UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 51

Docket No. AT-0752-11-0694-I-1

Colin R. Ford,

Appellant,

v.

United States Postal Service,

Agency.

April 6, 2012

John Macon, Memphis, Tennessee, for the appellant.

Dana E. Morris, Esquire, Memphis, Tennessee, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision dismissing the appeal on the basis of res judicata and collateral estoppel. For the reasons set forth below, we GRANT the appellant's petition under 5 C.F.R. § 1201.115, VACATE the initial decision, and REMAND the appeal to the Atlanta Regional Office for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 On March 26, 2010, the agency issued a notice proposing to remove the appellant from his position as a preference eligible part-time regular Mail

Handler for Unsatisfactory Attendance. Initial Appeal File (IAF), Tab 18, Subtabs 4e, 4h. The agency alleged that the appellant had been absent without leave since December 22, 2009, and that he had failed to respond to the agency's directions to report to work and/or provide medical documentation to support his absence. *Id.*, Subtab 4h at 1.

¶3 The appellant's union filed a grievance on his behalf, which proceeded to arbitration. IAF, Tab 18, Subtabs 4d, 4f. On April 22, 2011, shortly after a hearing before the arbitrator, *see id.*, Subtab 4d, the appellant filed a Board appeal and requested a hearing, challenging what he alleged was a removal, although no decision letter had been issued. IAF, Tab 1 at 2, 8. The appellant also claimed harmful procedural error, gender and disability discrimination, and a violation of his veterans' preference rights. *Id.* at 3, 5.

¶4 On May 30, 2011, the arbitrator issued a decision in which she sustained the grievance based on a procedural error. IAF, Tab 18, Subtab 4d at 115. Specifically, the arbitrator found that the notice of proposed removal was defective because it did not inform the appellant of his right to meet with the plant manager in response to the proposed removal. *Id.* The arbitrator explained that, because of this deficiency, the agency did not issue a letter of decision regarding the proposed removal which, in turn, led to the appellant's not receiving notice of his Board appeal rights. *Id.* The arbitrator ordered the agency to rescind the notice of proposed removal and reinstate the appellant without back pay to his status prior to the issuance of the notice. *Id.*

¶5 On June 9, 2011, the administrative judge issued an initial decision in which he dismissed the appellant's removal appeal for lack of jurisdiction because the agency had not issued a decision on the appellant's proposed removal. *Ford v. U.S Postal Service*, MSPB Docket No. AT-0752-11-0603-I-1 (Initial Decision, June 9, 2011). The administrative judge docketed this

constructive suspension appeal based upon the appellant's allegation that the agency stopped paying him on March 26, 2010.[*] *Id.* at 2 n.3.

¶6 In response to the agency's motion to dismiss the instant appeal for lack of jurisdiction, the administrative judge issued an order informing the parties of the jurisdictional requirements in a constructive suspension appeal. IAF, Tabs 18, 19. The administrative judge ordered the appellant to submit evidence and argument amounting to a nonfrivolous allegation that his constructive suspension claim was within the Board's jurisdiction. IAF, Tab 19. Both parties filed responses to the order. IAF, Tabs 20, 21.

¶7 In an August 3, 2011 order, the administrative judge stated that, during a July 22, 2011 prehearing conference, in response to the administrative judge's question as to what "specifically" the appellant was appealing, the appellant's representative answered that the appellant was appealing the portion of the arbitrator's decision that did not award him back pay for the time he was placed on leave without pay after the issuance of the notice of proposed removal. IAF, Tab 25 at 2. The administrative judge then informed the parties that "although the Board might have had jurisdiction over a constructive suspension, it appeared this issue had already been litigated by the parties during the arbitration case and the appeal would be barred by issue or claim preclusion." *Id.* The administrative judge canceled the hearing and notified the parties that he would be issuing a decision relating to the topics of issue and claim preclusion. *Id.* The appellant filed a response to the administrative judge's order, arguing that the administrative judge should not apply collateral estoppel to the arbitrator's finding regarding back pay. IAF, Tab 26 at 2-4.

¶8 On August 11, 2011, the administrative judge issued an initial decision that dismissed the appeal as barred by res judicata. IAF, Tab 27, Initial Decision (ID)

---

[*] All documents in the record for the appellant's removal appeal were placed in the record for this appeal. *See* IAF, Tab 15 at 2.

at 4. In the alternative, he found that, even if res judicata does not bar the appeal, the appellant is precluded by collateral estoppel from relitigating the arbitrator's determination regarding back pay. *Id.* at 5.

¶9 The appellant has filed a petition for review in which he again argues that the administrative judge erred in giving collateral estoppel effect to the arbitrator's finding regarding back pay. Petition for Review File, Tab 2. The agency has not filed a response to the appellant's petition.

ANALYSIS

This appeal is not barred by res judicata.

¶10 Res judicata precludes 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. *Peartree v. U.S. Postal Service*, 66 M.S.P.R. 332, 337 (1995). The Board has held that it is inappropriate to apply res judicata to arbitration decisions involving Postal Service employees who have Board appeal rights because such employees are permitted to file both a grievance and a Board appeal from the same adverse action. *Milligan v. U.S. Postal Service*, 106 M.S.P.R. 414, ¶¶ 7, 16 (2007). As a preference eligible Postal Service employee, the appellant has Board appeal rights. 39 U.S.C. § 1005(a); 5 U.S.C. § 7511(a)(1)(B)(ii). Therefore, consistent with Board precedent, we find that this appeal is not barred by res judicata.

Collateral estoppel does not bar the appellant's back pay claim.

¶11 A party is collaterally estopped 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 precluded by the doctrine had a full and fair

opportunity to litigate the issue in the prior action. *McNeil v. Department of Defense*, 100 M.S.P.R. 146, ¶ 15 (2005).

¶12 Applying this standard, the administrative judge found that collateral estoppel precludes the appellant from litigating whether back pay was warranted because: (1) the issue in this appeal of whether the appellant is entitled to back pay is identical to the same issue involved in the arbitration; (2) the issue was actually litigated in the arbitration; (3) the determination of the issue in the arbitration was necessary to the resulting judgment; and (4) the party precluded (i.e., the appellant) was fully represented in the arbitration. ID at 5.

¶13 We disagree with the administrative judge's finding that the arbitrator's decision regarding back pay should be given preclusive effect in this appeal. The action before the arbitrator, i.e., the appellant's proposed removal, is significantly different from the action at issue here, i.e., the appellant's alleged constructive suspension following the issuance of the notice of proposed removal. Further, as a preference eligible employee of the Postal Service, the appellant's entitlement to back pay is governed by the Back Pay Act, 5 U.S.C. § 5596, and 5 C.F.R. § 550.805. *Donovan v. U.S. Postal Service*, 101 M.S.P.R. 628, ¶ 2 n.1, *review dismissed*, 213 F. App'x 978 (Fed. Cir. 2006). Under 5 C.F.R. § 550.805(c), the appellant's entitlement to back pay depends on whether he was ready, willing, and able to perform his duties during the period of the alleged constructive suspension. In her decision, however, the arbitrator did not make any findings regarding that issue. IAF, Tab 18, Subtab 4d. In fact, while the arbitrator found that back pay is unwarranted, she did not offer any explanation for this finding, nor did she include any discussion of the issue of back pay. *Id.* Given these circumstances, we find that the issue of back pay was not actually litigated in the arbitration and the application of collateral estoppel is therefore inappropriate in this case.

¶14 Based on his application of the doctrines of res judicata and collateral estoppel, the administrative judge did not adjudicate the underlying issue of

jurisdiction in this case. On remand, he shall determine whether the appellant has satisfied the requirements for Board jurisdiction over a constructive suspension appeal. If he finds that the appellant has met his burden of proof on this question, he must then decide the merits of the appellant's claim and adjudicate the appellant's affirmative defenses, after providing the appellant notice of the relevant elements and burdens of proof for those affirmative defenses. *See Slocum v. U.S. Postal Service*, 107 M.S.P.R. 129, ¶¶ 14-15 (2007).

ORDER

¶15 Accordingly, we REMAND the appeal to the Atlanta Regional Office for further adjudication in accordance with this Opinion and Order.

FOR THE BOARD:

_____

William D. Spencer
Clerk of the Board
Washington, D.C.