge as requiring her to proceed with discovery without waiting for a jurisdictional determination.

Id. at 3-8. Before the appellant filed her motion to compel discovery, the agency's representative had indicated on January 10, 2012, that the agency would not respond to the appellant's discovery request until the administrative judge issued a new order and ruled on jurisdiction. *Id.* at 5. On January 27, 2012, after case processing had resumed, the agency asserted that the administrative judge should deny the motion to compel as prematurely filed. IAF, Tab 9 at 4-5. On January 31, 2012, the administrative judge denied the motion to compel, finding that it was premature because the agency had until February 6, 2012, to file a jurisdictional response and the administrative judge had not yet determined if jurisdiction existed over the appeal. *Id.*, Tab 11 at 2. The administrative judge found no basis to allow the parties to engage in discovery before her jurisdictional ruling. *Id.*

The administrative judge then issued a February 7, 2012 initial decision, based on the written record because she found no genuine dispute of material fact. IAF, Tab 12 at 1-2. In the initial decision, she held for the first time that the Board has jurisdiction over the appeal and at the same time denied the appellant's request for corrective action because, among other things, the agency used the direct hiring authority to fill the positions under vacancy announcement HHS-CM-2011-0009. *Id.* at 2-3, 6-7.

Because the administrative judge found that the appellant established Board jurisdiction under VEOA, and because the administrative judge declined to hold a hearing as she indicated she would in her acknowledgment order, she was responsible for advising the parties that there would be no hearing, for setting a date on which the record would close, and for affording the parties an opportunity to make submissions regarding the merits of the appeal before the date the record would close. *See Jarrard v. Department of Justice*, [113 M.S.P.R. 502](#), ¶ 11 (2010). The administrative judge did not do so in this case, and it was therefore not clear to the parties that they would have no further opportunity to develop the record on the merits. *See id.* The administrative judge's failure to notify the

parties of when the record would close was especially problematic in light of the appellant's assertion that there were discovery matters still outstanding. *See id.* This procedural error prejudiced the appellant's substantive rights because there remains the factual issue of whether the agency filled all of the applicable vacancies using its direct hiring authority, and the appellant would have had an opportunity to resubmit her motion to compel discovery.

Therefore, we remand this appeal for further adjudication consistent with *Jarrard*, [113 M.S.P.R. 502](#). The administrative judge shall provide the appellant with an opportunity to complete discovery and to develop her argument that the agency did not fill all of the positions under vacancy announcement HHS-CM-2011-0009 using its direct hiring authority.³ If the parties' submissions show that there is a genuine issue of material fact regarding the appellant's entitlement to relief under VEOA, the administrative judge shall hold a hearing on the appeal as requested by the appellant. *See id.*, ¶ 16.

³ Because we are remanding this case for further adjudication, we find it unnecessary to address whether the administrative judge abused her discretion in denying the appellant's motion to compel discovery.

ORDER

For the reasons discussed above, we REMAND this case to the regional office for further adjudication in accordance with this Remand Order.⁴

FOR THE BOARD:

William D. Spencer
Clerk of the Board

Washington, D.C.

⁴ The administrative judge may incorporate her previous findings concerning vacancy announcement HHS-CM-2011-0017 into her new initial decision.