UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 60

Docket No. PH-0752-05-0403-C-5

Bohdan Senyszyn,

Appellant,

v.

Department of the Treasury,

Agency.

March 30, 2010

Bohdan Senyszyn, Brooklyn, New York, pro se.

Laurence T. Emert, Esquire, New York, New York, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review (PFR) of the November 30, 2009 compliance initial decision (CID) that denied his petition for enforcement (PFE). For the reasons discussed below, we find that the PFR does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.118, however, and DISMISS the PFE under the doctrine of res judicata.

BACKGROUND

¶2 The agency indefinitely suspended the appellant from the position of GS-13 Internal Revenue Agent on April 9, 2005, based on reasonable cause to believe that he had committed a crime for which a sentence of imprisonment may be imposed. The administrative judge, the Board, and the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) sustained the indefinite suspension. *See Senyszyn v. Department of the Treasury*, 200 F. App'x 990 (Fed. Cir. 2006). In addition, the administrative judge and the Board denied the appellant's first four PFEs concerning the indefinite suspension. The appellant appealed all but one of those final decisions, *Senyszyn v. Department of the Treasury*, 102 M.S.P.R. 236 (2006) (Table), to the Federal Circuit. The Federal Circuit affirmed all of the decisions that were appealed to it. *See Senyszyn v. Department of the Treasury*, 342 F. App'x 593 (2009) [C-3]; *Senyszyn v. Department of the Treasury*, 260 F. App'x 271 (Fed. Cir. 2007); *Senyszyn v. Department of the Treasury*, 244 F. App'x 347 (Fed. Cir. 2007). On February 10, 2009, the Board denied the appellant's fifth PFE.[*] *Senyszyn v. Department of the Treasury*, 110 M.S.P.R. 437 (2009) [C-4]. The appellant has not filed an appeal with the Federal Circuit of that decision.

¶3 In addition, the agency removed the appellant from his position on December 21, 2007, specifying that he had entered guilty pleas to felony charges; the administrative judge issued an initial decision dismissing the appeal without prejudice to refiling because the appellant is incarcerated; and the Board denied the appellant's PFR of the initial decision by Final Order. *Senyszyn v.*

---

[*] Because of a regional office docketing error in an earlier appeal, the current docketing numbers reflect one less PFE than the appellant actually filed. The current CID repeats that error by referring to this as the appellant's fifth PFE, when it is actually his sixth PFE. Also, as discussed below, the current CID does not mention *Senyszyn*, 110 M.S.P.R. 437.

Department of the Treasury, 109 M.S.P.R. 699 (2008) (Table). The appellant has not filed an appeal with the Federal Circuit of that decision.

¶4 In his current PFE, the appellant cited *Senyszyn*, 342 F. App'x 593 [C-3] as finding that the agency properly continued his indefinite suspension from September 20, 2007, when he pled guilty to four criminal charges, until 19 days later, when the agency issued the October 9, 2007 notice proposing his removal. He asserted that he was entitled to pay for the notice period, i.e., from October 10, 2007, through the December 21, 2007 effective date of his removal. Compliance File, Tab 1.

¶5 The administrative judge denied the appellant's PFE. CID at 1, 5. He recounted the history of the appeals, although he did not explicitly mention his CID or the Board's decision in *Senyszyn*, 110 M.S.P.R. 437 [C-4], and seems to have attributed findings to C-3 that he made in C-4. Specifically, he stated that, in C-3, he found that the appellant was not entitled to back pay and benefits for the period between resolution of the criminal charges and his removal, and that his decision was affirmed by both the Board and the Federal Circuit. CID at 3-4. Actually, he made that determination in C-4. CID in C-4 at 3-4. He found that the appellant's current appeal essentially reiterated the same claim. He found that the agency acted appropriately when it continued the indefinite suspension beyond the resolution of the criminal proceedings, and, thus, that the appellant was not entitled to any back pay or benefits for the period between resolution of the criminal charges and his removal. CID at 4-5.

¶6 The appellant has filed a PFR. PFR File, Tabs 1, 3. The agency has filed a response opposing the appellant's PFR. *Id.* at 4. After the record closed on review, the parties filed additional submissions. *Id.*, Tabs 5-8.

ANALYSIS

The appellant's PFR does not provide a basis for Board review.

¶7 We grant PFRs such as this one only when significant new evidence is presented to us 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 at 5 C.F.R. § 1201.115. After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we deny the PFR.

¶8 As previously noted, the parties filed submissions after the record closed on review. Once the record closes, no additional evidence or argument will be accepted unless the party submitting it shows that the evidence was not readily available before the record closed. 5 C.F.R. § 1201.114(i). Because the parties have not done so, we have not considered their late-filed submissions.

The administrative judge should have dismissed the PFE on the basis of res judicata.

¶9 Under the doctrine of res judicata, a valid, final judgment on the merits of an action bars a second action involving the same parties or their privies based on the same cause of action. Res judicata precludes the parties from relitigating issues that were, or could have been, raised in the prior action and is applicable if the following criteria are satisfied: (1) the prior judgment was rendered by a forum with competent jurisdiction; (2) the prior judgment was a final judgment on the merits; and (3) the same cause of action and the same parties or their privies were involved in both cases. *See, e.g.*, *Carson v. Department of Energy*, 109 M.S.P.R. 213, ¶ 24 (2008), *aff'd*, No. 2008-3285 (Fed. Cir. Oct. 9, 2009). This doctrine applies to PFEs. *Id.*, ¶ 25.

¶10 Here, the administrative judge should have applied res judicata instead of simply issuing another CID denying the appellant's latest PFE. In affirming as

modified the CID in *Senyszyn*, 110 M.S.P.R. 437 [C-4], the Board issued a final decision acknowledging the appellant's argument that the Board's Final Order in C-3 entitled him to back pay for the period of October 9 through December 21, 2007. The Board, however, found "no error in the [administrative judge's] determination that nothing in that order 'could even remotely be construed as a directive to the agency to provide any monetary relief, or any other relief for that matter, to the appellant,' and thus, that 'the appellant has not established that the agency is in noncompliance with the Board's final decision.'" *Senyszyn*, 110 M.S.P.R. 437, ¶ 8.

¶11 Contrary to the appellant's apparent belief, the court's decision in *Senyszyn*, 342 F. App'x 593 [C-3], which was issued after the Board's decision in *Senyszyn*, 110 M.S.P.R. 437 [C-4], does not warrant a different result. Admittedly, the court explicitly found proper only the appellant's indefinite suspension from September 20, 2007, through October 9, 2007. It does not follow, however, that the court found improper his continued indefinite suspension from October 10, 2007, until he was removed on December 21, 2007, because that was not the issue before it. That issue arose in *Senyszyn*, 110 M.S.P.R. 437 [C-4], which the appellant did not appeal to the court.

¶12 To summarize, in *Senyszyn*, 110 M.S.P.R. 437 [C-4], the Board issued a final judgment on the merits concerning the issue of whether the appellant was entitled to back pay for the period between the October 9, 2007 notice of proposed removal and the December 21, 2007 effective date of his removal. The judgment was rendered by a forum with competent jurisdiction and the same cause of action and the same parties or their privies were involved in both cases. Accordingly, we DISMISS the appellant's PFE on the basis of res judicata.

ORDER

¶13 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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