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

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| CURTIS HANS TISBERGER,<br>Appellant, | DOCKET NUMBER<br>CH-0752-11-0086-I-1 |
| v. | |
| UNITED STATES POSTAL SERVICE,<br>Agency. | DATE: November 4, 2011 |

# THIS ORDER IS NONPRECEDENTIAL[1]

Curtis Hans Tisberger, Rockford, Illinois, pro se.

Nathan R. Mellman, Esquire, Chicago, Illinois, for the agency.

**BEFORE**

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, 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. We grant petitions such as this one only when significant new evidence is presented to us

[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

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). For the reasons discussed below, we GRANT the appellant's petition for review, VACATE the initial decision IN PART, and REMAND the case to the regional office for further adjudication in accordance with this Order.

Remand is necessary for adjudication of this removal appeal on the merits.

The Board has determined that it lacks jurisdiction over a personnel action taken pursuant to a Last Chance Agreement (LCA) in which an appellant waives his right to appeal to the Board. *See, e.g.*, *Smith v. Department of the Interior*, 113 M.S.P.R. 592, ¶ 6 (2010); *Lizzio v. Department of the Army*, 110 M.S.P.R. 442, ¶ 7 (2009), *aff'd*, 374 F. App'x 973 (Fed. Cir. 2010). The appellant bears the burden of proving that his appeal is within the Board's jurisdiction. *Lizzio*, 110 M.S.P.R. 442, ¶ 7. The LCA at issue in this appeal, however, does not contain an express waiver of Board appeal rights concerning any future action taken because of noncompliance with the LCA. *See* Initial Appeal File (IAF), Tab 8, Subtab 1 at 66-67. Therefore, remand is necessary for adjudication of this removal appeal on the merits.

In this regard, we note that, according to the language of the notice of proposed removal and decision notice, the agency did not simply reinstate a prior removal action that had been held in abeyance; rather, it proposed the appellant's removal based on a new charge of violation of the LCA and afforded him the required due process and statutorily-required procedural protections that are applicable in adverse actions taken under 5 U.S.C. chapter 75. IAF, Tab 8, Subtab 1 at 24-27, 71-73. Accordingly, in order to prevail in this appeal, the agency must prove its charge by preponderant evidence as in any other chapter 75

removal case. IAF, Tab 9, Initial Decision (ID) at 5; *Jackson v. Department of Justice,* 96 M.S.P.R. 498, ¶ 13 (2004).[2]

The administrative judge correctly determined that the appellant failed to establish jurisdiction under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) or Veterans Employment Opportunities Act of 1998 (VEOA).

The appellant appeared to claim veterans' preference and completed the VEOA section of his appeal form. IAF, Tab 1 at 4-8. VEOA provides redress for preference eligible individuals whose rights have been violated under any statute or regulation relating to veterans' preference. 5 U.S.C. § 3330a(a)(1)(A). If an appellant raises a VEOA claim, he must receive adequate notice regarding his rights and burdens under VEOA before the Board can dismiss the appeal for lack of jurisdiction. *Nahoney v. U.S. Postal Service,* 112 M.S.P.R. 93, ¶¶ 17-18 (2009); *Easter v. Department of the Army,* 99 M.S.P.R. 288, ¶ 6 (2005). Here, the administrative judge provided the appellant with such notice and ordered the appellant to make nonfrivolous allegations establishing jurisdiction over his claim, IAF, Tab 3, but the appellant did not respond to it. In the initial decision, the administrative judge therefore found that the appellant failed to make nonfrivolous allegations that would establish jurisdiction over his VEOA claim. ID at 9. We agree.

The veterans' preference rules appear only to apply to hiring and retention during a reduction in force, and there are no allegations of such circumstance here. *See* 5 U.S.C. §§ 3308-3320, 3501-3504; *Livingston v. Office of Personnel Management,* 105 M.S.P.R. 314, ¶ 15, *review dismissed,* 226 F. App'x 1001 (Fed. Cir. 2007). The appellant has asserted that he is a preference eligible who has

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[2] In light of this finding, we need not address the appellant's apparent argument that the LCA as a whole is unenforceable or invalid. *Jackson,* 96 M.S.P.R. 498, ¶ 13 n.*.

completed several years of current continuous service and has Board appeal rights. IAF, Tab 1 at 1, 5. Beyond that, however, the appellant has not asserted a nonfrivolous allegation that his status as a preference eligible, under these facts, gives rise to a violation of a statute or regulation relating to veterans' preference. *See, e.g.*, *Mojarro v. U.S. Postal Service*, 113 M.S.P.R. 335, ¶¶ 2-4 (2010) (preference eligible Postal Service employee's allegations of a constructive suspension did not support a VEOA claim).

Further, as the administrative judge recognized, in making these allegations, the appellant may have been attempting to raise a USERRA discrimination claim based on his status as a veteran, rather than a VEOA claim. ID at 7-8. If an appellant either explicitly or implicitly alleges USERRA as an affirmative defense, the administrative judge must inform him of his burden of proof and of his burden of going forward with the evidence, as well as of the type of evidence necessary to prove the defense. *Morgan v. U.S. Postal Service*, 82 M.S.P.R. 1, ¶ 11 (1999), *aff'd*, 250 F.3d 754 (Fed. Cir. 2000) (Table), *overruled on other grounds*, *Fox v. U.S. Postal Service*, 88 M.S.P.R. 381 (2001). Here, the administrative judge also provided the appellant with notice informing the appellant of his burdens and elements of proof under USERRA, IAF, Tab 5, but, as with the jurisdictional order on VEOA, the appellant did not respond to it. In the initial decision, the administrative judge found that the appellant failed to make nonfrivolous allegations that would establish jurisdiction over his USERRA claim. ID at 8. In light of the appellant's failure to respond to the administrative judge's jurisdictional order, we agree. Because the administrative judge first apprised the appellant of the jurisdictional elements of a USERRA claim, it was also proper to dismiss that claim for lack of jurisdiction.

**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.