

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

JAMES PAUL CORRIGAN,
Appellant,

DOCKET NUMBER
DC-1221-12-0348-W-1

v.

DEPARTMENT OF DEFENSE,
Agency.

DATE: February 8, 2013

THIS ORDER IS NONPRECEDENTIAL¹

James Paul Corrigan, APO, APO/FPO Europe, pro se.

Maxwell G. Selz, APO, APO/FPO Europe, 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 dismissed the appellant's individual right of action (IRA) appeal for lack of jurisdiction. Generally, we grant petitions such as this one only when: the initial decision

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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, affirm the initial decision in part and vacate it in part, and REMAND the case to the regional office for further adjudication in accordance with this Order.³

DISCUSSION OF ARGUMENTS ON REVIEW

The appellant claims on petition for review that the administrative judge applied the wrong standard of proof. Petition for Review (PFR) File, Tab 1 at 4-5. To establish the Board's jurisdiction over an IRA appeal, the appellant must show that he has exhausted his administrative remedies before the Office of Special Counsel (OSC) and make nonfrivolous allegations that: (1) He engaged in whistleblowing activity by making a protected disclosure, and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action. *Yunus v. Department of Veterans Affairs*, [242 F.3d 1367](#), 1371 (Fed. Cir. 2001). To prove his claim on the merits, however, an appellant

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.

³ The agency has not challenged the administrative judge's findings that the appellant exhausted his remedy before OSC and nonfrivolously alleged that he made a protected disclosure. We find no basis to disturb these findings and affirm the initial decision with regard to them.

must establish by preponderant evidence that he engaged in whistleblowing activity by making a protected disclosure, and that such whistleblowing activity was a contributing factor in the personnel action; if so, the Board must order corrective action unless the agency establishes by clear and convincing evidence that it would have taken the same personnel action in the absence of the disclosure. *Fisher v. Environmental Protection Agency*, [108 M.S.P.R. 296](#), ¶ 15 (2008).

The administrative judge set out these two standards clearly in her order on jurisdiction. Initial Appeal File (IAF), Tab 5 at 2-4, 4-5. Moreover, in the initial decision, she repeated the proper standard for proving the Board's jurisdiction over an IRA appeal, explaining that a nonfrivolous allegation is an allegation of fact that, if proven, could establish that the appellant made a whistleblowing disclosure, and that such an allegation supported by affidavits or other evidence confers jurisdiction. ID at 5. With regard to the appellant's claim regarding his decertification, the administrative judge found that it was not a covered personnel action because the appellant failed to nonfrivolously allege that it caused, or was a factor in, any nonselection. *Id.* at 6. Contrary to the appellant's claim, she did not find that he failed to establish that his decertification in fact caused any nonselection. Similarly, with regard to the appellant's claim that the District superintendent falsely alleged that he was in violation of his leave without pay (LWOP) status and should be terminated, the administrative judge did not find that the appellant failed to prove his claim. Rather, she found that, since the evidence he submitted in support of his claim showed only that the superintendent inquired about the appellant's LWOP status, IAF, Tab 9 at 65, he failed to nonfrivolously allege that the superintendent took or failed to take or threatened to take a covered personnel action against him. ID at 7. We therefore find no support for the appellant's claim that the administrative judge applied the wrong standard of proof.

The appellant also argues on review that the administrative judge abused her discretion by issuing the initial decision before he could pursue discovery that would have assisted him in making a nonfrivolous allegation of Board jurisdiction. PFR File, Tab 1 at 4. We agree.

The appellant timely sought discovery in accordance with the administrative judge's Acknowledgment Order. IAF, Tabs 2, 8 at 10-11. In part, the appellant's discovery request sought information regarding the agency's September 2011 filling of a vacant social studies teacher position, *id.*, Tab 8 at 10, a position he alleges was filled during the time he was improperly decertified. The agency requested an expedited decision on jurisdiction, claiming that it would save the parties time and resources and avoid potential disputes. *Id.*, Tab 13. When the agency advised the appellant that it would not respond to his discovery request until the administrative judge ruled on jurisdiction, the appellant filed a motion to compel. *Id.*, Tab 15. The following day, without having ruled on the agency's request, or the appellant's motion, the administrative judge issued the initial decision finding, as noted, that the appellant's certification status is not a covered personnel action because he failed to nonfrivolously allege that the decertification caused, or was even a factor in, any nonselection. ID at 6.

The appellant alleges that he would have been able to establish the Board's jurisdiction if the agency had provided him the materials he requested. An administrative judge has wide discretion over matters pertaining to discovery, and the Board will not reverse his rulings on discovery matters absent an abuse of discretion. [5 C.F.R. § 1201.41\(b\)\(4\)](#); *Parker v. Department of Housing & Urban Development*, [106 M.S.P.R. 329](#), ¶ 9 (2007). An appellant may request discovery of relevant materials to assist him in meeting his burden of establishing the Board's jurisdiction. *Id.* As noted, some of the information the appellant sought could be relevant in determining whether he nonfrivolously alleged that his disclosure was a contributing factor in the agency's decision to fail to take a

personnel action against him, specifically, failing to consider him for a position for which he was qualified. [5 C.F.R. § 1201.71](#); *Ormond v. Department of Justice*, [118 M.S.P.R. 337](#), ¶ 13 (2012) (failure to appoint is a personnel action). Thus, on remand, the administrative judge should rule on the appellant's motion to compel, allowing discovery that could lead to relevant evidence regarding the Board's jurisdiction over this IRA appeal. Thereafter she shall make a new finding as to whether the appellant nonfrivolously alleged that his disclosure was a contributing factor in the agency's decision to take or not to take a covered personnel action against him.

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:

William D. Spencer
Clerk of the Board

Washington, D.C.