

**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 17, 2023

**NOTICE AND ORDER TO THE PARTIES AND CORRECTION TO
ORDER TO SHOW CAUSE - TIMELINESS**

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). The issue of Board jurisdiction is always before the Board and may be raised by either party or sua sponte by the Board at any time during a Board proceeding. *Hasanadka v. Office of Personnel Management*, 116 M.S.P.R. 636, ¶ 19 (2011). The existence of Board jurisdiction is a threshold issue in adjudicating an appeal. *Id.*

The appellant bears the burden of proof, by preponderant evidence, to establish that the alleged action is within the Board's jurisdiction. 5 C.F.R. § 1201.56(a)(2)(i). *See Bravman v. Department of the Navy*, 26 M.S.P.R. 169, 171 (1985). Preponderant evidence is defined as the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. *See* 5 C.F.R. § 1201.56(c)(2). Nonetheless, the appellant's initial burden, at this stage, is simply to make nonfrivolous allegations of the Board's jurisdiction; if he does so, he will be entitled to a hearing at which he could establish jurisdiction by

preponderant evidence. *Frison v. Department of the Army*, 94 M.S.P.R. 431 at ¶ 4. A nonfrivolous allegation is an assertion that, if proven, could establish the matter at issue. 5 C.F.R. § 1201.4(s). An allegation generally will be considered nonfrivolous when, under oath or penalty of perjury, it is more than conclusory, plausible on its face, and material to the legal issues in the appeal. *Id.*

I previously provided the parties with notice and/or issued orders to show cause as to claims previously raised by the appellant. *See* AF, Tab 3 (involuntary actions (i.e., resignation, retirement, constructive discharge (or dismissal), constructive retirement, compelled retirement, etc.)); AF, Tab 4 (timeliness); AF, Tab 14 (disability retirement and general Board jurisdiction (i.e., appealable actions)); and AF, Tab 20 (res judicata and collateral estoppel). The appellant has also recently identified allegations related to the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Voluntary Early Retirement Authority (VERA). *See* AF, Tabs 19, 21, 23, and 24. The appellant has also argued that his prior constructive discharge (or dismissal) claim is different than his current involuntary retirement (or compelled retirement) claim.¹ *Id.* As the record currently stands, it appears the appellant resigned from the agency on June 6, 2022, *see* AF, Tab 13 at 8, and that he retired on June 18, 2022. *See* AF, Tab 1 at 3, question no. 3. The appellant has not provided additional information or evidence in regard to his retirement (e.g., his application, OPM determination(s), etc.). As such, I am providing the parties notice on Board appeal rights and the threshold requirement that to pursue a Chapter 75 action (i.e., involuntary retirement) an appellant had to be an “employee” at the time of an alleged Chapter 75 action (i.e., involuntary retirement).

¹ It is not in dispute that the appellant elected to file a Title VII constructive discharge claim with the United States District Court for the Eastern District of Virginia. *See* AF, Tabs 19, 21, 23 and 24.

Notice to the Parties

USERRA

The Board has USERRA jurisdiction over appeals from any action taken by a Federal employer against any person alleging a violation of that law in that person's civilian Federal employment. *See* 38 U.S.C. §§ 4311(a), (b), 4303(4)(A)(ii), 4324(b). As is relevant here, a USERRA claim may be filed concerning discrimination or retaliation because a person:

(1) has taken an action to enforce a protection afforded any person under [38 U.S.C. Chapter 43], (2) has testified or otherwise made a statement in or in connection with any proceeding under [that] chapter, (3) has assisted or otherwise participated in an investigation under [that] chapter, or (4) has exercised a right provided for in [that] chapter.

This prohibition against retaliation applies regardless of whether the person has performed service in the uniformed services. 38 U.S.C. § 4311(b). To establish Board jurisdiction over an appeal alleging a violation of this provision of USERRA, the appellant must make non-frivolous allegations that: (1) he took action to enforce a protection afforded any person under chapter 43 of Title 38 of the U.S. Code, gave testimony or made a statement in or in connection with any proceeding under that chapter, rendered assistance or otherwise participated in an investigation under that chapter, or exercised a right provided for in that chapter; and (2) his action was a substantial or motivating factor in the agency action that he claims was based on USERRA discrimination or retaliation.

The appellant may submit an appeal claiming a violation of USERRA directly to the Board or may submit such an appeal after filing a complaint and exhausting procedures with the Secretary of Labor (Secretary). *See* 38 U.S.C. § 4322. The appellant "exhausts" the Secretary's procedures when the Secretary notifies him that his complaint has not been resolved. 5 C.F.R. § 1208.11(b). Therefore, if the appellant filed a complaint with the

Secretary before filing this appeal, the Board lacks jurisdiction until the Secretary provides him with such notification.

VERA

The appellant bears the burden of proving by preponderant evidence his entitlement to an early retirement under VERA. 5 C.F.R. § 1201.56(a)(2); *see Slater v. General Services Administration*, 95 M.S.P.R. 378, ¶ 13 (2004) (appellant bears the burden of proving entitlement to law enforcement retirement credit), *overruled on other grounds by McNeil v. Department of Defense*, 100 M.S.P.R. 146 (2005).

VERA allows agencies that are undergoing substantial restructuring and downsizing to temporarily lower the age and service requirements in order to increase the number of employees who are eligible for retirement. *See* 5 U.S.C. § 8414(b); Office of Personnel Management, March 2017 Voluntary Early Retirement Guide (OPM VERA Guide), https://www.opm.gov/policy-data-oversight/workforce-restructuring/voluntary-early-retirement-authority/vera_guide.pdf (last visited May 17, 2023). An agency must request VERA approval from the Office of Personnel Management. OPM VERA Guide at 2–3. If an agency receives VERA authority and decides to use an approved VERA to assist it in reaching specific goals, an agency may decide which employees are covered by VERA, establish the VERA window period, and determine the number of employees who may retire under VERA. *Id.* at 4–5.

Under the Federal Employees’ Retirement System (FERS), the Board has jurisdiction to consider any appeal from “an administrative action or order affecting the rights or interests of an individual or of the United States.” *See* 5 U.S.C. § 8461(e) (FERS); 5 U.S.C. § 8347(d)(1) (CSRS). 5 U.S.C. § 8414 identifies those circumstances under which an employee may be entitled to an early retirement provided that they meet the minimum age and year requirements. An employee must meet the established criteria including section 5 U.S.C. 8414(b)(v) which specifically requires that an early retirement must be

“determined by the agency.” 5 U.S.C. 8414(b)(v). Thus, FERS provides for voluntary early retirement when, among other things, an employee voluntarily separates from the service and is within the scope of the offer of voluntary early retirement. *See* 5 U.S.C. § 8414(b)(1)(B)(iv), (v) and 5 C.F.R. § 842.213(k) (FERS).

In addition, the agency’s authority to offer a VERA arises out of 5 U.S.C. § 9902(f). The statute defines a VERA eligible “employee” as an “employee with the Department of Defense, serving under an appointment without time limitation, except that such terms does not include” the following:

- (A) a reemployed annuitant under subchapter III of chapter 83 or 84, or another retirement system for employees of the Federal Government;
- (B) An employee having a disability on the basis of which such employee would be eligible for disability retirement under any of the retirement systems referred to in subparagraph (A); or
- (C) For the purposes of eligibility for separation incentives under this section, an employee who is in receipt of a decision notice of involuntary separation for misconduct or unacceptable performance.

5 U.S.C. § 9902(f)(3). Moreover, the employee must be “at least 50 years of age and has completed 20 years of service, or has at least 25 years of service” 5 U.S.C. § 9902(f)(4). Additionally, the statute states that the employee may apply and receive benefits “in accordance [emphasis added] with chapter 83 or 84 if the employee has been employed continuously within the Department of Defense for more than 30 days before the date on which the determination to conduct a reduction or restructuring within 1 or more Department of Defense components is approved.” *Id.* 5 U.S.C. Chapter 84, which governs FERS, provides authority to OPM to oversee and administer FERS. *See* 5 U.S.C. § 8461. Congress identified the prerequisite for early retirement in 5 U.S.C. 8414 which includes VERA retirement. *See* 5 U.S.C. 8414(b)(1)(B)(iv) and (v). Pursuant to 5 C.F.R. § 1201.3, the Board’s jurisdiction is limited to the review of “[d]eterminations affecting the rights or interests of an individual under the Federal retirement laws. The appellant must show that the agency was authorized to conduct a

VERA; he applied for retirement pursuant to the approved VERA (including the date of application); he met the agency's VERA qualifications set forth in 5 U.S.C. § 9902(f) (i.e., definition of employee, age, years of federal service, etc.); and OPM or the agency denied his request for retirement pursuant to the approved VERA (including the date that OPM and/or the agency denied his application for VERA retirement).

Importantly, without an actual claim for retirement benefits by the appellant (including VERA, disability, or any other retirement claim), and an actual decision on that claim by OPM or the agency, any decision by the Board about what the appellant may or may not be entitled to would be an advisory opinion, which the Board is expressly prohibited from issuing. *See* 5 U.S.C. § 1204(h); *Blaha v. Office of Personnel Management*, 108 M.S.P.R. 21, ¶ 11 (2007). Consequently, as the Board recently found, unless and until the appellant establishes that he actually applied for voluntary early optional retirement and received a decision from OPM or the agency on his application, there is no basis to find Board jurisdiction over this retirement matter. *Manning v. Office of Personnel Management*, 2023 WL 2606682, ¶ 12 (MSPB Mar. 22, 2023) (nonprecedential).

Board Appeal Rights – Employee

The Board has jurisdiction over an involuntary retirement only if it is tantamount to a forced removal (i.e., a constructive discharge or dismissal). *See Staats v. U.S. Postal Service*, 99 F.3d 1120, 1124 (Fed. Cir. 1996); *Shoaf v. Department of Agriculture*, 260 F.3d 1336, 1341 (Fed. Cir. 2001). According to the appellant's submissions, he resigned from the agency on June 6, 2022. *See* AF, Tab 13 at 8. However, on the appellant's appeal form, he claimed he retired on June 18, 2022 – after his resignation on June 6, 2022.² *See* AF, Tab 1 at 3.

² The appellant has not submitted his retirement application or any correspondence from OPM to establish the date of his retirement.

The Board may not have jurisdiction over the alleged June 18, 2022 involuntary retirement action because it appears the appellant was not an “employee” at the time of the alleged action. To qualify as an “employee” pursuant to 5 U.S.C Title 5 the appellant must meet the following definition:

- (1) “employee” means--
 - (A) an individual in the competitive service--
 - (i) who is not serving a probationary or trial period under an initial appointment; or
 - (ii) who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less;
 - (B) a preference eligible in the excepted service who has completed 1 year of current continuous service in the same or similar positions--
 - (i) in an Executive agency; or
 - (ii) in the United States Postal Service or Postal Regulatory Commission; and
 - (C) an individual in the excepted service (other than a preference eligible)--
 - (i) who is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service; or
 - (ii) who has completed 2 years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to 2 years or less.

5 U.S.C. § 7511(a)(1). The appellant must show that he was an “employee” at the time the agency took the challenged action.

Order to the Appellant

As noted above, the appellant has the burden to make a nonfrivolous allegation of Board jurisdiction and to prove that this appeal is within the Board’s jurisdiction. Therefore, after review of the above, the appellant may supplement his prior jurisdictional response, *see* AF, Tab 19, with additional argument/evidence to establish Board jurisdiction **no later than June 8, 2023**. The appellant should not refile his prior evidence and/or argument.

Order to the Agency

The agency may file a single response addressing all of the appellant’s jurisdictional arguments/claims and the issues identified in the orders to show cause – as identified above and in this Notice – no later than **June 20, 2023**.

Correction to Order to Show Cause - Timeliness

On May 23, 2023, I issued an Order to Show Cause - Timeliness wherein I informed the appellant of his burden to establish that this appeal was timely filed. *See* AF, Tab 4. In the order, I erroneously stated:

It appears that the filing period in this case began on June 22, 2023, and that your appeal was filed by e-file on May 3, 2023. It therefore appears that your appeal was filed 20 days late.

AF, Tab 4 at 2 (emphasis as in original). This section should have read:

It appears that the filing period in this case began on June 18, 2022, and that your appeal was filed by e-file on May 3, 2023. It therefore appears that your appeal was filed 289 days late.

Accordingly, the Order to Show Cause - Timeliness is hereby corrected to reflect the second statement above. *See* AF, Tab 4.

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.** I will not accept evidence or argument on these issues 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

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 Jenny Lin Naylor
Department of the Army
111 S. George Mason Dr., Bldg 2
Arlington, VA 22204

May 17, 2023
(Date)

/s/
Tonya Holman
Paralegal Specialist