



## U.S. MERIT SYSTEMS PROTECTION BOARD

### Case Report for November 7, 2014

#### BOARD DECISIONS

**Appellant:** Fred Johnson  
**Agency:** Department of Veterans Affairs  
**Decision Number:** [2014 MSPB 82](#)  
**MSPB Docket Number:** DE-1221-14-0012-W-1  
**Issuance Date:** October 30, 2014  
**Appeal Type:** Individual Right of Action Appeal  
**Action Type:** Removal

#### **Knowing and Informed Election of Remedies Res Judicata**

The appellant alleged in an individual right of action (IRA) appeal that his 2009 removal was predicated on reprisal for whistleblowing. The administrative judge (AJ) dismissed the appeal for lack of jurisdiction because the appellant had filed a prior Board appeal of his removal and that the initial decision issued in that case dismissed the appeal because the appellant had made an election under 5 U.S.C. § 7121 to pursue his claims through the negotiated grievance procedure. The AJ noted that the agency's decision effecting the removal provided adequate notice to the appellant of his election rights under 5 U.S.C. § 7121(g)(2) and that he was thus precluded from filing a Board appeal. The appellant argued on petition for review (1) that he should not be collaterally estopped from pursuing his whistleblowing claim because this claim not actually litigated; and (2) that the choice of forum rule is inapplicable because he lacked the ability to make a knowing, binding, and informed election of remedies.

**Holding:** The Board vacated the initial decision and dismissed the IRA appeal based on the doctrine of res judicata.

1. An employee's election of remedies under 5 U.S.C. § 7121(g) must be knowing and informed, and, if it is not, it will not be binding upon the employee. Here, this notice standard was not met because the agency removed the appellant without specifically notifying him of his right to file a request for corrective action with OSC, and because the agency did not notify him of the effect that the grievance would have on his right to file an appeal before the Board.

2. The appeal is barred by the doctrine of *res judicata* because the prior judgment of the arbitrator was rendered by a forum with competent jurisdiction, the prior judgment was a final judgment on the merits, and the same cause of action and parties were involved in both cases.

**Appellant: Robert Miller**

**Agency: Federal Deposit Insurance Corporation**

**Decision Number: [2014 MSPB 83](#)**

**MSPB Docket Number: SF-1221-13-0574-W-2**

**Issuance Date: November 6, 2014**

**Appeal Type: Individual Right of Action Appeal**

**Action Type: Prohibited Personnel Practice**

### **WPEA Exhaustion of Administrative Remedies**

#### **Categories of Actions Under WPEA**

#### **Retroactivity of WPEA**

The appellant filed an Individual Right of Action (IRA) appeal, alleging that the agency retaliated against him for disclosures he made during his grievance. All of the material events in the matter took place prior to the December 27, 2012, effective date of the Whistleblower Protection Enhancement Act (WPEA). The administrative judge initially dismissed the matter without prejudice pending the Board's decision in *Hooker v. Department of Veterans Affairs*, which addressed the retroactivity of the WPEA. After the Board issued *Hooker*, which held that the new IRA appeal rights granted through 5 U.S.C. § 2301(b)(9)(B) in the WPEA did not apply retroactively to prior-filed appeals, the administrative judge ordered the appellant to show why the matter should not be similarly dismissed. The appellant responded and the administrative judge subsequently dismissed the appeal. The administrative judge held that, pursuant to *Hooker*, the WPEA did not retroactively apply to his appeal, depriving him of Board jurisdiction. The administrative judge further held that even if the WPEA applied retroactively, his claims would still not be covered by

the WPEA. Finally, the administrative judge held that, to the extent the appellant was raising allegations of reprisal for separate whistleblowing disclosures not mentioned in his OSC complaint, he did not prove he exhausted his administrative remedies before filing the IRA.

**Holding:** The Board affirmed the initial decision as modified.

1. The appellant failed to exhaust his administrative remedies on his claims related to his additional disclosures because he did not first make a reasonably clear and precise claim with OSC about the disclosures. The additional disclosures did not just provide more detail of the claims he brought to OSC; they were actually new allegations of protected activity.
2. Reprisal for filing a grievance is covered by 5 U.S.C. § 2302(b)(9), even if the disclosures in the grievance satisfy 5 U.S.C. § 2302(b)(8).
3. Pursuant to *Hooker*, the WPEA will not apply retroactively to include 5 U.S.C. § 2302(b)(i)(A)(i) actions.

**The U.S. Court of Appeals for the Federal Circuit issued a nonprecedential decision in the following case:**

**Petitioner:** Althea Poe-Henderson

**Respondent:** Merit Systems Protection Board

**Tribunal:** U.S. Court of Appeals for the Federal Circuit

**Case Number:** [2014-3138](#)

**MSPB Docket No.:** PH-0752-13-0037-I-1

**Issuance Date:** November 6, 2014

### **Timeliness**

On October 10, 1990, the petitioner was separated from her employment with the Department of Defense. On October 18, 2012, she filed an appeal with the Board challenging her removal. The administrative judge ordered her to show good cause for her late filing, and she responded only by stating that she did not learn of her termination until sometime during the 1990's, and that she had been under a psychiatrist's care since 1980 due to a nervous breakdown. The administrative judge then ordered the petitioner to submit evidence of the

year she was terminated, along with any medical information she wished to provide, but she did not respond. Accordingly, the administrative judge then dismissed her case. One year after the dismissal became a final decision, the petitioner filed a petition for review with the Board. She was instructed to show good cause for the untimely filing, but she did not respond, and the Board dismissed the petition.

**Holding:** The Court affirmed the Board's decision.

**1. The petitioner presented no evidence to show that she suffered from an illness during the time she could have filed a petition for review, and therefore she did not show good cause for the untimely filing of her petition for review.**

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