UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CLEVELAND B. HOLLOWAY, Appellant, v. DEPARTMENT OF THE INTERIOR, Agency.	DOCKET NUMBER DE-1221-98-0017-W-1 DATE: JUN 2 1999

Cleveland B. Holloway, Rock Springs, Wyoming, pro se.

Andrea S. V. Gelfuso, Esquire, Lakewood, Colorado, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant petitions for review of an initial decision that dismissed his individual-right-of-action (IRA) appeal as res judicata and, in the alternative, for lack of jurisdiction. For the reasons discussed below, we GRANT his petition; AFFIRM AS MODIFIED the initial decision with respect to its dismissal of his claims for expenses related to his purchase of a house and moving expenses; DISMISS as untimely filed his allegation of involuntary resignation; and VACATE the initial decision with respect to its dismissal of his claim for reinstatement and REMAND the matter for further proceedings consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant previously filed an IRA appeal and a compliance appeal. The prior IRA appeal (MSPB Docket No. DE-1221-95-0513-W-1) involved the appellant's directed reassignment on June 11, 1995, from a GS-11 Geologist position in Rock Springs, Wyoming, to another such position in Cody, Wyoming. *See* Initial Appeal File (IAF), Tab 10, Subtabs 1, 4b. The appeal was dismissed pursuant to a December 14, 1995 settlement agreement, which was entered into the record for enforcement purposes. *See* IAF, Tab 9, Subtabs 4f, 4q. The initial decision dismissing the appeal as settled became final on January 19, 1996, when the appellant did not file a petition for review.

¶3 Effective June 27, 1996, the appellant resigned in order to run as a Republican candidate for the U.S. Senate. *See* IAF, Tab 2 at 3-5, 11, Enclosures 1-6, Tab 9, Subtab 4f at 2 and Subtab 4m.

¶4 The appellant subsequently filed a compliance appeal (MSPB Docket No. DE-1221-95-0513-C-1), alleging that the agency breached the December 14, 1995 settlement agreement by refusing to: (1) reimburse him for expenses related to his purchase of a house in Cody; (2) reimburse him for moving expenses to Cody, which he anticipated incurring in early 1997; and (3) reinstate him to his former position after he lost the election. *See* Compliance Initial Decision (CID), IAF, Tab 9, Subtab 4f. The administrative judge (AJ) held that the agency was not in breach of any of its obligations under the settlement agreement. *Id.* The initial decision became final on September 17, 1997, when the Board denied the appellant’s petition for review.

¶5 In the meantime, the appellant filed a complaint with the Office of Special Counsel (OSC) regarding the agency's failure to reinstate him and other matters. IAF, Tab 2, Appellant's September, December 20, and December 30, 1996 memoranda to OSC. After OSC issued a July 29, 1997 notice informing him that

it had terminated its investigation without taking corrective action, *id.* at 10-11, the appellant timely filed the present IRA appeal, IAF, Tabs 1, 2.

¶6 A different AJ issued an order stating that the matters raised in the present appeal appeared to be the same as those previously raised in the compliance appeal, and providing the appellant an opportunity to submit evidence and argument to show why the appeal should not be dismissed as res judicata. IAF, Tabs 9,[1]12. The AJ subsequently issued an order stating that the appellant must specifically identify his alleged whistleblowing disclosures, the personnel actions he is challenging, and the issues he raised before OSC. The AJ also stated that the appellant must show that his appeal from his alleged involuntary resignation on June 27, 1996, was timely, and if not, that there was good cause for his filing delay. IAF, Tab 14.

¶7 After considering the parties' responses to the jurisdictional/timeliness orders, IAF, Tabs 13, 16, 17, the AJ dismissed the appeal, Initial Decision (ID) at 2, IAF, Tab 18. She found that the appellant's claims for expenses related to his purchase of a house, moving expenses, and reinstatement were barred from being relitigated by the doctrine of res judicata because they were previously raised in the compliance appeal in which a final decision was issued. *Id.* at 2. The AJ further found, alternatively, that the Board lacked jurisdiction over the appeal because the appellant failed to show that he engaged in any protected whistleblowing activity. *Id.*

¶8 The appellant has timely filed a petition for review, arguing that the AJ erred by dismissing his claims as res judicata because they were not resolved in the compliance appeal and that he was entitled to a hearing on his alleged involuntary

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[1] There are two Tab 9's in the record below, one in Volume 1 and the other in Volume 2: it appears that the AJ inadvertently created two Tab 9's. The Tab 9 cited here is part of Volume 1. The Tab 9 cited everywhere else in the Opinion and Order is part of Volume 2.

resignation.[2] Petition for Review (PR), Petition for Review File (PRF), Tab 1. The agency has timely responded in opposition to the appellant's petition. PRF, Tab 3.[3]

ANALYSIS

The appellant's claim for expenses related to his purchase of a house in Cody is dismissed for lack of jurisdiction.

¶9 The AJ held that the appellant's claim for expenses related to the purchase of a house in Cody is barred as res judicata. ID at 2. Without deciding whether that disposition was correct, we hold that the claim must be dismissed for lack of jurisdiction. In the now-final decision in the prior enforcement action, the AJ held that the agency was not in breach of its obligation under the settlement agreement to pay the appellant's costs associated with the purchase of a house in Cody, finding that the appellant had never presented a formal claim for reimbursement of those expenses; the AJ found that the agency stood ready and willing to pay such a claim upon proper presentation. IAF, Tab 9, Subtab 4f. To establish jurisdiction over the purchase costs claim in an IRA appeal, the appellant would have to show that the costs involved a "personnel action." *See* 5 U.S.C. § 2302(a)(2)(A); *Geyer v. Department of Justice*, 63 M.S.P.R. 13, 16-17 (1994). The only personnel action listed in the statute that could apply is a

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[2] With his petition for review, the appellant submitted copies of documents that were previously of record. He also submitted for the first time on review an October 13, 1993 article from a periodical. We have not considered the article because the appellant failed to show that it was unavailable before the record closed below despite his due diligence. 5 C.F.R. § 1201.115; *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980).

[3] After the record on review closed, the appellant filed a reply to the agency's response. PRF, Tab 4. We have not considered the reply because the Board's regulations do not provide for the filing of such a submission, and the appellant has not shown that it was based on any evidence that was not readily available before the record on review closed. 5 C.F.R. § 1201.114(i).

"decision concerning ... benefits," 5 U.S.C. § 2302(a)(2)(A)(ix), yet the appellant, despite being ordered by the AJ to identify the personnel actions he was challenging, IAF, Tab 14, still does not allege that he ever presented a claim for the purchase costs that the agency denied, *see* IAF, Tab 16. The appellant has therefore failed to allege that the purchase costs involve a "decision concerning ... benefits," since there has been no decision. This claim is dismissed for lack of jurisdiction.

The appellant's claim for moving expenses to Cody is dismissed for lack of jurisdiction.

¶10 In the now-final compliance initial decision, the AJ held that the appellant had no right under the pertinent regulations to recover any moving expenses incurred after he resigned. Collateral estoppel, or issue preclusion, is appropriate when (1) an issue is identical to that involved in the prior action, (2) the issue was actually litigated in the prior action, (3) the determination on the issue in the prior action was necessary to the resulting judgment, and (4) the party precluded was fully represented in the prior action. *Kroeger v. U.S. Postal Service*, 865 F.2d 235, 239 (Fed. Cir. 1988). We find that since it was decided in the prior appeal that the appellant has no right to recover moving expenses under the pertinent regulations, he is collaterally estopped from alleging that recovery of post-resignation moving expenses is a "benefit" covered by 5 U.S.C. § 2302(a)(2)(A)(ix). *See Marren v. Department of Justice*, 50 M.S.P.R. 369, 372 (1991) (the appellant failed to show that the agency's denial of official time involved a "personnel action" under section 2302(a)(2)(A)(ix) because he failed to show that such official time was a benefit granted by any law or regulation). None of the other personnel actions listed at 5 U.S.C. § 2302(a)(2)(A) even arguably applies. The appellant, therefore, has not made a nonfrivolous allegation that the moving expenses claim involves a "personnel action" upon which an IRA appeal may be based. *See Geyer*, 63 M.S.P.R. at 16-17.

The appellant's claim for reinstatement must be remanded for further adjudication.

¶11 The appellant's claim for reinstatement was raised but dismissed as beyond the Board's enforcement authority in the prior compliance appeal and was not adjudicated on its merits. Therefore, it is not barred by the doctrine of res judicata. *See Peartree v. U.S. Postal Service*, 66 M.S.P.R. 332, 338-39 (1995).

¶12 The appellant exhausted the OSC process regarding this claim, as noted above. In fact, the AJ in the compliance appeal correctly informed the appellant that he may file an IRA appeal regarding this claim after exhausting the OSC process. IAF, Tab 9, Subtab 4f at 4. In addition, a reinstatement is a "personnel action" under 5 U.S.C. § 2302(a)(2)(A)(v),[4] and an agency's "fail[ure] to take … a personnel action" may be challenged in an IRA appeal, 5 U.S.C. § 2302(b)(8). The remaining jurisdictional question is whether the appellant made a protected whistleblowing disclosure under 5 U.S.C. § 2302(b)(8). *See Geyer*, 63 M.S.P.R. at 16-17. Specifically, the appellant must establish that he disclosed information that he reasonably believed evidenced a violation of any law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. *See Smith v. Department of the Army*, 80 M.S.P.R. 311, ¶ 4 (1998).

¶13 The AJ concluded that the appellant failed to show that he made any protected disclosures under section 2302(b)(8). Her conclusion was not supported by any legal or factual findings, however. *See Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587, 589 (1980) (an initial decision must identify all material issues of fact and law, summarize the evidence, resolve issues of credibility, and include the administrative judge's conclusions of law and his legal reasoning, as well as the authorities on which that reasoning rests); IAF, Tabs 2,

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[4] The appellant's claim that the agency refused to "reinstate" him after he resigned might also involve a denial of an "appointment" or "reemployment," under 5 U.S.C. § 2302(a)(2)(A)(i) or (vii), respectively.

16 (the appellant described his alleged whistleblowing activity). For the reasons discussed below, we conclude that the AJ erred in finding, without a hearing, that the appellant failed to show that he made any protected disclosures under section 2302(b)(8).

¶14 The appellant contended below that he raised numerous whistleblowing disclosures dating back to 1986. IAF, Tab 16. He alleged, for instance, that in June 1987 he reported drug use in a government building. *Id.* at 2. He further alleged and showed that he previously raised this allegation to the OSC. *Id.* at 3; IAF, Tab 2 at 24. The record shows that, in 1987, the appellant reported to the agency's Inspector General and others marijuana use by agency employees at the workplace and that he named witnesses including himself who smelled marijuana at the workplace and observed or was aware of marijuana use by named agency employees outside of the workplace. IAF, Tab 10, Subtabs 4pp, 4ss, 4zz. The appellant did not correlate this allegation with a type of protected disclosure, but it is obvious that this disclosure involved "a violation of ... law." 5 U.S.C. § 2302(b)(8). A pro se appellant's pleadings are not held to the same standard as those drafted by attorneys in a judicial proceeding. *Smith,* at ¶ 7. We therefore find that the appellant raised a nonfrivolous allegation that he engaged in protected whistleblowing activity in 1987 by disclosing a violation of law.[5] *See Pashun v. Department of the Treasury,* 74 M.S.P.R. 374, 380-81 (1997) (the appellant's disclosures about hazing involving intoxicated employees could, if proven, constitute violations of law, rule or regulation, and the appellant thus raised a nonfrivolous allegation that he engaged in protected whistleblowing activity).

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[5] That an alleged disclosure was made prior to July 9, 1989, the effective date of the Whistleblower Protection Act, does not preclude an IRA appeal based on such a disclosure so long as the personnel action appealed was taken after July 9, 1989. *See Di Pompo v. Department of Veterans Affairs*, 62 M.S.P.R. 44, 48-49 (1994).

¶15 The appellant also alleged that a June 8, 1996 article in a local newspaper reported that he was transferred by the agency after disclosing "fraud, waste and abuse" and that as a result of this article his supervisor denied his request for leave and benefits. IAF, Tab 16 at 5, 11; IAF, Tab 2 at 12, 17, 21. He alleged and showed that this allegation was previously raised to the OSC. IAF, Tab 16 at 11; Tab 2 at 12, 29. The newspaper article does not describe the particulars of the appellant's alleged disclosures regarding "fraud, waste, and abuse." The Board has held, however, that one who is perceived as a whistleblower is entitled to the protections of the Whistleblower Protection Act, even if he has not actually made protected disclosures. *Juffer v. U.S. Information Agency*, 80 M.S.P.R. 81, ¶ 12 (1998); *Zimmerman v. Department of Housing & Urban Development*, 61 M.S.P.R. 75, 83 (1994). We therefore find that the appellant raised a nonfrivolous allegation that he was perceived as a whistleblower. *See id.*

¶16 For the reasons discussed, we conclude that the appellant raised nonfrivolous allegations that, if proven, could establish the Board's IRA jurisdiction over his alleged denial of reinstatement and that the AJ erred by dismissing this appeal without a jurisdictional hearing. *See Smith*, at ¶ 12; *Juffer*, at ¶ 18. Accordingly, we remand this matter for a hearing and further adjudication.

<u>The appellant's allegation of involuntary resignation is dismissed as untimely filed.</u>

¶17 Because the AJ did not address the alleged involuntary resignation in her initial decision, and because the record is sufficiently developed for the Board to resolve the matter on review, we do so here. *See Nelson v. U.S. Postal Service*, 79 M.S.P.R. 314, 319 (1998); *cf. Guba v. Department of the Army*, 70 M.S.P.R. 192, 195 (1996) (where the AJ failed to address an issue, and the record was insufficiently developed for the Board to resolve it on review, it was remanded).

¶18 An involuntary resignation, i.e., a constructive removal, is an otherwise appealable matter and, as such, need not satisfy the jurisdictional requirements for an IRA appeal. *See* 5 U.S.C. § 1221(b); *see generally Spiegel v. Department of*

the Army, 2 M.S.P.R. 140, 141 (1980) (an involuntary resignation is tantamount to a removal). To appeal the resignation as an otherwise appealable matter, however, the appellant must establish that it was indeed involuntary. *See Talley v. Department of the Army*, 50 M.S.P.R. 261, 263 (1991). We need not reach the jurisdictional issues because we dismiss the matter as untimely filed, for the reasons discussed below. *See Blaske v. Department of the Navy*, 76 M.S.P.R. 164, 167-68 (1997), *aff'd*, 168 F.3d 1322 (Fed. Cir. 1998) (Table).

¶19 With respect to an otherwise appealable matter, such as an alleged involuntary resignation, an appellant may either file a Board appeal directly or file a Board appeal after exhausting the OSC process. *See* 5 U.S.C. § 1221(b); 5 C.F.R. § 1209.5(b). Our review of the appellant's submissions below indicates that the appellant did not specifically raise before OSC an allegation that his alleged involuntary retirement was based on whistleblower reprisal. IAF, Tab 2, Appellant's September, December 20, and December 30, 1996 memoranda to OSC; IAF, Tab 16 at 7-8, 10. We therefore find that the appellant did not exhaust the OSC process regarding the alleged involuntary resignation, and that his appeal is not subject to the time limit under 5 C.F.R. § 1209.5(b).

¶20 Alternatively, this appeal, filed on September 26, 1997, was untimely with respect to the allegation of involuntary resignation on June 29, 1996, because it was filed more than a year after the expiration of the 30-day time limit on July 29, 1996. 5 C.F.R. § 1201.22(b). The AJ informed the appellant of this timeliness issue and afforded him an opportunity to submit evidence and argument to show that the appeal was timely filed with respect to this matter or that there was good cause for the filing delay. IAF, Tab 14. In response, the appellant contended that the time limit should be waived because the agency failed to inform him of the time limit. IAF, Tab 16 at 8.

¶21 An employee-initiated action, such as a resignation, is presumed to be voluntary, and voluntary actions are not appealable to the Board. *See, e.g.*,

Blaske, 76 M.S.P.R. at 167. Consequently, an employee is not entitled to notice of appeal rights from such a presumptively voluntary action, unless the agency has reason to know that it might be involuntary. *See, e.g., id.* Here, the appellant chose to resign after the agency correctly informed him that retaining his federal employment while running for partisan political office would subject him to prosecution and possible removal for violation of the Hatch Act. *See* 5 U.S.C. § 7323(a)(3) (precluding federal employees from running for partisan political office); *Special Counsel v. Dominguez*, 55 M.S.P.R. 652, 653 (1992) (employee prosecuted by OSC and removed from his position for having run for partisan political office); IAF, Tab 2 at 3-5, 11, Enclosures 1-6, Tab 9, Subtab 4f at 2 and Subtab 4m. A resignation is not involuntary merely because it is tendered to avoid a threatened removal. *See Schultz v. U.S. Navy*, 810 F.2d 1133, 1136-37 (Fed. Cir. 1987); *Blaske*, 76 M.S.P.R. at 168. Although the appellant's resignation letter states that it was not a "voluntary resignation," it further states that he correctly understood it to be "a mandatory resignation due to political activity and federal guidelines." IAF, Tab 2, Enclosures 4, 5. Thus, the record shows that the appellant made an informed choice to resign, and he has not alleged or shown any basis for finding that the agency had reason to know that his resignation might be involuntary. *See Blaske*, 76 M.S.P.R. at 169; *cf. Gingrich v. U.S. Postal Service*, 67 M.S.P.R. 583, 586-87 (1995) (the agency was obligated to provide notice of appeal rights where the appellant asked that his retirement documents reflect that it was "caused by breach of salary and benefits contract and duress due to lack of information from the restructuring to protect my rights"). We therefore find that the agency was not obligated to provide him with a notice of appeal rights with respect to his resignation. *See Blaske*, 76 M.S.P.R. at 169. Nor has the appellant alleged or shown that he was diligent in attempting to discover his appeal rights or that there was otherwise good cause for his filing delay of more than a year. *See id.* at 169-70. Accordingly, we dismiss the matter

as untimely filed. *See id.* at 171. Because there are no disputed facts regarding the timeliness issues, the appellant is not entitled to a hearing. *See Persons v. U.S. Postal Service*, 75 M.S.P.R. 428, 433 (1997).

ORDER

¶22 Accordingly, we REMAND this appeal for further proceedings regarding the appellant's claim for reinstatement, as discussed above. If the AJ finds on remand that the Board has jurisdiction over the matter, she shall adjudicate its merits.

FOR THE BOARD: _____

Robert E. Taylor
Clerk of the Board

Washington, D.C.