

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

DAVID R. MASON,  
Appellant,

DOCKET NUMBER  
AT-1221-12-0005-W-1

v.

DEPARTMENT OF HOMELAND  
SECURITY,  
Agency.

DATE: November 13, 2012

**THIS FINAL ORDER IS NONPRECEDENTIAL\***

David R. Mason, Gallatin, Tennessee, pro se.

Steven M. Tapper, Esquire, Atlanta, Georgia, 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 of the initial decision that dismissed the individual right of action (IRA) appeal without prejudice to

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\* A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

refiling. We AFFIRM the initial decision and FORWARD this case to the regional office for docketing as a refiled appeal.

On September 30, 2011, the appellant filed an IRA appeal. Initial Appeal File (IAF), Tab 1. On May 3, 2012, the administrative judge issued an initial decision that dismissed the appeal without prejudice to refiling. Initial Decision (ID) at 1, 3. The administrative judge found that the appellant raised some of the same alleged protected disclosures that he raised in his prior IRA appeal, MSPB Docket No. AT-1221-09-0728-B-1, that the presiding administrative judge dismissed the prior IRA appeal for lack of jurisdiction, finding that several of the appellant's disclosures were not protected, and that the Board has not yet issued a final decision in that matter. ID at 2. The administrative judge informed the parties that the appeal would be automatically refiled. ID at 3.

On June 1, 2012, the appellant filed a petition for review of the May 3, 2012 initial decision that dismissed his IRA appeal without prejudice. Petition for Review (PFR) File, Tab 1. He alleges that the administrative judge erred in applying the doctrine of collateral estoppel. *Id.* at 4-5. However, the administrative judge made no such finding. The administrative judge informed the parties that the doctrine of collateral estoppel may apply and preclude the appellant from relitigating issues in this appeal that he previously raised in MSPB Docket No. AT-1221-09-0728-B-1, explaining the rationale behind the dismissal of the present IRA appeal without prejudice to refiling pending the Board's decision in MSPB Docket No. AT-1221-09-0728-B-1. ID at 2-3.

The appellant also challenges the administrative judge's denial of his motion to compel discovery as untimely filed, despite the parties' agreement to extend the discovery period. PFR File, Tab 1 at 4-5. However, even if the administrative judge abused his discretion in denying the appellant's motion to compel, the error does not prejudice the appellant's substantive rights because the administrative judge dismissed the appeal without prejudice to refiling, and the appellant will be afforded the opportunity to conduct discovery in the refiled

appeal. *See Panter v. Department of the Air Force*, [22 M.S.P.R. 281](#), 282 (1984) (an adjudicatory error that is not prejudicial to a party's substantive rights provides no basis for reversal of an initial decision); *see also Ryan v. Department of the Air Force*, [117 M.S.P.R. 362](#), ¶ 5 (2012) (the Board will not reverse an administrative judge's rulings on discovery matters or the exclusion of witnesses or rulings concerning proceedings absent an abuse of discretion).

The appellant has shown no error in the administrative judge's decision to dismiss the present IRA appeal without prejudice to refiling based on the likely impact of the Board's decision in MSPB Docket No. AT-1221-09-0728-B-1 upon the appellant's claims in this IRA appeal. Thus, we discern no reason to disturb the initial decision that dismissed this IRA appeal without prejudice to refiling.

We note that the Board issued a decision in MSPB Docket No. AT-1221-09-0728-B-1 on June 15, 2012. *See Mason v. Department of Homeland Security*, MSPB Docket No. AT-1221-09-0728-B-1, Nonprecedential Final Order (June 15, 2012). Had the appellant not filed a petition for review, the regional office would have automatically refiled his IRA appeal. *See ID* at 3. Accordingly, we FORWARD this case to the regional office for docketing as a refiled appeal and for adjudication.

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 and AFFIRM the initial decision issued by the administrative judge, which is now the Board's final decision. [5 C.F.R. § 1201.113](#)(b). We FORWARD this case to the Atlanta Regional Office for docketing and adjudication as a refiled appeal.

**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](http://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.