



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for November 15, 2024

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BOARD DECISIONS

Appellant: Robert J. MacLean
Agency: Department of Homeland Security
Decision Number: [2024 MSPB 15](#)
Docket Number: DC-1221-22-0590-W-3
Issuance Date: November 14, 2024

WHISTLEBLOWER PROTECTION ACT RES JUDICATA

The appellant filed an individual right of action (IRA) appeal in 2019 alleging whistleblower reprisal in connection with his removal that year and other personnel actions. The appellant filed the instant IRA appeal in 2022 while the 2019 IRA appeal was pending before an administrative judge. In February 2023, the administrative judge issued an initial decision in the 2019 appeal denying corrective action, and the appellant's petition for review of that initial decision is currently pending before the Board. The agency moved to dismiss the instant appeal based on res judicata and/or adjudicatory efficiency, asserting that the appellant was seeking to relitigate matters that were or could have been raised in the 2019 appeal. In an order during the

adjudication of the appeal, the administrative judge thus dismissed for adjudicatory efficiency the appellant's claims regarding two alleged personnel actions—nonselections for positions in 2015 and forcing the appellant to use 2 months of sick leave for a fitness-for-duty evaluation in 2017—finding that they had been litigated in the 2019 appeal and that the appellant was precluded from pursuing a second IRA appeal regarding those actions, even if he now alleged they were based on disclosures and activity not previously raised. The administrative judge certified her dismissals of these claims for interlocutory review.

Holding: The doctrines of res judicata and adjudicatory efficiency may bar a second IRA appeal involving personnel actions that were the subject of a prior IRA appeal.

1. 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. The doctrine precludes parties from relitigating issues that were, or could have been, raised in the prior action. Res judicata does not apply if the prior decision is not yet final; thus, when an appellant files an appeal that raises claims from an earlier appeal after the initial decision in the earlier appeal has been issued but before the Board has acted on the petition for review, it is appropriate to dismiss the subsequent appeal on adjudicatory efficiency grounds, not res judicata.
2. The issue here is whether the appellant's two IRA appeals involve the same causes of action. Statute and the Board's regulations support the concept that the cause of action in an IRA appeal centers on the personnel action. So does case law, under which it is well-settled that an employee who appeals a removal directly to the Board is precluded from later filing an IRA appeal challenging the same removal, i.e., the same personnel action, because the employee could have raised whistleblower reprisal in the original appeal.
3. An appellant may not circumvent res judicata's bar of multiple appeals challenging the same personnel action by asserting different legal theories. Res judicata would not, however, bar an appellant in a second IRA appeal from alleging that different personnel actions were taken in retaliation for protected disclosures raised in a prior IRA appeal because the cause of action would not be the same.

4. The Board and the U.S. Court of Appeals for the Federal Circuit have rejected claims that purported new evidence should defeat the preclusive effect of res judicata. The Federal Circuit has explained that newly discovered facts relating to a previously litigated claim form the basis of a new claim only on rare occasions, such as negligent misrepresentation by the other party. Even considering this potential exception, the Federal Circuit has explained that when the newly discovered facts were revealed during the pendency of the prior case, such purported new evidence was insufficient to defeat res judicata's bar of a subsequent appeal. Here, the appellant's 2019 IRA appeal is still pending before the Board, and at the time he filed the present appeal, the administrative judge had not yet issued an initial decision in the 2019 appeal. Under these circumstances, any purported new evidence pertaining to the claims raised in the appellant's 2019 appeal are insufficient to defeat a finding that adjudicatory efficiency or res judicata should preclude this appeal.
5. Because the claim was or could have been brought in a prior proceeding, the administrative judge thus did not err in dismissing for adjudicatory efficiency the appellant's claim regarding forcible use of leave. Regarding the nonselections, the appellant should clarify which nonselections he is challenging, and the administrative should then determine whether the personnel action may be dismissed for adjudicatory efficiency or on another basis.

COURT DECISIONS

NONPRECEDENTIAL:

Crandall v. Merit Systems Protection Board, No. [2024-1373](#) (Fed. Cir. Nov. 14, 2024) (MSPB Docket No. SF-3443-18-0312-I-1). The court affirmed the Board's decision dismissing the petitioner's appeal for lack of jurisdiction, finding that the petitioner was employed by the Army & Air Force Exchange Service, a nonappropriated fund instrumentality, and thus had no right to appeal her termination or alleged whistleblower reprisal to the Board.

Dixon-Johnson v. Office of Personnel Management, No. [2024-1716](#) (Fed

Cir. Nov. 13, 2024) (MSPB Docket No. DA-0842-22-0224-I-1). The court affirmed the Board's decision that affirmed OPM's final decision concluding that the petitioner was ineligible for an annuity supplement and that her high-three average salary under FERS was correctly computed, finding that the petitioner did not meet any of the statutory conditions for an annuity supplement and that the Board correctly concluded that to compute her high-three average salary, her salary amounts had to be weighted by the periods they were in effect.

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