

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

100 M.S.P.R. 442

JOHN A. MERZWEILER,
Appellant,

DOCKET NUMBER
SF-1221-04-0707-W-1

v.

OFFICE OF PERSONNEL
MANAGEMENT,
Agency.

DATE: November 2, 2005

John A. Merzweiler, Huntington Beach, California, pro se.

Patrick Jennings, Washington, D.C., for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Barbara J. Sapin, Member

OPINION AND ORDER

¶1 The appellant petitions for review of the November 22, 2004 initial decision dismissing his appeal as barred by res judicata. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.118, however, VACATE the initial decision, and DISMISS the appeal for lack of Board jurisdiction.

BACKGROUND

¶2 The Postal Service removed the appellant from his position as a Custodial Laborer for mental inability to meet the requirements of his position, and the appellant appealed his removal to the Board. *Merzweiler v. U.S. Postal Service*, 69 M.S.P.R. 274, *aff'd*, 98 F.3d 1359 (Fed. Cir. 1996) (Table). The record of that appeal shows that the Postal Service “removed [the appellant] for this reason so as to attempt to secure him a disability retirement, and that its application to the Office of Personnel Management (OPM) on his behalf was successful.” *Id.* at 276. After the annuity was approved, the Postal Service cancelled the removal and the administrative judge (AJ) dismissed the appellant’s appeal of the removal action. *Id.* The appellant petitioned the Federal Circuit for review, the Board requested and was granted a remand, and shortly thereafter “OPM cancelled the disability annuity it had awarded the appellant, solely because the [Postal Service] had cancelled the removal.”¹ *Id.* at 276-77. “The [Postal Service] then ‘reactivated’ the removal action, as of its original effective date,” and the Board affirmed the removal. *Id.* After the Postal Service “reactivated” the appellant’s removal, OPM reinstated his disability retirement annuity. Initial Appeal File (IAF), Tab 4.

¶3 In the prior appeal, the Board found no merit to the appellant’s argument “that because the agency cancelled the removal, and OPM cancelled the retirement and stated that the agency ‘should restore him to [its] rolls’ he is entitled to retroactive reinstatement to his former job.” *Merzweiler*, 69 M.S.P.R. at 277. This action is an attempt to argue the same theory under the rubric of an individual right of action (IRA) appeal, by contesting the Office of Special Counsel’s (OSC) decision that it is without jurisdiction to pursue the appellant’s

¹ Cancellation of the appellant’s removal eliminated one of the prerequisites for an agency-filed disability retirement application, namely that “the agency has issued a decision to remove the employee.” 5 C.F.R. § 844.202(a)(1).

complaint which alleged that OPM violated merit system principles by failing to ensure his reinstatement following the Postal Service's rescission of his removal. IAF, Tab 1 at 8; *see* 39 U.S.C. § 410 (with certain limited exceptions, the provisions of Title 5, United States Code, do not apply to the Postal Service).

¶4 The AJ issued an acknowledgment order which noted the appellant's jurisdictional burden with respect to an IRA cause of action, IAF, Tab 2 at 2, but the appellant replied that "[w]histleblowing is not an issue here," IAF, Tab 3. Rather than attempting to establish IRA jurisdiction over his appeal, the appellant continued to argue that OSC and the Board were failing to enforce merit system principles by allowing the Postal Service to cancel his removal without reinstating him and by condoning OPM's refusal to order his reinstatement. *Id.* OPM responded that the appeal should be dismissed on the basis of res judicata. IAF, Tab 4 at 1.

¶5 Noting that the Board had no jurisdiction to entertain the appellant's apparent complaint against OSC, the AJ issued a show cause order stating that unless the appellant made a nonfrivolous allegation of Board jurisdiction, his appeal would be dismissed. IAF, Tab 5. The appellant responded that his complaint was against OPM for refusing to enforce its instruction to the agency to reinstate the appellant following OPM's denial of the disability retirement application filed by the Postal Service, and argued that Chapter 12 of Title 5, United States Code, provides Board jurisdiction over OPM. IAF, Tab 6.

¶6 The AJ found that because "the appellant has previously appealed and received decisions on the precise issue he is attempting to reappeal here[,] the appellant is barred by res judicata from challenging the same personnel action under a different theory. IAF, Tab 7, ID at 2-3. In a timely petition for review (PFR), the appellant continues to argue that OPM violated merit system principles when it failed to enforce its instruction to the agency to reinstate the appellant. Petition for Review File (PFRF), Tab 1. OPM filed a timely response arguing the appellant's PFR does not meet the review criteria. PFRF, Tab 4.

ANALYSIS

¶7 The doctrines of res judicata and collateral estoppel are bases to dismiss an appeal over which the Board has jurisdiction. *Mycka v. Office of Personnel Management*, 56 M.S.P.R. 675, 679 (1993). However, when jurisdiction is lacking, with limited exceptions not applicable here, these doctrines are not an appropriate basis for the dismissal of an appeal. *See, e.g., Noble v. U.S. Postal Service*, 93 M.S.P.R. 693, ¶ 11 (2003) (“Collateral estoppel may be grounds for dismissing an appeal for lack of jurisdiction if a jurisdictional determination in a prior decision is afforded collateral estoppel effect and the appellant provides no other valid basis of Board jurisdiction.”).

¶8 In this appeal, the appellant is essentially asking the Board to order corrective action with respect to an alleged prohibited personnel practice, namely, OPM’s alleged failure to enforce merit system principles by refusing to ensure his reinstatement after the U.S. Postal Service rescinded his removal.² IAF, Tab 1. Because “the Board has jurisdiction to entertain such allegations only in the context of a ‘corrective action proceeding’ brought by the Special Counsel” pursuant to 5 U.S.C. § 1214, the Board lacks jurisdiction to consider the appellant’s claims in this appeal. *Perez v. Army and Air Force Exchange Service*, 680 F.2d 779, 787-88 (D.C. Cir. 1982); *Wren v. Department of the Army*, 2 M.S.P.R. 1, 2 (1980) (5 U.S.C. § 2302(b) is not an independent source of Board jurisdiction), *aff’d*, 681 F.2d 867, 871-73 (D.C. Cir. 1982). Accordingly, while the AJ may have improperly relied on the doctrine of res judicata as the grounds to dismiss this appeal, we dismiss the appellant’s appeal on jurisdictional grounds.

² The appellant is apparently claiming that OPM’s failure to ensure his reinstatement violates the merit system principles enumerated in 5 U.S.C. § 2301 and thereby constitutes a personnel action prohibited by 5 U.S.C. § 2302(b)(12) (it is a prohibited personnel practice “to take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit systems principles in section 2301 of this title”).

ORDER

¶9 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

**NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS**

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. 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 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, <http://fedcir.gov/contents.html>.

Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.