

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

JACK KLIGMAN,
Petitioner,

DOCKET NUMBER
CB-1205-12-0014-U-1

v.

OFFICE OF PERSONNEL
MANAGEMENT,
Agency.

DATE: September 19, 2012

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Jack Kligman, Philadelphia, Pennsylvania, pro se.

Michelle L. Perry, Esquire, Washington, D.C., for the agency.

BEFORE

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

FINAL ORDER

The petitioner requests that the Board review an Office of Personnel Management (OPM) regulation, which provides that an appointing official need not consider an applicant further after considering him for the same competitive

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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\(c\)](#).

service position three times. MSPB Docket No. CB-1205-12-0014-U-1, Request File (RF), Tab 1 at 1, 3. For the reasons discussed below, we DENY the petitioner's request.

DISCUSSION

The petitioner applied for a Seasonal Tax Examiner position with the Internal Revenue Service (IRS) in 1999, but was not selected. RF, Tab 12 at 5. The agency considered him for selection in three separate appointments to that position, but did not select him for any of them. *Id.* Applying [5 C.F.R. § 332.405](#), which provides that an appointing official need not consider an applicant further after considering him for the same competitive service position three times, the agency did not consider the petitioner for subsequent appointments from the certificate of eligibles. RF, Tab 12 at 5. In 2006, the petitioner filed a regulation review request regarding section 332.405. The Board denied his request on the merits. *See Kligman v. Office of Personnel Management*, [103 M.S.P.R. 614](#) (2006).

Here, the petitioner again seeks review of section 332.405, contending that the agency's application of the regulation violates section 2302(b)(4) which states that an employee shall not "deceive or willfully obstruct any person with respect to such person's right to compete for employment." [5 U.S.C. § 2302\(b\)\(4\)](#); RF, Tab 1 at 7. Specifically, the petitioner contends that the agency used section 332.405 to evade its obligation to conduct a suitability determination pursuant to [5 C.F.R. § 731.101](#). RF, Tab 1 at 1-2, 4-5.

The Board has original jurisdiction to review rules and regulations promulgated by OPM. [5 U.S.C. § 1204\(f\)](#). The Board is authorized to declare an OPM rule or regulation invalid on its face if the Board determines that the provision would, if implemented by an agency, on its face, require any employee to commit a prohibited personnel practice as defined by [5 U.S.C. § 2302\(b\)](#). *See also* [5 U.S.C. § 1204\(f\)\(2\)\(A\)](#). Similarly, the Board has authority to determine

that an OPM regulation has been invalidly implemented by an agency, if the Board determines that the provision, as implemented, has required any employee to commit a prohibited personnel practice. [5 U.S.C. § 1204](#)(f)(2)(B).

We need not determine whether the petitioner has made nonfrivolous allegations establishing a claim within the Board's jurisdiction under section 1204(f), nor whether we would exercise our discretion to review such a claim, because his claim is barred by the doctrine of res judicata. "The doctrine of res judicata precludes a second action involving the same parties or their privies and based on the litigation of claims that were, or could have been, asserted in a prior proceeding." *Coronel v. Office of Personnel Management*, [101 M.S.P.R. 407](#), ¶ 3 (2006); *see also, e.g., Navarro v. Office of Personnel Management*, [105 M.S.P.R. 278](#), ¶ 4 (2007) (citing *Nevada v. United States*, [463 U.S. 110](#), 130 (1983)). The doctrine applies 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." *Navarro*, [105 M.S.P.R. 278](#), ¶ 4.

The petitioner filed a regulation review request with the Board in 2006, contending, as he does here, that the IRS violated [5 U.S.C. § 2302](#)(b)(4) when it applied [5 C.F.R. § 332.405](#) to his application for the Seasonal Tax Examiner position (the same position at issue in his current regulation review request).² *See Kligman*, [103 M.S.P.R. 614](#). We declined his request, holding that the "IRS's

² The petitioner also unsuccessfully litigated his nonselection before the Board and various federal courts. *See* RF, Tab 12 at 5-8; *see also, e.g., Kligman v. Department of the Treasury*, MSPB Docket No. PH-0731-05-0545-I-1 (Initial Decision Nov. 28, 2005) (dismissing appeal for lack of jurisdiction); *Kligman v. Department of the Treasury*, MSPB Docket No. PH-0752-09-0251-I-1 (Initial Decision, Mar. 27, 2009) (dismissing appeal for lack of jurisdiction under the doctrine of collateral estoppel), *aff'd*, 357 F. App'x 289 (Fed. Cir. 2009); *Kligman v. Internal Revenue Service*, 272 F. App'x 166 (3d Cir. 2008); *Kligman v. Internal Revenue Service*, 2010 WL 1659643 (E.D. Pa. Apr. 26, 2010); *Kligman v. Internal Revenue Service Human Resources*, 2007 WL 2409738 (E.D. Pa. Aug. 20, 2007).

implementation of OPM's regulation does not obstruct an individual's right to compete for employment. . . . [T]he regulation identified by the petitioner only administers how the competition for employment will take place, it does not obstruct the right to compete." *Id.*, ¶ 10. We noted that the Federal Circuit had previously rejected a challenge to the validity of the regulation. *Id.*, ¶ 11. We also rejected the petitioner's claim "regarding the relationship between suitability determinations and the procedures set forth in 5 C.F.R. § 332.405." *Id.*, ¶ 12.

The petitioner's prior regulation review request meets the requirements for res judicata: (1) it was decided by the Board, a forum with competent jurisdiction; (2) it was a final judgment on the merits of the petitioner's claims; and (3) it involved the same cause of action and the same parties. *See Kligman*, [103 M.S.P.R. 614](#), ¶¶ 10-12; *Navarro*, [105 M.S.P.R. 278](#), ¶ 4. Accordingly, res judicata bars his attempt to relitigate his regulation review request. *Id.*; *see also Coronel*, [101 M.S.P.R. 407](#), ¶ 3.

The petitioner contends that res judicata does not apply because his prior MSPB appeals were dismissed for lack of jurisdiction, and therefore not decided on the merits. RF, Tab 13 at 25-26, 28-29. The petitioner's prior regulation review request was decided on the merits, however, and as discussed above, was substantively identical to his current request. Even if his current request were not substantively identical to the previous request (as the petitioner appears to argue, *see* RF, Tab 13 at 29), it would be barred because res judicata precludes litigation of claims that "were, *or could have been*, asserted in a prior proceeding." *Coronel*, [101 M.S.P.R. 407](#), ¶ 3; *Corpuz v. Office of Personnel Management*, [100 M.S.P.R. 560](#), ¶ 5 (2005) (emphasis added). The petitioner is "not entitled to return to the Board based on a new theory of" his case. *Corpuz*, [100 M.S.P.R. 560](#), ¶ 5. To the extent that his current claim "is distinguishable from the claims made in" his prior regulation review request, it "could have been raised in the earlier proceeding[]." *Id.*

Accordingly, the petitioner's request for regulation review is DENIED. This is the final decision of the Merit Systems Protection Board in this proceeding. Title 5 of the Code of Federal Regulations, section 1203.12(b) ([5 C.F.R. § 1203.12\(b\)](#)).

**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.