UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

MARTIN AKERMAN,
Appellant,

v.

DEPARTMENT OF THE ARMY,
Agency.

DOCKET NUMBER
DC-0752-23-0457-I-1

DATE: May 4, 2023

ORDER DENYING INTERIM RELIEF, NOTICE TO THE APPELLANT AND THE AGENCY, AND CLOSE OF RECORD ORDER

On May 4, 2023, the appellant requested interim relief until "resolution of all controversies."[1] Appeal File (AF), Tab 13. Under 5 U.S.C. § 7701(b)(2)(A), an appellant may be provided interim relief if he is the prevailing party. To establish he was a prevailing party, the appellant must show the Board issued a decision in his favor. *See Kwartler v. Department of Veterans Affairs*, 108 M.S.P.R. 330, ¶ 13 (2008). Here, the appellant is not a prevailing party as he just initiated this appeal on May 3, 2023, and I have not issued an initial decision in his favor. Accordingly, the appellant's request for interim relief is **DENIED**.

[1] The appellant also stated, "The Pro Se Petitioner expects a status conference and discovery in order to uncover the truth behind their false arrest and imprisonment and to establish liability for the harm they have suffered." AF, Tab 13 at 3. However, I will only schedule a status conference and authorize discovery if I determine the appellant has made a nonfrivolous allegation of Board jurisdiction. To the extent the appellant's statement can be interpreted as request for a status conference and to initiate discovery, his requests are **DENIED**.

Notice to the Appellant

Constructive Discharge Claim

The appellant has clarified that he is not pursuing an involuntary retirement/constructive discharge claim in this appeal because he elected to pursue this claim in another forum. AF, Tab 13 at 3. To the extent that it can be interpreted that the appellant raised an involuntary retirement/constructive discharge claim, I find the appellant has withdrawn it. *See id.* **As such, I will not consider or adjudicate a claim of an involuntary retirement/constructive discharge, including whether the appellant has established Board jurisdiction for that claim. Moreover, he will be unable to present or raise (i.e., file a new appeal or to reinstate the claim in this appeal) such a claim to the Board in the future because his decision is an act of finality.**

Board Jurisdiction

The appellant has the burden of establishing the Board's jurisdiction by a preponderance of the evidence. 5 C.F.R. § 1201.56(b)(2)(i). An appellant is entitled to a jurisdictional hearing only where he makes a nonfrivolous allegation the Board has jurisdiction over his appeal. *See Yusuf v. U.S. Postal Service*, 112 M.S.P.R. 465, ¶ 15 (2009); *Liu v. Department of Agriculture*, 106 M.S.P.R. 178, ¶ 8 (2007). Nonfrivolous allegations of Board jurisdiction are allegations of fact that, if proven, could establish the Board has jurisdiction over the appeal; mere *pro forma* allegations are insufficient to satisfy this nonfrivolous standard. *See Lara v. Department of Homeland Security*, 101 M.S.P.R. 190, ¶ 7 (2006); *Ferdon v. U.S. Postal Service*, 60 M.S.P.R. 325, 329 (1994). If the appellant meets his initial burden to make a nonfrivolous allegation of Board jurisdiction, he will then have the additional burden of proving, by a preponderance of the evidence, the merits of his appeal.

The Board's jurisdiction is limited to those matters over which it has been given jurisdiction by law, rule or regulation. *Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985). Thus, it follows that the Board does not

have jurisdiction over all matters alleged to be unfair or incorrect. *Roberts v. Department of the Army*, 168 F.3d 22, 24 (Fed. Cir. 1999). Appealable adverse actions within the Board's jurisdiction include: a removal; a suspension for more than 14 days; a reduction in grade; a reduction in pay; and a furlough of 30 days or less. *See* 5 U.S.C. § 7512(1)-(5). The Board also has jurisdiction over matters as set forth in 5 C.F.R. § 1201.3. It is well settled that in the absence of an otherwise appealable action, the Board has no jurisdiction to consider an appellant's claim that an agency committed a harmful procedural error or some other type of prohibited personnel practice. *See Penna v. U.S. Postal Service*, 118 M.S.P.R. 355, ¶ 13 (2012) (absent an otherwise appealable action, the Board has no jurisdiction to consider claims of discrimination, retaliation, harmful error, prohibited personnel practices, or an agency's failure to comply with regulations or Executive Orders).

As is relevant here, there is no law, rule, or regulation that provides an individual with a right to appeal a claim of a false arrest or imprisonment or the appellant's broad claim that "The Agency's repeated shifting of blame for the false arrest and imprisonment interfered with the Pro Se Petitioner's property interest in their position, their entitlement to disability retirement, by denying them a fair and impartial hearing that could have established liability for the harm they suffered." AF, Tab 13 at 3. Thus, it appears the Board lacks jurisdiction over the appellant's claims. *Meeker v. Merit Systems Protection Board*, 319 F.3d 1368 (Fed. Cir. 2003) (The Board does not have general jurisdiction to entertain any statutory challenge and that its jurisdiction is "strictly confined to those matters over which it has been given jurisdiction by statue, rule, or regulation").

Disability Retirement

To raise a disability retirement claim, it is a threshold issue that the Office of Personnel Management (OPM) must have issued the appellant a final reconsideration decision letter. *See DeGrant v. Office of Personnel Management*, 107 M.S.P.R. 414 (2007) (the Board generally lacks jurisdiction to hear an appeal

of a retirement matter when OPM has not issued a reconsideration decision on the matter). Because the appellant did not nonfrivolous allege in his response to the Order to Clarify Claim that OPM issued such a decision, nor did he attach the letter to his response as directed, it appears that to the extent that the appellant raised a disability retirement claim, the Board lacks jurisdiction.[2]

Nevertheless, in an appeal from OPM's denial of a disability retirement application, an appellant must prove by preponderant evidence that he is entitled to disability retirement benefits. 5 C.F.R. § 1201.56(b)(2)(ii). Preponderant evidence is the degree of relevant evidence that a reasonable person, considering the record as a whole, would need to find that a disputed fact is more likely true than untrue. 5 C.F.R. § 1201.4(q). In other words, an appellant must show that it is more likely than not that he was disabled, as the retirement law uses that term.

To qualify for disability retirement benefits under the Federal Employees Retirement System (FERS), an appellant must meet the following requirements: (1) completed 18 months of civilian service creditable under FERS; (2) while employed in a position subject to FERS, the appellant became disabled because of a medical condition, resulting in a deficiency in performance, conduct, or attendance, or if there is no such deficiency, the disabling medical condition is incompatible with either useful and efficient service or remaining in the position; (3) the disabling medical condition is expected to continue for at least one year from the date the appellant filed his application for disability retirement; (4) it would be unreasonable for the agency to accommodate the appellant's disabling

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[2] In a prior order, I ordered the appellant to clarify his claims, but he failed to clearly articulate whether he was challenging OPM's denial of his request for a disability retirement annuity. *See* AF, Tab 12. The order required the appellant to briefly clarify his claim – in two to three sentences – and provided him with examples of how he could clearly convey to me whether he was pursuing a disability retirement claim in this appeal. *Id*. Instead, his verbose response failed to clearly convey whether he was pursuing such a claim (i.e., he is protecting his property interest in his entitlement to disability retirement). *See* AF, Tab 13.

medical condition in his current position; and (5) he has not declined a reasonable offer of reassignment to a vacant, funded position at his same grade or pay level.

"Accommodation" means an adjustment made to an appellant's job or work environment that enables him to perform the duties of his position. Reasonable accommodation may include modifying the worksite; adjusting the work schedule; restructuring the job; obtaining or modifying equipment or devices; providing interpreters, readers, or personal assistants; and retraining the appellant. Thus, while his reassignment to a vacant, funded position may constitute an accommodation that precludes disability retirement, his ability to perform a set of ungraded, unclassified duties, which do not amount to an official position, does not disqualify the appellant from receiving disability retirement. In addition, except in cases involving mental incompetence, his application must have been filed while the appellant was still employed or within one year of his separation. The laws and regulations where these criteria are set forth are found at 5 U.S.C. § 8451 and 5 C.F.R. §§ 844.102, 844.103(a), and 844.201. The appellant should read these laws and regulations.

Order to the Appellant

The appellant has the burden of proving that this appeal is within the Board's jurisdiction. Therefore, I **ORDER** him to file **no later than June 8, 2023**, evidence and/or argument to establish Board jurisdiction. Only if he does so, will he be given the opportunity to prove by preponderant evidence that the Board has jurisdiction over this appeal. Absent good cause, **the appellant is advised that if he submits a filing in regard to his allegations or Board jurisdiction before June 8, 2023, I will consider it his response to this Notice – and he will not be provided further opportunity to respond to this Notice or to raise a nonfrivolous allegation of Board jurisdiction.**

Notice to the Agency

The agency may file a response to the appellant's submission **within 10 days of his submission or no later than June 20, 2023, whichever is earlier.**

Because OPM is the proper party in a denial of disability retirement claim, the agency is not required to respond to any allegation related to the a purported denial of disability retirement.[3]

Close of Record

Unless I notify the parties to the contrary, **the record on jurisdiction and timeliness will close on June 20, 2023, or when the agency files its response – whichever is earlier. If, however, the appellant fails to timely respond to this Notice and the above Order to the Appellant, the record will close on these issues on June 8, 2023.** I will not accept evidence or argument on this issue filed after the close of record unless a party shows it is new and material evidence that was unavailable before the record closed. Any rebuttal under this rule must be received within **5 days** of the other party's filing.

FOR THE BOARD: /S/
Joshua Henline
Administrative Judge

[3] If I determine during case processing that the appellant actually raised a disability retirement claim in this appeal, I will docket a separate retirement appeal with OPM as the responding agency.

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent as indicated this day to each of the following:

Appellant

Electronic Mail — Martin Akerman
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Electronic Mail — Eugene R. Ingrao, Sr.
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May 4, 2023
(Date)

/s/
Joshua Henline
Administrative Judge