

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

MARSHA L. PAYTON,
Appellant,

DOCKET NUMBER
AT-0353-11-0956-I-1

v.

DEPARTMENT OF HOMELAND
SECURITY,
Agency.

DATE: August 3, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Marsha L. Payton, Holly Hill, Florida, pro se.

Linda A. Church, Miami, 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¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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 a September 20, 2011 appeal. Initial Appeal File (IAF), Tab 1. Among other things, she challenged the agency's August 18, 2011 denial of her request to be restored to her former position.² *See id.* Because the appellant had raised the identical claim in a prior action, *see Payton v. Department of Homeland Security*, [113 M.S.P.R. 463](#), *aff'd*, 403 F. App'x 496 (Fed. Cir. 2010), the administrative judge provided the appellant with notice of the elements of the doctrine of res judicata and provided her with an opportunity to establish why her appeal should not be dismissed on that basis. IAF, Tab 7. The appellant's response indicated that she mistakenly believed that the Board had ordered her restoration and that the Court of Appeals for the Federal Circuit had subsequently affirmed the Board's action, but that the agency had refused to comply.³ IAF, Tab 8. Nevertheless, the appellant did not address the application of the doctrine of res judicata to her restoration claim. *Id.* Without holding the requested hearing, the administrative judge dismissed the appeal for lack of

² The appellant also alleged without support that the agency had falsified her 2004 removal, and she included letters that indicate she had unsuccessfully pursued that claim up to and including filing a petition for certiorari in the United States Supreme Court. IAF, Tab 1.

³ Contrary to the appellant's understanding, the agency removed her on charges of misconduct including reckless disregard for the safety of others, insubordination, failure to follow instructions, unprofessional conduct, and absence without leave, and the Board affirmed the agency's action. *See, e.g., Payton*, [113 M.S.P.R. 463](#), ¶ 9; *Payton v. Department of Homeland Security*, MSPB Docket No. AT-0752-05-0043-I-1, *petition for review denied*, [99 M.S.P.R. 669](#) (2005) (Table). Moreover, the Court of Appeals for the Federal Circuit affirmed the Board's decisions when it rejected the appellant's restoration and removal appeals. *See Payton v. Department of Homeland Security*, 403 F. App'x 496 (Fed. Cir. 2010) (Nonprecedential); *Payton v. Department of Homeland Security*, 300 F. App'x 890 (2008) (Nonprecedential).

jurisdiction under the doctrine of res judicata, finding that the Board's decision on the appellant's previous restoration appeal, i.e., that the appellant was not entitled to restoration rights because she was separated in part for cause, was a final decision on the merits and that the appellant's claim in the instant matter was identical. IAF, Tab 9, Initial Decision (ID) at 3; *see Payton*, [113 M.S.P.R. 463](#). The appellant filed a petition for review of that decision, along with four subsequent submissions.⁴ Petition for Review (PFR) File, Tabs 1, 3-6. The agency did not respond.

In her petition for review, the appellant reiterates her mistaken belief that the agency "falsified" her removal and that the Board subsequently ordered her restoration, but she 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

⁴ The Board has not considered the appellant's submissions dated February 16, March 6, and May 16, 2012, because they were filed after the close of the record on review and the appellant failed to show that they were not readily available before the record closed. *See* [5 C.F.R. § 1201.114](#)(i); PFR File, Tabs 2, 4-6.

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.* In the appellant's prior restoration appeal, the Board found that the appellant's removal for cause precludes her restoration rights, and it dismissed the appeal for lack of jurisdiction. *Payton*, [113 M.S.P.R. 463](#), ¶¶ 9-10. As noted above, the administrative judge in the instant matter dismissed this appeal under the doctrine of res judicata based on the Board's decision in the appellant's prior restoration appeal. ID at 3. However, the Board has found that res judicata is not applicable to a prior decision that dismissed an appeal for lack of jurisdiction. *Armas v. Department of Justice*, [71 M.S.P.R. 244](#), 248 (1996). Indeed, a dismissal for lack of jurisdiction does not preclude a second action on the same claim under the doctrine of res judicata⁵; a second action in the same forum would generally be precluded by the doctrine of collateral estoppel, which would preclude relitigation of the same jurisdictional issue. *Peartree*, [66 M.S.P.R. 332](#), 338.

The doctrines of res judicata (claim preclusion) and collateral estoppel (issue preclusion) both concern the preclusive effects of a prior adjudication and are based on similar policy concerns—to “relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.” *Id.* at 336-37 (quoting *Allen v. McCurry*, [449 U.S. 90](#), 94 (1980)). Collateral estoppel, or issue preclusion, 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 precluded was fully represented in the prior action. *Kroeger v. U.S. Postal*

⁵ We note, however, that, unlike the Board, federal courts have given res judicata effect to dismissals for lack of subject matter or personal jurisdiction. *See, e.g., Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, [456 U.S. 694](#), 702 n.9 (1982); *see also Restatement (Second) of Judgments* § 12.

Service, [865 F.2d 235](#), 239 (Fed. Cir. 1988). The question of the appellant's restoration rights, as litigated in the appellant's prior restoration appeal, meets all four of these requirements. The issue, i.e., the appellant's right to restoration, is identical, the parties actually litigated the issue, it was necessary to the resulting judgment, and the appellant was fully represented. See *Noble v. U.S. Postal Service*, [93 M.S.P.R. 693](#), ¶ 9 (2003) (citing "*Fisher v. Department of Defense*, [64 M.S.P.R. 509](#), 515 (1994) (a party's *pro se* status does not preclude the application of collateral estoppel; the 'fully represented' requirement is satisfied when the party to whom collateral estoppel is applied has had a full and fair chance to litigate the issue in question)"). Based on Board precedent, the administrative judge correctly found that the appeal could also be properly dismissed under the doctrine of collateral estoppel. ID at 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.