

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

DARRALYN C. COUNCIL, SR,
Appellant,

DOCKET NUMBER
AT-1221-12-0027-W-1

v.

DEPARTMENT OF VETERANS
AFFAIRS,
Agency.

DATE: July 17, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Darralyn C. Council, Sr., Orlando, Florida, pro se.

James A. Mantia, Orlando, Florida, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. See [5 C.F.R. § 1201.117\(c\)](#).

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 in Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)).

The appellant filed an October 7, 2011 individual right of action (IRA) appeal in which he alleged that the agency removed him in retaliation for protected whistleblowing activity. Initial Appeal File (IAF), Tab 1. Because the appellant had previously filed an appeal of his August 2008 removal in which he could have raised his whistleblowing claims, *see Council v. Department of Veterans Affairs*, MSPB Docket No. AT-0752-09-0091-I-1, *petition for review denied*, [112 M.S.P.R. 657](#) (2009) (Table), the administrative judge gave the appellant notice of the elements of the doctrine of res judicata and provided him with an opportunity to establish why his appeal should not be dismissed on that basis, IAF, Tab 9. In his response, the appellant did not address the application of the doctrine of res judicata to his IRA appeal. IAF, Tab 11. Without holding the requested hearing, *see* IAF, Tab 1 at 2, the administrative judge dismissed the appellant's IRA appeal as barred under the doctrine of res judicata, IAF, Tab 12, Initial Decision (ID). The appellant filed a petition for review, along with four subsequent submissions.² Petition for Review (PFR) File, Tabs 1, 3, 5, 7, 9. The agency responded to the petition for review and the appellant's subsequent submissions.³ PFR File, Tabs 4, 6, 8.

² The Board has not considered the appellant's submissions dated February 14, March 26, and May 23, 2012, because he filed them after the close of the record on review and failed to show that they were not readily available before the record closed. *See* PFR File, Tabs 2, 5, 7, 9; [5 C.F.R. § 1201.114\(i\)](#).

³ Although the agency's submissions after the close of the record merely respond to the appellant's, and therefore could not be anticipated before the close of the record on review, just as with the appellant's submissions after the close of the record on review, we have not considered them. *See* PFR File, Tabs 6, 8; [5 C.F.R. § 1201.114\(i\)](#).

In his petition for review, the appellant does not challenge the administrative judge's application of the doctrine of res judicata in the instant matter. PFR File, Tab 1. The Board will grant a petition for review only when significant new and previously unavailable evidence is presented or it is shown that the administrative judge made an error interpreting a law or regulation. *E.g.*, *Inman v. Department of Veterans Affairs*, [115 M.S.P.R. 41](#), ¶ 11 (2010); [5 C.F.R. § 1201.115](#). Accordingly, because the appellant fails to explain why the administrative judge's legal determination is incorrect or to identify specific evidence in the record that demonstrates error, we deny the petition for review. *See Inman*, [115 M.S.P.R. 41](#), ¶ 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. *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 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 the administrative judge correctly found, the record indicates that all the criteria for the application of the doctrine of res judicata to the appellant's claim are satisfied. ID at 2-3.

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 petition for review. Except as modified by this Final Order, the initial decision of the administrative judge is the Board's final decision.

**NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS**

This is the Board's final decision in this matter. [5 C.F.R. § 1201.113](#). 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.