

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

**2010 MSPB 61**

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Docket No. AT-0353-09-0770-I-1

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**Marsha L. Payton,  
Appellant,**

**v.**

**Department of Homeland Security,  
Agency.**

April 1, 2010

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Marsha L. Payton, Holly Hill, Florida, pro se.

Rebecca A. Laws, Esquire, Miami, Florida, for the agency.

**BEFORE**

Susan Tsui Grundmann, Chairman  
Anne M. Wagner, Vice Chairman  
Mary M. Rose, Member

**OPINION AND ORDER**

¶1 The appellant petitions for review of the initial decision dismissing her restoration appeal for lack of jurisdiction. For the following reasons, we GRANT the appellant's petition for review and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still DISMISSING the appeal for lack of jurisdiction.

**BACKGROUND**

¶2 The appellant was injured on September 30, 2003, and on December 1, 2003, the Office of Workers' Compensation Programs (OWCP) accepted her

claim for compensation for that injury. Initial Appeal File (IAF), Tab 1 at 65. On September 15, 2004, she was removed from her position based on five charges of misconduct. *See Payton v. Department of Homeland Security*, MSPB Docket No. AT-0752-05-0043-I-1, slip op. at 1-2 (Initial Decision, Feb. 10, 2005) (Removal ID), *petition for review denied*, [99 M.S.P.R. 669](#) (2005) (Table). She appealed her removal to the Board, but that action, along with all five charges, was sustained in an initial decision that became final when the appellant's petition for review of that decision was denied. Removal ID; *Payton*, [99 M.S.P.R. 669](#).

¶3 The appellant filed a July 8, 2009 appeal alleging that the agency had repeatedly failed to restore her to duty. IAF, Tab 1 at 1, 16. Although the appellant referred to multiple occasions on which the agency failed to restore her to work, she appeared to be specifically challenging only the most recent of these occasions, i.e., the agency's failure to restore her following a medical examination on June 1, 2009. *See id.*, Tab 1 at 21, 73, 75-76; *id.*, Tab 8 at 4. According to the "employer discharge summary" that was based on that examination, the appellant was described as "cleared to perform all job functions associated with regular job duties." *Id.*, Tab 1 at 21.

¶4 The administrative judge to whom the appeal was assigned issued an acknowledgment order noting that the appellant appeared to have been removed because of misconduct, rather than because of a compensable injury, advising her that she had the burden of proving jurisdiction over her appeal, and providing her with an opportunity to make nonfrivolous allegations sufficient to avoid dismissal of her appeal for lack of jurisdiction. IAF, Tab 2 at 2. After considering the parties' responses to the order, and without holding the hearing the appellant had requested, the administrative judge issued an initial decision dismissing the appeal for lack of jurisdiction. Initial Appeal File (IAF), Tab 11, Initial Decision (ID) at 1, 3; *see id.*, Tab 6 at 1. In doing so, she found that the appellant had

“made no claim that she was separated because of a compensable injury.” ID at 3.

¶5 In her petition for review of the initial decision, the appellant asserts that she was separated because of a compensable injury, and that the Board therefore has jurisdiction over her appeal. Petition for Review File (PFRF), Tab 1 at 3, 5-6. The agency responds in opposition to the appellant’s petition. *Id.*, Tab 3.

#### ANALYSIS

¶6 Under [5 C.F.R. § 353.301](#)(b), an employee who is separated because of a compensable injury, and whose full recovery takes longer than one year from the date she became eligible for compensation, is entitled to priority consideration for restoration to the position she left or an equivalent one, provided she applies for restoration in a timely manner. Such an employee may appeal to the Board if she believes that her reemployment rights were violated because of the employment of another person. [5 C.F.R. § 353.304](#)(b); *see* [5 C.F.R. §§ 330.204](#), 330.209. The Board has jurisdiction over the appeal if the appellant has made nonfrivolous allegations that: (1) She was separated because of a compensable injury; (2) she fully recovered more than one year after the date she became eligible for OWCP benefits; (3) she requested restoration within 30 days after the cessation of OWCP compensation; and (4) the agency violated her reemployment priority rights. *See, e.g., Nevins v. U.S. Postal Service*, [107 M.S.P.R. 595](#), ¶ 11 (2008).

¶7 As noted above, the appellant suffered a compensable injury and she presented evidence that she fully recovered more than one year later. *See* IAF, Tab 1 at 21, 65. We note further that the administrative judge erred in finding that the appellant did not claim that she was separated because of a compensable injury. The appellant referred below to one of the five charges on which her removal was based, i.e., the charge that she was absent without leave (AWOL); she asserted that the agency placed her in an AWOL status as she was recovering from her injuries, IAF, Tab 1 at 3; *id.*, Tab 9 at 2; and she stated further that she

“was removed from employment as [she] was recovering from an injury sustained at work,” IAF, Tab 1 at 4. The appellant also claimed, in relation to the AWOL charge sustained in her September 2004 removal, that she “was ill & recovering from two injuries 2003/2004.” IAF, Tab 7 at 2.

¶8 An employee who has been separated is entitled to the reemployment priority rights described above if her separation either resulted from, or was substantially related to, a compensable injury. *See, e.g., Chamberlain v. Department of the Navy*, [50 M.S.P.R. 626](#), 631 (1991); [5 C.F.R. §§ 353.103\(b\), 353.108](#). However, an employee who has been removed for cause, other than for a compensable injury, is not entitled to restoration, and cannot appeal any failure of restoration to the Board. *Frye v. U.S. Postal Service*, [102 M.S.P.R. 695](#), ¶ 9 (2006); [5 C.F.R. § 353.302](#). A valid reason for separation, unrelated to a compensable injury, precludes restoration rights, even if the separation was also related to a compensable injury. *Mobley v. U.S. Postal Service*, [86 M.S.P.R. 161](#), ¶ 7 (2000) (citing *New v. Department of Veterans Affairs*, [142 F.3d 1259](#), 1265 (Fed. Cir. 1998)).

¶9 As we have indicated above, the appellant’s 2004 removal was based on four charges in addition to the AWOL charge mentioned above. Removal ID at 1-2. That is, it was based in part on charges that the appellant recklessly disregarded the safety of others, was insubordinate, failed to follow instructions, and engaged in unprofessional conduct. *Id.* Although, as noted above, the appellant alleged that the AWOL charge was related to her compensable injury, she did not claim in the instant appeal that any of the four other charges on which her removal was based were related to that injury.\*

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\* The charge of insubordination was based on the appellant’s failure to attend a meeting. *See* Removal ID at 4. The appellant claimed, in her removal appeal, that she should not have been required to report to the meeting in light of her compensable injury. *See id.* She has made no such claim in the instant appeal, however. Moreover, even if she had, the allegation would not affect our disposition of this appeal, since the

¶10 The appellant has asserted that the agency “bogusly” removed her after she was injured, implying that the charges on which the agency stated that it was removing her were not the real reasons for the action, and that the agency instead removed her because it did not want to retain an injured employee. *See, e.g.,* IAF, Tab 9 at 3. However, as noted above, the charges on which she was removed were sustained on appeal, i.e., found to be proper and adequate bases for her removal. Moreover, any attempt by the appellant to challenge the charges or the removal itself would be precluded under the doctrine of res judicata. *See Peartree v. U.S. Postal Service*, [66 M.S.P.R. 332](#), 337 (1995) (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).

¶11 Under the circumstances described above, we find that the appellant’s assertions, even if substantiated, would not establish that her removal was based only on reasons related to her compensable injury. Accordingly, we concur in the administrative judge’s conclusion that the appellant has failed to establish jurisdiction over her appeal. The appeal is DISMISSED.

#### ORDER

¶12 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\(c\)](#)).

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appellant has made no attempt to relate any of the remaining three charges on which her removal was based to her compensable injury.

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, [www.cafc.uscourts.gov](http://www.cafc.uscourts.gov). 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:

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