

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

**2009 MSPB 88**

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Docket No. SF-4324-09-0109-I-1

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**Nikola Bilandzich,  
Appellant,**

**v.**

**Department of the Army,  
Agency.**

May 27, 2009

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Julia D. Greble, Esquire, Albany, New York, for the appellant.

Violet Kristoff, Esquire, Herlong, California, for the agency.

**BEFORE**

Neil A. G. McPhie, Chairman  
Mary M. Rose, Vice Chairman

**OPINION AND ORDER**

¶1 The appellant has filed a petition for review (PFR) of the initial decision (ID) that dismissed his appeal under the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at [38 U.S.C. §§ 4301-4333](#)) (USERRA) “for lack of Board jurisdiction.” ID at 2. For the reasons discussed below, we GRANT the PFR under [5 C.F.R. § 1201.115](#), VACATE the ID, FIND jurisdiction, and REMAND the case for further adjudication consistent with this Opinion and Order.

## BACKGROUND

¶2 The appellant filed a USERRA appeal in which he alleged that he had served in the uniformed service of the United States from at least 1980 to 1997, and that the agency violated *Butterbaugh v. Department of Justice*, [336 F.3d 1332](#) (Fed. Cir. 2003), by improperly charging him military leave on non-work days, which caused him to use annual leave, sick leave, or leave without pay to perform military duty. He requested a hearing. Initial Appeal File (IAF), Tab 1.

¶3 On November 20, 2008, the administrative judge (AJ) issued an Acknowledgment Order concerning the appeal. He stated that a person's entitlement to USERRA benefits by reason of prior military service "terminates upon the occurrence of any of the following events" set forth in [38 U.S.C. § 4304](#) and ordered the appellant to file a statement within 10 days addressing whether those events applied to his service. IAF, Tab 2 at 2-3. The agency subsequently filed a motion to dismiss the appeal in which it noted that it had not received any response from the appellant to the Acknowledgment Order. *Id.*, Tab 5, subtab 1 at 1. On December 24, 2008, the appellant submitted a response opposing the agency's motion to dismiss, but did not address the matter raised by the Acknowledgment Order. *Id.*, Tab 6.

¶4 Without issuing any additional orders, the AJ dismissed the appeal. He stated that, "[t]o date, the appellant has not responded to that [Acknowledgment] Order, or otherwise provided such required information. Accordingly, the appeal is dismissed for lack of Board jurisdiction." ID at 2.

¶5 The appellant has filed a PFR. PFR File, Tab 1. The agency has not responded to the PFR.

## ANALYSIS

¶6 The appellant contends that he was denied the opportunity to have a status conference and hearing, to submit evidence, to call witnesses, and to adjudicate his claim. He asserts that he is entitled to a hearing under *Kirkendall v.*

*Department of the Army*, [479 F.3d 830](#) (Fed. Cir.) (en banc), *cert. denied*, 128 S. Ct. 375 (2007). PFR at 3. He has attached a response to the Acknowledgment Order, which he states he failed to file within 10 days of the order “[a]s the result of an inadvertent clerical error.” *Id.* at 4, 7-9. He argues that the AJ should not have dismissed the appeal because he did not exhibit bad faith, USERRA cases do not have a statute of limitations, and any harm to the agency caused by the delay was de minimis. *Id.* at 5. He contends that the response, which states that he was not separated from the military under any of the circumstances identified in the Acknowledgment Order, shows that he is entitled to the benefits of USERRA, and, thus, that the AJ erred in dismissing his appeal for lack of jurisdiction. *Id.* at 4-5, 7. In that regard, he argues that the AJ should not have dismissed his appeal for failure to respond to a single order. *Id.* at 5. He asks that the case be remanded to the AJ for adjudication on the merits. *Id.* at 6.

¶7 We find that the AJ erred in dismissing the appellant’s USERRA appeal. Although the ID stated that the appeal was dismissed for lack of jurisdiction, in essence, the AJ dismissed the appeal for failure to prosecute because the appellant did not respond to the Acknowledgment Order. Absent bad faith or evidence that the appellant intends to abandon his appeal, a timely-filed appeal should not be dismissed for failure to prosecute. *Johnson v. Department of the Treasury*, [108 M.S.P.R. 592](#), ¶ 16 (2008). Here, the appellant clearly did not intend to abandon his appeal because he responded to the agency’s submission. IAF, Tab 6. The Board has specifically stated that it is inappropriate to dismiss an appeal for failure to respond to a single order. *See, e.g., Lubert v. U.S. Postal Service*, [110 M.S.P.R. 430](#), ¶ 14 (2009); *Roy v. Department of the Treasury*, [103 M.S.P.R. 638](#), ¶ 8 (2006), *review dismissed*, 262 F. App’x 261 (Fed. Cir. 2007).

¶8 We further find that the appellant has established jurisdiction over his USERRA appeal. To establish Board jurisdiction over a USERRA discrimination appeal arising under [38 U.S.C. § 4311\(a\)](#), the appellant must allege the following: (1) He performed duty or has an obligation to perform duty in a uniformed

service of the United States; (2) the agency denied him initial employment, reemployment, retention, promotion, or any benefit of employment; and (3) the denial was due to the performance of duty or obligation to perform duty in the uniformed service. A claim under USERRA should be broadly and liberally construed in determining whether it is non-frivolous. *Lubert*, [110 M.S.P.R. 430](#), ¶ 11; *Downs v. Department of Veterans Affairs*, [110 M.S.P.R. 139](#), ¶ 15 (2008). The appellant has made such allegations. IAF, Tab 1; PFR at 8-9.

¶9 An appellant has an unconditional right to a Board hearing once he has established jurisdiction over his USERRA appeal. *Kirkendall*, 479 F.3d at 844-46; *Downs*, [110 M.S.P.R. 139](#), ¶¶ 17-18. We note, however, that appellants are expected to comply with all orders issued by the Board's AJs. On remand, the appellant must be more diligent in complying with the AJ's orders and in pursuing his appeal to avoid the imposition of sanctions as necessary to serve the ends of justice. *E.g.*, *Lubert*, [110 M.S.P.R. 430](#), ¶ 15; *Holland v. Department of Labor*, [108 M.S.P.R. 599](#), ¶ 13 (2008).

#### ORDER

¶10 Accordingly, we remand this case to the regional office for adjudication on the merits, including the appellant's requested hearing.

FOR THE BOARD:

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William D. Spencer  
Clerk of the Board  
Washington, D.C.