

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

**2013 MSPB 47**

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Docket No. AT-0752-12-0017-I-2

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**Ernest J. Harris,  
Appellant,**

**v.**

**United States Postal Service,  
Agency.**

June 19, 2013

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David H. Brown, Jacksonville, Florida, for the appellant.

Susan Breymaier, Esquire, Memphis, Tennessee, for the agency.

**BEFORE**

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

**OPINION AND ORDER**

¶1 The appellant has filed a petition for review of an initial decision that dismissed for lack of jurisdiction his appeal of an alleged furlough. For the reasons discussed below, we DENY the appellant's petition for review and AFFIRM the initial decision AS MODIFIED by this Opinion and Order.

**BACKGROUND**

¶2 During negotiations over the 2010-2015 collective bargaining agreement, the agency and the American Postal Workers Union (the union) reached a Memorandum of Understanding (MOU) governing the conversion of Part-Time

Regular (PTR) and Part-Time Flexible (PTF) positions to full-time positions. MSPB Docket No. AT-0752-12-0017-I-1, Initial Appeal File (IAF 1), Tab 4 at 23-25; MSPB Docket No. AT-0752-12-0017-I-2, Initial Appeal File (IAF 2), Tab 7 at 7-25. Pursuant to the MOU, the agency created a number of Non-Traditional Full-Time (NTFT) positions. IAF 2, Tab 7 at 14. On August 27, 2011, the agency reassigned the appellant from his PTF position to a NTFT position in which he was assigned to work something less than a traditional full-time schedule of 5 8-hour days. IAF 1, Tab 1. The appellant filed an appeal in which he contended that the agency furloughed him each time it gave him less than 8 hours of work in a day. IAF 1, Tab 1.

¶3 Meanwhile, the agency and the union submitted a dispute about the MOU implementing the conversion from PTR/PTF positions to NTFT positions to national arbitration, and the administrative judge dismissed the appeal without prejudice pending the outcome of the arbitration. IAF 1, Tab 9. After the appeal was automatically refiled and the arbitrator issued his decision, IAF 2, Tab 1, Tab 7 at 7-25, the administrative judge issued an initial decision in which she dismissed the appeal for lack of jurisdiction. IAF 2, Tab 13. The administrative judge found that the arbitrator's ruling that the MOU permitted the agency to assign NTFT employees to less than full-time schedules was binding and that the appellant was collaterally estopped from claiming that the agency breached the MOU when it did not give him a full-time schedule. MSPB Docket No. AT-0752-12-0017-I-2, Initial Decision (ID 2) at 2-3.

¶4 On review, as he did below, the appellant asserts that the agency violated the MOU when it assigned him to an NTFT position rather than a regular full-time position. Petition for Review (PFR) File, Tab 1 at 1. He argues that, because his placement in an NTFT position was improper, he was entitled to a traditional full-time work schedule and any time the agency had him work less than 8 hours per day or 40 hours per week, it furloughed him. *Id.* at 1-2.

## ANALYSIS

### The appellant's placement in an NTFT position did not violate the MOU.

¶5 The arbitration award covered two related grievances. Case number 2481 related to the agency's decision to place part-time employees in NTFT positions instead of traditional full-time positions. Case number 2494 is not pertinent to this appeal. IAF 2, Tab 7 at 22. The arbitrator denied the union's grievance in case number 2481, finding that the MOU authorized the creation of NTFT positions. *Id.* at 22-23. He further found that, although the MOU did not require the agency to create any NTFT positions, it expressly authorized the agency to do so, and the agency did not violate either the MOU or the national contract by creating NTFT positions and placing some of the converted part-time employees into the NTFT positions. *Id.* at 22-25.

¶6 The administrative judge, reframing to some degree the issue presented in the arbitration, found that the appellant was collaterally estopped from claiming that he was entitled to a full-time schedule because that issue had already been decided by the arbitrator. ID 2 at 3. Collateral estoppel, or issue preclusion, precludes a party from relitigating an issue when: (1) The issue is identical to one in a prior action; (2) the issue was actually litigated in the prior action; (3) the previous determination of that issue 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 to the earlier action or as one whose interests were otherwise fully represented in that action. *Ford v. U.S. Postal Service*, [118 M.S.P.R. 10](#), ¶ 11 (2012); *McNeil v. Department of Defense*, [100 M.S.P.R. 146](#), ¶ 15 (2005). In determining whether an issue is identical for collateral estoppel purposes, differences precluding the application of collateral estoppel may be in facts, subject matter, periods of time, case law, statutes, procedural protections, notions of public interest, or qualifications of tribunals. *Tanner v. U.S. Postal Service*, [94 M.S.P.R. 417](#), ¶ 11 (2003).

¶7 Here, the issues in the arbitration (whether the agency violated the collective bargaining agreement by establishing NTFT positions) and in the appeal (whether the appellant, who occupies an NTFT position, is furloughed when he works a less than full-time schedule) are closely related, but they are not identical. *See Owens v. U.S. Postal Service*, [57 M.S.P.R. 63](#), 67 (1993). Thus, the arbitration award cannot be afforded collateral estoppel effect. *See White v. U.S. Postal Service*, [46 M.S.P.R. 48](#), 55 n.4 (1990). Nevertheless, in cases involving the Postal Service, the Board applies the doctrine of stare decisis to national-level arbitration decisions because those decisions are considered to be universally binding on other arbitrators and similarly situated or represented parties. *Gamble v. U.S. Postal Service*, [48 M.S.P.R. 228](#), 232 (1991). Therefore, the arbitrator's finding that the agency did not violate the MOU when it placed part-time employees in NTFT positions is binding, and we agree with the administrative judge's finding that the appellant may not, therefore, contend that the agency was required to place him in a position with a traditional full-time schedule.

The appellant has not been subjected to a furlough.

¶8 A furlough of 30 days or less is an action that is appealable to the Board under [5 U.S.C. §§ 7512\(5\), 7513\(d\), and 7701](#). A furlough is the temporary placement of an employee in a nonduty, nonpay status because of lack of work or funds or for other nondisciplinary reasons. *Marks v. U.S. Postal Service*, [78 M.S.P.R. 451](#), 454 (1998). An employee's tour of duty and the legal consequences flowing therefrom, such as regular periods of inactivity, are conditions of employment and determine whether the Board has jurisdiction over an appeal. *Prior v. Department of the Air Force*, [56 M.S.P.R. 561](#), 567 (1993) (citing *Strickland v. Merit Systems Protection Board*, [748 F.2d 681](#), 684 (Fed. Cir. 1984)). If, therefore, the placement of the employee in a nonduty, nonpay status was in accordance with the terms of his appointment, he has not been subjected to a furlough under 5 U.S.C. chapter 75 and does not have the right to

appeal his placement to the Board. *See Marks*, 78 M.S.P.R. at 454; *Prior*, 56 M.S.P.R. at 567.

¶9 In light of the national arbitration award, we must find that the appellant's placement in an NTFT position did not violate either the MOU or the national contract. In other words, the appellant's placement was proper. The administrative judge found, and the parties do not appear to dispute, that NTFT positions by definition do not guarantee 8 hours of work per day or 40 hours of work per week. *See* ID 2 at 2-3; IAF 1, Tab 4 at 23-24, Tab 5 at 2-3; IAF 2, Tab 8 at 2-3, Tab 9 at 5-6 & n.1. The appellant acknowledged below that the provisions of the MOU constitute the relevant terms and conditions of employment. *See* IAF 2, Tab 10 at 1. Because the absence of any guarantee of full-time work hours is inherent in the nature of NTFT positions and is a condition of employment for the NTFT positions, the appellant was not furloughed when the agency provided him with less than a full-time work schedule. *See Prior*, 56 M.S.P.R. at 567-68 (the agency's placement of the appellant into nonpay status in keeping with the terms of his employment does not constitute a furlough appealable to the Board); *Tom v. Department of the Interior*, [32 M.S.P.R. 126](#), 129-30 (1987) (the appellant's temporary placement in nonpay status for lack of work was not an adverse action requiring adherence to statutory procedures because it was in keeping with the terms of his seasonal employment and therefore did not constitute a suspension or a furlough). We find, therefore, that the appellant was not affected by a furlough and that the administrative judge correctly dismissed this appeal for lack of jurisdiction.

#### ORDER

¶10 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 review of this final decision by the United States Court of Appeals for the Federal Circuit. 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 the date of this order. See [5 U.S.C. § 7703](#)(b)(1)(A) (as rev. eff. Dec. 27, 2012). 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](#)) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, <http://www.mspb.gov/appeals/uscode/htm>. 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.