

MARTIN AKERMAN v. DEPARTMENT OF THE ARMY

Docket # DC-0752-23-0457-I-1

Final Jurisdictional Response

Summary Page

Case Title : MARTIN AKERMAN v. DEPARTMENT OF THE ARMY

Docket Number : DC-0752-23-0457-I-1

Pleading Title : Final Jurisdictional Response

Filer's Name : Martin Akerman

Filer's Pleading Role : Appellant

Details about the supporting documentation

#	Title/ Description	Mode of Delivery
1	Supporting Documentation	Uploaded

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MARTIN AKERMAN v. DEPARTMENT OF THE ARMY

Docket # DC-0752-23-0457-I-1

Final Jurisdictional Response

Online Interview

1. Would you like to enter the text online or upload a file containing the pleading?

See attached pleading text document

2. Does your pleading assert facts that you know from your personal knowledge?

Yes

3. Do you declare, under penalty of perjury, that the facts stated in this pleading are true and correct?

Yes

Merit Systems Protection Board
1615 M St. NW
Washington, DC 20419

Subject: Appeal and Assertion of Involuntary Retirement and USERRA Violations

Dear Members of the Merit Systems Protection Board,

I trust this correspondence finds you well. I write to appeal my involuntary retirement and assert the Board's jurisdiction to hear my appeal. I propose three grounds for this jurisdiction:

1. The Board has jurisdiction to hear appeals from employees who can demonstrate, by a preponderance of the evidence, that their resignation or retirement was involuntary and tantamount to a forced removal (*Shoaf v. Dep't of Agric.*, 260 F.3d 1336, 1341 (Fed. Cir. 2001)). On December 13, 2022, I applied for disability retirement under the Federal Employees Retirement System (FERS). Despite multiple follow-ups, my agency failed to respond to this application. On May 24, 2023, this lack of response was confirmed during my conversation with the Office of Personnel Management (OPM) case manager, Kristen B.
2. I contend that I was coerced into retirement due to unlawful actions by my agency, satisfying the *Twiqbal* standard for plausibility (*Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Specifically, on February 14, 2022, I was falsely arrested due to actions orchestrated by Bill Popplar. Following this event, I was unjustifiably denied sick leave, subsequently my request for Family and Medical Leave Act (FMLA) was also denied, and I was subjected to a suspension on April 24, 2022, under the Douglas Factors signed by General Garduno. These adverse actions culminated in my constructive discharge on June 18, 2022, which is currently under appeal before the Fourth Circuit.
3. I reported violations of the Uniformed Services Employment and Reemployment Rights Act (USERRA) to the Office of Special Counsel (OSC), MSPB, Eastern District of Virginia (EDVA), and the Fourth Circuit Court of Appeals (4USCA). In these reports, I detailed how the Department of the Air Force and the National Guard Bureau have manipulated the loyalty of military personnel and placed them in a position to violate federal employment laws against domestic civil servants. This has impeded my receipt of workers' compensation and disability retirement benefits. I assert that these actions are retaliatory, representing an adverse employment action in response to my USERRA complaints, violating 38 U.S.C. § 4311(b). Furthermore, I contend that this confinement by the agency can be reviewed under the rules of Habeas Corpus, as established in *Bush v. Lucas*, 462 U.S. 367 (1983).

In conclusion, given these factual allegations, I contend that the Board has jurisdiction to hear my appeal under the grounds of involuntary retirement due to violations of FERS and USERRA, and that my complaint conforms to the *Twiqbal* standard. Therefore, I respectfully request the Board to schedule a hearing to further examine these matters.

As a Pro Se Appellant, I moved to certify your order, which denied the motion to appoint a special panel, for an interlocutory appeal to the Merit Systems Protection Board (MSPB). Concurrently, I have rebutted allegations of frivolous and meritless filings in relation to a Petition for Writ of Habeas Corpus.

In accordance with 5 C.F.R. § 1201.91, this interlocutory appeal is justified where the ruling involves an important question of law or policy, and an immediate ruling will materially advance the completion of the proceeding or prevent undue harm. As of May 22, 2023, the interlocutory appeal has been dispatched to the following parties:

The Clerk's Office of the Supreme Court of Nevada
Mr. Dennis Barghaan, Representative Attorney for the Defendants
The Office of the Nevada Attorney General
The Office of the Adjutant General, State of Nevada Office of the Military
The General Counsel of the U.S. Merit Systems Protection Board
The Clerk of the United States Court of Appeals, 4th Circuit

Through these actions, I aim to exhaust all available remedies within the administrative jurisdiction, a step necessary before seeking further recourse. I believe that an interlocutory appeal can help bring to light the intricacies of the case and ensure a fair and just resolution.

I wish to reassure you that these steps do not detract from my respect for the court's authority or my intention to comply with all relevant legal procedures. Rather, they reflect my commitment to pursuing the necessary channels to address the issues at hand.

I will keep you updated on the progress of the interlocutory appeal. Your understanding and patience in this matter are greatly appreciated.

Sincerely,

[Your Name]

**U.S. OFFICE OF SPECIAL COUNSEL**

1730 M Street, N.W., Suite 218

Washington, D.C. 20036-4505

202-804-7000

May 3, 2023

Sent via electronic mail

Martin Akerman

2001 North Adams Street

#440

Arlington VA 22201

Makerman.dod@gmail.com

Re: OSC File No. MA-22-000917

Dear Mr. Akerman:

This letter is to inform you that an error was made in the OSC file number included in the Closure and IRA letters that your received on May 20, 2022. Please take note that the accurate number for you file is MA-22-000917.

Sincerely,

A handwritten signature in blue ink that reads "Maureen Taylor".

Maureen Taylor

Attorney

Investigation and Prosecution Division

FILED**IN THE SUPREME COURT OF THE STATE OF NEVADA MAY 05 2023**ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *Elizabeth Brown*
DEPUTY CLERKMartin Akerman, Pro Se,
Petitioner, Pro PerCase No. 86458
86458

v.

Gen. Ondra L. Berry,
Adjutant General of the Nevada National Guard,
et. al.,
Respondents.Video Participation
Requested**MOTION FOR AN EMERGENCY WRIT OF REPLEVIN**

1. The Petitioner respectfully requests that the court grant declaratory relief in the form of a judgment declaring that his personal property was wrongfully subject to civil forfeiture without due process, in violation of his Eighth Amendment rights. Additionally, the Petitioner requests a judgment declaring that his detention and imprisonment were unlawful on the grounds of false arrest, false imprisonment, and procedural and constitutional rights violations. Furthermore, the Petitioner's property rights to his tenured position included procedural safeguards, which were allegedly violated in order to justify the civil forfeiture. New evidence has emerged suggesting that the Nevada Air National Guard Officer may have been framed for the illegal treatment of the Petitioner, casting doubt on the legitimacy of both the civil forfeiture and the detention. The court must consider both the motion for the emergency writ of replevin and the habeas corpus petition in tandem to determine the appropriate relief for the Petitioner.

2. Issue: Whether the writ of replevin and the petition for writ of habeas corpus are inextricably intertwined in the context of the Petitioner's case and whether the civil forfeiture associated with the writ of replevin constitutes an Eighth Amendment violation.

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5 Total Pages

23-14295

3. Rule: A writ of replevin is a legal remedy to recover personal property that has been wrongfully taken or withheld, whereas a writ of habeas corpus is a legal remedy to challenge the legality of one's detention or imprisonment. The two remedies, while distinct, can become intertwined when the subject matter of the replevin claim is directly related to the grounds of the habeas corpus petition. Additionally, civil forfeiture can violate the Eighth Amendment's prohibition against excessive fines if the forfeiture is grossly disproportional to the gravity of the offense (*Austin v. United States*, 509 U.S. 602, 622 (1993)).

4. Application: In the present case, the Petitioner seeks a writ of replevin to recover his property, which was allegedly subject to civil forfeiture without due process, under 5 U.S.C. 7513. Simultaneously, the Petitioner has filed a petition for writ of habeas corpus, challenging the legality of his detention and imprisonment based on false arrest, false imprisonment, and violation of his procedural and constitutional rights.

5. In this context, the writ of replevin and the petition for writ of habeas corpus are inextricably intertwined because the Petitioner's claims of due process violations in both remedies stem from the same set of circumstances. The wrongful seizure of his property and his unlawful detention are both alleged to have resulted from the same actions taken by the Respondents. Therefore, the success of the Petitioner's writ of replevin may depend on the outcome of his habeas corpus petition, as a finding that his detention was unlawful could impact the validity of the associated civil forfeiture.

6. Furthermore, the Petitioner contends that the civil forfeiture of his property constitutes an Eighth Amendment violation, as the forfeiture is grossly disproportional to the gravity of the [undisclosed and untried] offense. Citing *Austin v. United States*, the Petitioner asserts that the excessive fines clause applies to the civil forfeiture in his case (509 U.S. at 622).

7. Conclusion: The Petitioner's motion for an emergency writ of replevin and his petition for writ of habeas corpus are inextricably intertwined because they both involve claims of due process violations arising from the same set of circumstances. The success of one remedy may have a direct impact on the other, making it essential for the court to consider both claims in tandem when determining the appropriate relief for the Petitioner. Additionally, the civil forfeiture in question may violate the Eighth Amendment's prohibition against excessive fines, further supporting the need for judicial review.

8. Remedy: If the court finds that the Petitioner's rights were violated, the appropriate declaratory relief would include the following:

- a. A declaration that the civil forfeiture of the Petitioner's personal property was unlawful and in violation of his Eighth Amendment rights, as well as any applicable statutory or procedural requirements.
- b. A declaration that the Petitioner's detention and imprisonment were unlawful on the grounds of false arrest, false imprisonment, and procedural and constitutional rights violations.

9. This declaratory relief would provide the Petitioner with an official recognition of the violations of his rights and could serve as a basis for further actions to remedy the situation, such as seeking the return of his property or pursuing damages for the violations. By granting declaratory relief, the court would address the inextricable link between the wrongful civil forfeiture and the unlawful detention, ensuring that the Petitioner's constitutional rights are protected.

New Evidence Attached


10. The court may find that General Garduno, the Nevada Air National Guard Officer, was framed for the illegal confinement of the Petitioner, based on new signed testimony received from the Department of the Army. The evidence shows that one William Poppler may have put General Garduno's name in place of his own, to commit these atrocities upon the Plaintiff.

11. If the court finds that the Nevada Air National Guard Officer was indeed framed, and that William Poppler was the true perpetrator of the illegal actions against the Petitioner, this new evidence could have a significant impact on both the declaratory relief sought, and the habeas corpus petition, in Nevada. These additional allegations warrant discovery to establish facts and reduce the daylight between controversies.

CLOSING CERTIFICATION

I certify to the best of my knowledge, information, and belief that this motion: (1) is not being presented for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) is supported by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law; and (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.

Respectfully Submitted,

Signature of Pro Per Petitioner:  ***

Martin Akerman

2001 North Adams Street Unit 440
Arlington, VA 22201
(202) 656-5601

CERTIFICATE OF SERVICE BY MAIL

I, Martin Akerman, hereby certify, pursuant to N.R.C.P. 5(b), that on this 2nd day of the month of May of the year 2023, I mailed a true and correct copy of the foregoing MOTION FOR AN EMERGENCY WRIT OF REPLEVIN addressed to:

Federal Copies:

United States Attorney for the Eastern
District of Virginia
2100 Jamieson Avenue
Alexandria VA 22314


United States Court of Appeals
4th Circuit Clerk
1100 East Main Street, Suite 501
Richmond VA 23219

General Counsel
National Guard Bureau
1636 Defense Pentagon, STE 1E169
Washington DC 20301

Respondent Official:

Gen. Ondra L. Berry
STATE OF NEVADA OFFICE OF THE MILITARY
2460 FAIRVIEW DRIVE
Carson City NV 89701

Nevada Attorney General
Heroes' Memorial Building
Capitol Complex
Carson City, Nevada 89710

Signature of Pro Per Petitioner:  ***
Martin Akerman 2001 North Adams Street Unit 440
Arlington, VA 22201
(202) 656-5601



DEPUTY CHIEF OF STAFF, G1
CIVILIAN HUMAN RESOURCES AGENCY (CHRA)
CONSOLIDATED SERVICES DIVISION
ARMY BENEFITS CENTER - CIVILIAN

FORT RILEY, KS 66442-5004
EMCHW6D5AACSDABC

April 25, 2023

SUBJECT: Agency Challenge Letter

Claim # 550313053
DOI 4/05/2022

Office of Workers' Compensation Programs
PO BOX 8300
London, KY 40742-8300

Dear Claims Examiner,

The Army Benefits Center-Civilian, Injury Compensation Center of Excellence (ABC-C, ICCoE) is responding to claimant challenges for claimant Martian Akerman. This challenge letter is to address the Employing Agency Status being a sub command under Dept. of Army. There have been numerous challenges from the claimant stating that they are not with Dept. of Army but are under Dept. of Defense. When in fact National Guard Bureau Joint Staff is composed of Army & Air National Guard Personal, as well as Navy & Marine Corps Force. To a certain aspect Dept. of Army, Navy, Air Force, Marines are all under Dept. of Defense, however the claimant was apart of a sub command under Dept. of Army while in employed with National Guard Bureau (Title V) under command code 3892. In which the Army Benefits Center - Civilian has benefits guidance for OWCP.

The Position Description that was provided to Dept. of Labor states that the command code for the employing agency is: GB US Army National Guard Bureau (ARGB) this document has also been provided to Dept. of Labor. The position description also listed the supervisor for the claimant as Kenneth McNeil/ Chief Information Director for National Guard Joint Staff - J6, who is also an employee of Dept. of Army.

The Employing Agency has also provided SF-50s which states in Block 14 that the claimant was employed with National Guard Bureau Joint Staff, NGB - J6, C4 Systems & CIO Directorate in Arlington VA as IT Specialist GS 15 Step 10. In which the claimant was Suspended Indefinite with effective date of 4/24/2022. When the claimant resign from their position on 6/6/2022 they were also employed with National Guard Bureau Joint Staff.

Additional documentation has also been provided to Dept. of Labor:

- ❖ National Guard Bureau dated 14 February 2022 the proposed INDEFINITE SUSPENSION MEMO, where it is listed that claimant refused to sign.
- ❖ The Deputy Director of NGB Marin Rudy who signed the CA-2 Form on 01 DEC 2022 is also an employee of Dept. of Army.



DEPUTY CHIEF OF STAFF, G1
CIVILIAN HUMAN RESOURCES AGENCY (CHRA)
CONSOLIDATED SERVICES DIVISION
ARMY BENEFITS CENTER - CIVILIAN

FORT RILEY, KS 66442-5004
EMCHW6D5AACSDABC

- ❖ The claimant has provided MSPB Appeal Form to Dept. of Labor on 05 DEC 2022 in which in Block 5 is listed Dept. of Army Joint Activities. The claimant also listed in the appeal that "Mr. McNeil as their Senior Leader".
 - The claimant also provided email traffic from COL. Basler & William Poppler(Army National Guard Labor -Management/Employee Relations Specialist/LMER) on April 18, 2022 concerning speaking with Human Recourse person & it was told to the claimant from their National Guard Bureau LMER that all of their benefits is conducted by the Army Benefits Center - Civilian.
 - The claimant email address while they were an employee of the Employing Agency was martin.akerman.civ@army.mil.
 - The claimant has provided Dept. of Labor their Time & Attendance Report on 12/06/2022 which has their UIC as W39LAA which is assign to Dept. of Army, Army National Guard.

The claimant received and unfavorable Information for Security Determination under Dept. of Army Form 5248-R on 8 February 2022 & failure to meet condition of employment under AR 600-20, Army Command Policy which was sign by Mr. McNeil & Mr. Poppler on 11 April 2022 placing the claimant in an indefinite suspension without pay or duty status effective 24 April 2022 until the claimant obtain/regain an active Top Secret Clearance or until the Agency is warranted up to & including removal from Federal service, however the claimant resign from their federal position with the Army National Guard Bureau effective June 6, 2022 every document that has been provided from the Employing Agency is all from Dept. of Army, Army National Guard Burea(Title V), Agency Code - 3892 which is all correct information for this claimant.

If you have any questions concerning this request, please contact ABCC at 1-866-792-7620 Option #1.
Monday through Thursday 8:00 am until 4:00 pm CST.
Email: john.a.burgess40.civ@army.mil

Sincerely,

//SIGNED//

John A. Burgess

Injury Compensation Program Admin.

AI 7750153.7.1c

Martin Akerman
Pro Se
2001 North Adams Street, 440
Arlington, VA 22201

USPS CERTIFIED MAIL



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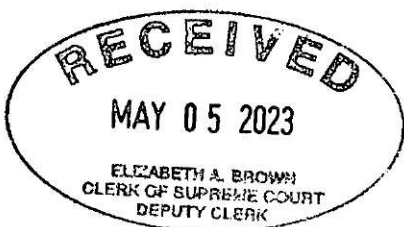
Clerk's Office
Supreme Court of Nevada
201 South Carson Street, Suite 201
Carson City, NV 89701



01080000401801



See Important Information Enclosed



Martin Akerman
2001 North Adams Street, Unit 440
Arlington, VA 22201
makerman.dod@gmail.com
202-656-5601

May 5, 2023

Veterans Employment and Training Service (VETS)
U.S. Department of Labor
200 Constitution Ave NW
Washington, DC 20210

Subject: Request for Assistance in Case Involving Alleged Violations of USERRA Rights of
General Garduno, Nevada Air National Guard

Dear Sir/Madam,

I am writing to request the assistance of the Veterans Employment and Training Service (VETS) in a matter concerning the rights of General Garduno, a General Officer of the Nevada Air National Guard, under the Uniformed Services Employment and Reemployment Rights Act (USERRA). I believe that General Garduno's rights under USERRA have been violated, and that new evidence has emerged which may significantly impact his case.

General Garduno was implicated in actions that resulted in the civil forfeiture of personal property and the detention of a tenured individual. These allegations led to a case against General Garduno before the Supreme Court of Nevada. However, new evidence has come to light suggesting that General Garduno may have been wrongfully accused. This new evidence indicates another individual, William Poppler, as the likely perpetrator of these actions.

The new information casts significant doubt on the legitimacy of the actions attributed to General Garduno. I am attaching the signed testimony from the Department of the Army that contains these new allegations, as well as a copy of the case before the Supreme Court of Nevada.

I am seeking the assistance of VETS to review this new evidence and to advocate on behalf of General Garduno. I am requesting a judgment that declares the actions taken against General Garduno as based on false accusations, thereby violating his rights under USERRA.

I appreciate the important role that VETS plays in protecting the rights of service members and veterans, and I believe that your assistance in this matter will be invaluable in ensuring that General Garduno's rights are upheld. I am ready and willing to provide any further information or documentation that you may require.

Thank you for your time and consideration. I look forward to your response.

Sincerely,

A handwritten signature in black ink, appearing to be 'Martin Akerman', written over the word 'Sincerely,'.

Martin Akerman

Attachments: Department of the Army Testimony, Case before the Supreme Court of Nevada

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE**

MARTIN AKERMAN,
Appellant,

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

v.

DEPARTMENT OF THE ARMY,
Agency.

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 statute, 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 nonfrivolously 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

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
2001 North Adams Street
Unit 440
Arlington, VA 22201

Agency Representative

Electronic Mail Eugene R. Ingrao, Sr.
Department of the Army
Attorney- Advisor
Office of the Chief Counsel, NGB
111 S. George Mason Drive
AHS-2/Room 3TI-308
Arlington, VA 22204

May 4, 2023
(Date)

/s/
Joshua Henline
Administrative Judge

Certificate Of Service

e-Appeal has handled service of the assembled pleading to MSPB and all of the Parties.

Following is the list of the Parties in the case:

Name & Address	Documents	Method of Service
MSPB: Washington Regional Office	Final Jurisdictional Response	e-Appeal / e-Mail
Jenny Lin Naylor Agency Representative	Final Jurisdictional Response	e-Appeal / e-Mail