

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

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GARY BESEMER,	)	DOCKET NUMBER
Appellant,	)	NY-0353-97-0072-I-1
	)	
v.	)	
	)	
UNITED STATES POSTAL SERVICE,	)	DATE: JAN 12, 1998
Agency.	)	
	)	
	)	
	)	

Ed Oliver, Bayport, New York, for the appellant.

Robert G. Doyle, Windsor, Connecticut, for the agency.

**BEFORE**

Ben L. Erdreich, Chairman  
Beth S. Slavet, Vice Chair  
Susanne T. Marshall, Member

**OPINION AND ORDER**

The appellant petitions for review of an initial decision that dismissed his restoration appeal for lack of jurisdiction. For the following reasons, we DENY the appellant's petition for review, REOPEN the appeal on our own motion pursuant to 5 C.F.R. § 1201.118, and AFFIRM the initial decision AS MODIFIED by this Opinion and Order, DISMISSING the appeal as untimely filed with no showing of good cause for the delay.

### BACKGROUND

In an appeal filed on October 20, 1996, the appellant asserted that the agency had denied him restoration beginning on May 9, 1993. Appeal File (AF), Tab 1a at 2-5. The appellant asserted that his rights were violated on his "original" request to return to duty in that he was not given proper appeal rights by the agency, and that he was denied a transfer after relocating, and had to "move back" over his doctors' recommendations. *Id.* at 3. The appellant also asserted that the agency's action was based on disability discrimination. *Id.* at 3.

The administrative judge (AJ) ordered the appellant to show that the Board had jurisdiction over his appeal by showing that he had suffered a compensable injury, and to show that his appeal was timely filed or that good cause existed for the delay. AF, Tab 2. In his response, the appellant asserted, among other things, that the effective date of the appealed action was "in a gray area," although the actual date of the adverse action and agency discrimination began on May 9, 1993. AF, Tab 5. The appellant claimed that good cause existed for tolling the time limit because, through due diligence, he recently discovered, on October 3, 1996, agency misconduct involving "person(s) in [a] management capacity [who] were removed from the Postal Service for misconduct and the destruction of evidence that were personally involved in the Appellant[']s case which was upheld after hearing." *Id.* He also asserted that there was good cause for any delay in filing because the agency engaged in unspecified continuing acts of discrimination. *Id.*

The agency moved to dismiss the appeal as untimely filed and based on the doctrine of res judicata, arguing that the appellant had filed a February 15, 1994 Board appeal of the agency's January 27, 1994 decision denying his request for restoration in New York, and that that appeal had been resolved in an April 22, 1994 settlement agreement that restored the appellant to duty and that was entered into the Board's record for enforcement purposes.

AF, Tab 6; *see* Appeal File in *Besemer v. U.S. Postal Service*, MSPB Docket No. NY-0353-94-0210-I-1, Tab 7, Subtab 4A. After the AJ ordered the appellant to show why his appeal should not be dismissed based on res judicata, *see* AF, Tab 7, the appellant asserted that the Board had jurisdiction over his appeal based on 5 C.F.R. § 1201.3(a)(7), disqualification of an employee or applicant because of a suitability determination, *see* AF, Tab 8.

In a February 20, 1997 initial decision, the AJ dismissed the appeal for lack of jurisdiction upon finding that res judicata applied. The AJ also found that the appellant's allegations of discrimination did not establish Board jurisdiction in the absence of an otherwise appealable matter. Because the appellant generally alleged that the agency had not complied with the settlement agreement, the AJ informed the appellant that he could file a petition for enforcement of the agreement.<sup>1</sup> The AJ did not reach the timeliness issue.

#### ANALYSIS

On review, the appellant asserts that he is appealing the agency's "unsuitability determination" that caused him to be restored in New York, rather than in Florida, where he had sought restoration first. Petition for Review File, Tab 5.<sup>2</sup> Although inartfully pled by the appellant below, it appears that he was

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<sup>1</sup> The appellant filed a petition for enforcement of the settlement agreement on April 23, 1997. *Besemer v. U.S. Postal Service*, MSPB Docket No. NY-0353-94-0210-C-1, Tab 1. In a July 28, 1997 initial decision that has since become a final Board decision, the AJ dismissed that petition as settled. *Id.*, Tab 8.

<sup>2</sup> The appellant's claim that the Board has jurisdiction over this appeal as a suitability appeal is without merit. The provisions of 5 C.F.R. part 731 apply only to competitive service and career SES positions. 5 C.F.R. § 731.101. Positions in the Postal Service are excepted service positions. *Daisy v. U.S. Postal Service*, 68 M.S.P.R. 15, 19 (1995). Therefore, the appellant has no right to appeal what he has alleged is an agency suitability determination, and the Board does not have jurisdiction over this appeal on that basis. *See Dixon v. U.S. Postal Service*, 69 M.S.P.R. 171, 174 (1995); *Lowry v. U.S. Postal Service*, 36

attempting to appeal, as a restoration appeal, the agency's July 26, 1993 determination that employment in the Suncoast District of Florida was not available "due to the large number of their employees who need accommodation." Appeal File in *Besemer v. U.S. Postal Service*, MSPB Docket No. NY-0353-94-0210-I-1, Tab 9, Subtab 2, Exhibit E. The appellant had apparently moved to Florida after the agency separated him from his position in New York based on a 1986 compensable injury. The parties stipulated that the appellant suffered a compensable injury in 1986, was separated by disability retirement in 1988 based on that compensable injury, received Office of Workers' Compensation Programs compensation in lieu of disability retirement benefits, and has partially recovered from his compensable injury. *See id.*, Tab 11.

The Board has jurisdiction over this appeal, and res judicata does not apply.

The AJ erred in dismissing this appeal for lack of jurisdiction. First, the doctrine of res judicata is not a basis to dismiss an appeal for lack of jurisdiction. Rather, it is a basis to dismiss an appeal over which the Board has jurisdiction. *See Mycka v. Office of Personnel Management*, 56 M.S.P.R. 675, 679 (1993). Second, a partially recovered employee may appeal to the Board for a determination of whether the agency is acting arbitrarily or capriciously in denying restoration. 5 C.F.R. § 353.304(c). The provisions of 5 C.F.R. part 353 cover an employee who was separated as a result of a compensable injury. 5 C.F.R. § 353.103(b). Here, the appellant was separated from his position as a result of compensable injury, he partially recovered from that injury, he requested restoration in Florida, and the agency denied that request. We therefore find that the Board has jurisdiction over this appeal. *See Hicks v. U.S. Postal Service*, 66 M.S.P.R. 137, 140-42 (1995).

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M.S.P.R. 540, 543 (1988); *see also Carroll v. U.S. Postal Service*, 72 M.S.P.R. 429, 430-31 (1996) (concurring opinion of Vice Chair Slavet).

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. *Peartree v. U.S. Postal Service*, 66 M.S.P.R. 332, 337 (1995). The doctrine precludes the parties from relitigating issues that were, or could have been, raised in the prior action, and is applicable 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. *Id.*

Because the second criterion is not satisfied here, it is unnecessary to address the first and third criteria. Regarding the second criterion, the decision dismissing the appellant's prior Board appeal as settled became final on June 8, 1994. Nevertheless, that decision was not a judgment "on the merits." As we held in *Vargo v. U.S. Postal Service*, 62 M.S.P.R. 156, 159 (1994), where the first appeal has been settled, the merits of the agency's action have not been examined, and the doctrine of res judicata cannot properly be applied.<sup>3</sup> Therefore, the AJ should not have dismissed this appeal based on res judicata.

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<sup>3</sup> The law of the case doctrine, however, would operate to prevent an appellant from relitigating issues that were resolved by the settlement agreement. *Vargo*, 62 M.S.P.R. at 159. In his 1994 appeal, the appellant indicated that the agency action he was appealing was the agency's January 27, 1994 denial of restoration. *Besemer v. U.S. Postal Service*, MSPB Docket No. NY-0353-94-0210-I-1, Tab 1 at 3. Under the terms of the April 22, 1994 settlement agreement, the appellant agreed to waive only "further appeal of this matter." *Id.*, Tab 14. We find that the denial of restoration in 1993 was not resolved by the parties' April 22, 1994 settlement agreement, and that the law of the case doctrine does not, therefore, bar the appellant from litigating the 1993 denial of restoration in this appeal. See *Vargo*, 62 M.S.P.R. at 159-60 (the law of the case doctrine does not bar an appellant from litigating issues that could have been raised in the prior settled action).

The appeal was untimely filed with no showing of good cause for the delay.

An appeal from a final or reconsideration decision that does not set an effective date must be filed within thirty-five days of the date of issuance of the decision. *See* 5 C.F.R. § 1201.22(b). This time limit applies to agency actions failing to restore former employees to employment following partial or full recovery from a compensable injury. *See id.* The appellant is appealing the agency's July 26, 1993 decision denying him restoration in Florida. Because the appellant did not, however, file an appeal of this action until October 20, 1996, he filed the appeal over three years late.

The appellant correctly asserted below that the agency did not give him notice of a Board appeal right when it issued its July 26, 1993 decision. AF, Tab 1a. When an agency issues a decision notice to an employee on a matter that is appealable to the Board, the agency must provide the employee with notice of his right to appeal to the Board. *See* 5 C.F.R. § 1201.21; *Jones v. U.S. Postal Service*, 65 M.S.P.R. 306, 309 (1994). As a general matter, an agency's failure to notify an employee of his or her Board appeal rights under circumstances requiring it to do so will justify a waiver of the filing deadline. *Gingrich v. U.S. Postal Service*, 67 M.S.P.R. 583, 587 (1995). Nevertheless, an appellant who should have been advised of his appeal rights, but was not, must show that he was diligent in filing an appeal after he learned that he could do so. *See id.* at 588.

The appellant has not shown that he was diligent in filing an appeal after learning that he could so. Although the appellant contended that he recently discovered agency misconduct that prompted him to file this appeal, he did not allege that he recently discovered his right to appeal the agency's action denying him restoration in July 1993, nor did he explain when he learned of his right to appeal that denial of restoration. *Cf. Gingrich*, 67 M.S.P.R. at 588 (finding the appellant diligent in filing an appeal after discovering his right to do so where it was undisputed that the appellant filed his appeal less than one month after he

found out that individuals who retired during the agency's nationwide restructuring may be able to contest their retirements). Moreover, by virtue of his February 15, 1994 Board appeal of the agency's action denying him restoration in New York, the appellant, who was represented by an attorney in that action, should have known of his right to appeal the denial of restoration in Florida.

Accordingly, the appellant has not met his burden of showing good cause for the delay in filing his petition for appeal of the denial of restoration in Florida in July 1993, *see* 5 C.F.R. § 1201.56(a)(2)(ii), and his appeal of that action is therefore dismissed as untimely filed.

### ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

### NOTICE TO THE APPELLANT REGARDING FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). 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 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

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Robert E. Taylor  
Clerk of the Board

Washington, D.C.