UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 120

Docket No. PH-0353-09-0609-I-1

Elbert Hicks,

Appellant,

v.

United States Postal Service,

Agency.

June 24, 2010

Elbert Hicks, Chesapeake, Virginia, pro se.

Charles Dudek, Landover, Maryland, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has petitioned for review of the December 14, 2009 initial decision that dismissed his denial of restoration appeal as barred by res judicata. We find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115(d), and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.118, however, and AFFIRM the initial decision as MODIFIED, still DISMISSING the appellant's denial of restoration claim as barred by res judicata. The appellant's discrimination, retaliation, and constructive removal claims are DISMISSED for lack of jurisdiction.

BACKGROUND

¶2 The appellant, formerly a letter carrier, suffered a compensable injury in July 1984 and resigned from the agency in September 1984. He partially recovered from his injury, and in 1985 he requested restoration to his former position. The agency denied his request, and the appellant filed an appeal with the Board. In a March 1986 initial decision, which became final the following month, the administrative judge reversed the agency's action and directed the agency to place the appellant's name on a reemployment list and to extend him priority consideration. *See Hicks v. U.S. Postal Service*, 83 M.S.P.R. 599, ¶ 2 (1999); *Hicks v. U.S. Postal Service*, 35 M.S.P.R. 27, 30 (1987).

¶3 Subsequently, the appellant filed a petition for enforcement. *Hicks*, 35 M.S.P.R. at 28. In a compliance initial decision, an administrative judge held, inter alia, that the agency had complied with the Board's final decision in all respects except one—placing the appellant's name on a reemployment list for Charleston, South Carolina, his last place of residence in the United States. *Id*. The agency later submitted evidence that it had afforded the appellant priority consideration in Charleston, and in September 1987 the Board issued a decision finding that the agency had complied with its final order to afford the appellant priority consideration as a partially recovered employee. *Id*. at 28-30.

¶4 The appellant filed a second restoration appeal in July 1994. *See Hicks v. U.S. Postal Service*, 73 F.3d 379 (Fed. Cir. 1995) (Table). The Board dismissed that appeal for lack of jurisdiction, based on its determination that the appellant had in fact requested vocational rehabilitation from the Department of Labor, not restoration by the agency. The United States Court of Appeals for the Federal Circuit affirmed the Board's decision. *Id*.

¶5 In September 1998, the appellant filed another appeal, claiming that the agency had failed to respond to his July 1998 request for partial restoration to duty in Ceiba, Puerto Rico. *See Hicks*, 83 M.S.P.R. 599, ¶¶ 5-6. He further claimed that the agency's failure to respond amounted to a constructive

discharge, and was the result of race and sex discrimination and retaliation for filing equal employment opportunity (EEO) complaints. *Id*. The administrative judge dismissed the appeal, finding that the appellant's restoration claim was barred under the principle of res judicata in light of the Federal Circuit's decision in *Hicks*, 73 F.3d 379, and that the Board lacked jurisdiction over his discrimination and reprisal complaints. The initial decision did not address the appellant's constructive discharge claim. *Hicks v. U.S. Postal Service*, MSPB Docket No. PH-0353-98-0439-I-1 (Initial Decision, Dec. 17, 1998). On September 30, 1999, the full Board affirmed the initial decision as modified, finding that the appeal was barred by res judicata, but not on account of the appellant's 1994 appeal, which did not examine the merits of his restoration claim. Rather, the Board found, the appellant's September 1998 appeal was an impermissible attempt to relitigate the merits of his 1985 restoration appeal, which clarified that his restoration rights were limited to the Charleston area. *Hicks*, 83 M.S.P.R. 599, ¶¶ 11-12.

¶6 On September 13, 1999, the appellant filed another appeal challenging the agency's failure to respond to his July 1998 request for partial restoration to duty in Ceiba, Puerto Rico. *Hicks v. U.S. Postal Service*, MSPB Docket No. NY-0353-99-0451-I-1 (Initial Decision, Jan. 12, 2000). The administrative judge dismissed the appeal, finding that the appellant's claim was barred under the principle of res judicata for the same reasons as his September 1998 appeal. *Id*. The initial decision became the final decision of the Board, and the Federal Circuit subsequently affirmed it. *Hicks v. U.S. Postal Service*, 251 F.3d 169 (Fed. Cir. 2000) (Table).

¶7 On August 18, 2009, the appellant filed the instant appeal, claiming that the agency has "continuously denied" his requests for restoration as a partially recovered employee, and that its denial of restoration constituted a constructive discharge. Initial Appeal File (IAF), Tab 1 at 3. He did not specify dates, but his appeal letter and supporting documentation indicate that he requested restoration

within the Capital Metro Operations Area. The appellant further asserted that the agency refused to offer him back pay based on an erroneous retroactive wage earning capacity decision. *Id*. In subsequent submissions, he contended that his resignation was involuntary and that on unspecified dates the agency had engaged in discrimination and retaliation for filing EEO complaints. IAF, Tabs 3, 8. The agency moved to dismiss the appeal based on lack of jurisdiction, untimeliness, and res judicata. IAF, Tab 6 at 4-9.

¶8 The administrative judge found that the appellant's claims were barred by res judicata, stating in general terms that the issues on appeal "have been previously decided by the Board." IAF, Tab 12 (Initial Decision, Dec. 14, 2009) (ID) at 6. With respect to the denial of restoration claim, she found that the appellant was attempting to relitigate the merits of his various claims for restoration beginning in 1985, but she did not indicate which of those decisions had decided his restoration claim on the merits. *Id*. at 6-7. The administrative judge also noted that the appellant had raised claims of discrimination and retaliation for EEO activity in previous Board appeals as well as before the Equal Employment Opportunity Commission, and found that the appellant had previously raised a constructive discharge claim, citing *Hicks*, 83 M.S.P.R. 599. ID at 2, 6-7. The administrative judge further found, in the alternative, that the discrimination and constructive discharge claims are outside the Board's jurisdiction, and that the appeal was untimely filed without a showing of good cause for the delay. *Id*. at 7-8.

¶9 On petition for review, the appellant contests the administrative judge's alternative findings on jurisdiction and timeliness. PFR File, Tab 1. He also submits a copy of a March 27, 2009 work capacity evaluation by his physician,

but does not explain the significance of the document. *Id*. The agency has responded in opposition to the appellant's petition.[1] PFR File, Tab 4.

ANALYSIS

¶10 A partially recovered employee is one who has recovered sufficiently to return to less physically demanding work. *Hicks*, 83 M.S.P.R. 599, ¶ 9. Under 5 C.F.R. § 353.301(d), agencies are required to "make every effort to restore in the local commuting area, according to the circumstances in each case, an individual who has partially recovered from a compensable injury and who is able to return to limited duty." *Hicks*, 83 M.S.P.R. 599, ¶ 9. Where an individual is entitled to seek and does seek restoration as a partially recovered employee, the agency is continuously obligated to make restoration efforts, to include searching throughout the agency but within the local commuting area for vacant positions to which he could be restored and to consider him for such vacancies. *Id*. For restoration rights purposes, the local commuting area is the geographic area in which an individual lives and can reasonably be expected to travel back and forth daily to his usual duty station. *Id*.

¶11 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. *Ryan v. Department of the Air Force*, 113 M.S.P.R. 27, ¶ 11 (2009) (citing *Peartree v. U.S. Postal Service*, 66 M.S.P.R. 332, 337 (1995)). Res judicata precludes parties from relitigating issues that were, or could have been, raised in the prior action, and is applicable if: (1) the prior judgment was

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[1] After the close of the record on review, the appellant filed a reply to the agency's response and attached various documents. PFR File, Tab 5. We do not consider the appellant's reply, because the Board's regulations do not provide for submissions beyond the petition for review and the opposing party's response, and the appellant has neither requested permission for his untimely reply nor shown that his filing was based on previously unavailable evidence. *See Von Muller v. Department of Energy*, 101 M.S.P.R. 91, ¶ 11 n.1, *aff'd*, 204 F. App'x 17 (Fed. Cir. 2006).

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. *Id*. As noted above, the Board previously adjudicated the appellant's 1985 restoration appeal, ordering that, as a partially recovered employee, he was entitled to have his name placed on a reemployment list and to receive priority consideration for vacant positions in Charleston. *Hicks*, 35 M.S.P.R. at 29-30. The Board subsequently found that the agency had fully complied with that order. *Id*. at 30. Thus, the Board held that the agency's continuing obligation to afford the appellant priority consideration and the appellant's entitlement to restoration rights as a partially recovered employee are limited to the Charleston local commuting area. *Hicks*, 83 M.S.P.R. 599, ¶ 10. By asserting that he was entitled to priority consideration for restoration as a partially recovered employee in the Capital Metro Area, the appellant was seeking to relitigate the merits of his 1985 restoration appeal, and we therefore find that his restoration claim is barred on grounds of res judicata. *Id*., ¶ 11; *see also Hicks*, 251 F.3d 169 at *2.

¶12 The administrative judge erred, however, in finding that the appellant's remaining claims are barred by res judicata. First, to the extent the appellant may have raised the same discrimination and retaliation claims in his 1998 appeal, those claims were dismissed for lack of jurisdiction, rather than denied on the merits, and so the doctrine of res judicata does not apply.[2] *See Williams v.*

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[2] Because the jurisdictional issue was litigated in the 1998 appeal, it is possible that the appellant's discrimination and retaliation claims are now barred by the doctrine of collateral estoppel. Collateral estoppel is appropriate when (1) an issue is identical to that involved in the prior action, (2) the issue was actually litigated in the prior action, (3) the determination on the issue in the prior action was necessary to the resulting judgment, and (4) the party against whom issue preclusion is sought had a full and fair opportunity to litigate the issue in the prior action, either as a party or as one whose interests were otherwise represented in that action. *Metallo v. Department of Defense*, 110 M.S.P.R. 229, ¶ 12 (2008). However, in the absence of specific dates, we cannot be certain whether the discrimination and retaliation claims the appellant raises in this appeal are the same as those at issue in his 1998 appeal.

Department of Health & Human Services, 112 M.S.P.R. 628, ¶ 9 (2009). Second, while the appellant may have raised a constructive removal claim in his 1998 appeal, *see Hicks*, 83 M.S.P.R. 599, ¶ 5, that claim was never adjudicated, on the merits or otherwise. Last, and crucially, res judicata is a basis for dismissing a claim over which the Board has jurisdiction. *Roesel v. Peace Corps*, 111 M.S.P.R. 366, ¶ 13 (2009). For the reasons discussed below, the Board cannot assert jurisdiction over the appellant's discrimination, retaliation, and constructive removal claims in the first instance.

¶13 The Board's jurisdiction is not plenary; it 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). With regard to the appellant's constructive removal claim, a Postal employee may appeal a removal action only if he is (1) preference eligible, (2) a supervisory or management employee, or (3) an employee engaged in personnel work in other than a purely nonconfidential clerical capacity. 39 U.S.C. § 1005(a)(4)(A); 5 U.S.C. § 7511(a)(1)(B). The record reflects that the appellant is not preference eligible, and that he occupied a non-supervisory, non-managerial, and non-confidential craft position. IAF, Tab 6 at 12, 21, 26, 28. Thus, the Board lacks jurisdiction over his constructive removal claim. As for the appellant's discrimination and retaliation claims, allegations of prohibited personnel practices under 5 U.S.C. § 2302(b)(1) and (9) do not confer jurisdiction on the Board in the absence of an otherwise appealable action. *See Booker v. U.S. Postal Service*, 53 M.S.P.R. 507, 509, *aff'd*, 982 F.2d 517 (Fed. Cir. 1992); *Wren v. Department of the Army*, 2 M.S.P.R. 1, 2 (1980), *aff'd*, 681 F.2d 867, 871-73 (D.C. Cir. 1982). Accordingly, we dismiss the appellant's discrimination, retaliation, and constructive removal claims for lack of jurisdiction.

ORDER

¶14 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:

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