

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

2010 MSPB 184

Docket No. DE-1221-09-0508-W-1

**Barry D. Inman,
Appellant,**

v.

**Department of Veterans Affairs,
Agency.**

September 8, 2010

Barry D. Inman, Wichita, Kansas, pro se.

Kent E. Duncan, Esquire, Saint Louis, Missouri, for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant has filed a petition for review of an initial decision dismissing his individual right of action (IRA) appeal as barred under the doctrine of res judicata and, alternatively, as untimely filed. For the reasons set forth below, we DENY the petition for review for failure to meet the review criteria under [5 C.F.R. § 1201.115\(d\)](#). However, we reopen the appeal on our own motion under [5 C.F.R. § 1201.118](#), and AFFIRM the initial decision AS MODIFIED by this Opinion and Order, still DISMISSING the appeal as untimely filed.

BACKGROUND

¶2 In August 2007, the appellant filed a complaint with the Office of Special Counsel (OSC) alleging that the agency retaliated against him for his whistleblowing – disclosing to the agency’s Under Secretary for Benefits that agency managers Daniel Umlauf and Michael Walcoff manipulated the hiring process for the GS-14 position of Veterans Service Center Manager (VSCM) in Wichita, Kansas, in order to hire Karl Pfanzelter – by failing to select the appellant for the position. *Inman v. Department of Veterans Affairs*, MSPB Docket No. DE-1221-08-0235-W-1, Initial Appeal File (IAF1), Tab 5, Subtab 1. By letter dated December 21, 2007, OSC notified the appellant that it was closing its inquiry into his allegations of whistleblower reprisal and informed him of his Board appeal rights. *Id.*, Tab 1.

¶3 On February 22, 2008, the appellant timely filed his first IRA appeal with the Board (*Inman I*), alleging that the agency did not select him for the VSCM position in reprisal for whistleblowing. *Id.* The administrative judge found that the appellant had made a non-frivolous allegation of jurisdiction so as to be entitled to a hearing, and issued an initial decision on June 12, 2008, that dismissed the appeal without prejudice to automatic refiling on August 14, 2008, to allow the parties sufficient time to complete discovery before proceeding to a hearing. IAF1, Tab 11. Accordingly, the appellant’s IRA appeal was automatically refiled on August 14, 2008. *Inman v. Department of Veterans Affairs*, MSPB Docket No. DE-1221-08-0235-W-2, Initial Appeal File (IAF2), Tab 1.

¶4 Following a hearing, the administrative judge issued a February 2, 2009 initial decision that denied the appellant’s request for corrective action, finding that the agency established by clear and convincing evidence that it would have selected Pfanzelter, and not the appellant, despite the appellant’s whistleblowing. IAF2, Tab 24. The Board denied the appellant’s petition for review of the initial decision by Final Order, and the initial decision became the final decision of the

Board. *Inman v. Department of Veterans Affairs*, [112 M.S.P.R. 67](#) (2009) (Table).

¶5 In November 2007, while the appellant's August 2007 complaint was pending before OSC, the appellant filed another complaint with OSC. *Inman v. Department of Veterans Affairs*, MSPB Docket No. DE-1221-09-0508-W-1, Initial Appeal File (IAF3), Tab 1 at 4; Tab 8, Exhibit 2, Exhibit 3 at 3, 5. In response to OSC's request for further information regarding the allegations set forth in his complaint, the appellant alleged that the agency failed to issue him performance evaluations for Fiscal Years (FY) 2006 and 2007 in reprisal for whistleblowing. IAF3, Tab 8, Exhibit 3 at 3. By letter dated June 6, 2008, OSC notified the appellant that it was closing its inquiry into his allegation of whistleblower reprisal and informed the appellant of his Board appeal rights. *Id.*, Exhibit 6. In the letter, OSC also informed the appellant that it would investigate the agency's failure to issue him performance evaluations as possible violations of [5 U.S.C. § 2302\(b\)\(12\)](#). *Id.*

¶6 By letter dated September 1, 2009, OSC informed the appellant that it was closing its investigation into his complaint that the agency had violated [5 U.S.C. § 2302\(b\)\(12\)](#) by failing to issue him performance evaluations for FY 2006 and 2007, based on OSC's belief that the agency had provided full corrective action by issuing those performance evaluations in June and July 2008 at OSC's request. IAF3, Tab 8, Exhibit 8.

¶7 On September 21, 2009, the appellant filed this IRA appeal, alleging that the agency failed to issue him performance evaluations for FY 2006 and 2007 in reprisal for whistleblowing. IAF3, Tab 1. On his Board appeal form, the appellant alleged that he had been denied "several" promotions since 2006 because he was unable to explain why he did not have a current performance evaluation. *Id.* at 6.

¶8 The administrative judge issued an Order to Show Cause informing the appellant that he appeared to be barred by res judicata from raising the issue of

the agency's failure to provide him performance evaluations for FY 2006 and 2007. IAF3, Tab 10. The Order also informed the appellant that the appeal appeared to be untimely. *Id.*

¶9 After receiving responses from the agency and the appellant, IAF3, Tabs 10 and 12, the administrative judge issued an initial decision that dismissed the appeal as barred by the doctrine of res judicata, finding, inter alia, that the cause of action in this appeal is the same as the cause of action in the appellant's first appeal, i.e., his non-selection for promotion. IAF3, Tab 14. In the alternative, the administrative judge found that the appeal must be dismissed because it was untimely filed. *Id.*

¶10 The appellant has filed a petition for review of the initial decision and the agency has filed a response to the petition for review. *Inman v. Department of Veterans Affairs*, MSPB Docket No. DE-1221-09-0508-W-1, Petition For Review File (PFR File), Tabs 1, 3.

ANALYSIS

¶11 The Board will grant a petition for review only when significant new evidence is presented or it is shown that the administrative judge made an error interpreting a law or regulation. *Lopez v. Department of the Navy*, [108 M.S.P.R. 384](#), ¶ 16 (2008); [5 C.F.R. § 201.115](#). In his petition, the appellant argues the merits of his allegation that the agency's failure to issue his performance appraisals for FY 2006 and 2007 constitutes whistleblower reprisal. PFR File, Tab 1. He fails to allege any specific error in the administrative judge's finding that the doctrine of res judicata precludes this IRA appeal or his finding that the appellant untimely filed this appeal. The appellant therefore fails to explain why the challenged legal determination is incorrect or to identify specific evidence in the record that demonstrates error. *See Weaver v. Department of the Navy*, [2 M.S.P.R. 129](#), 133 (1980), *review denied*, [669 F.2d 613](#) (9th Cir. 1982) (*per curiam*). Accordingly, we deny the petition for review.

The administrative judge erred by dismissing this appeal based on res judicata.

¶12 We reopen the appeal on our own motion under [5 C.F.R. § 1201.118](#), however, to address the administrative judge's finding that the appeal is barred by application of res judicata.

¶13 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). 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. *Id.*

¶14 The administrative judge found that all three criteria for applying the doctrine of res judicata were met in this case. IAF3, Tab 14 at 3-4. With respect to the first two criteria, the administrative judge found that: (1) the Board was the proper forum for the appellant's IRA appeal related to his non-selection for the VSCM position; and (2) when the Board denied the appellant's petition for review in *Inman I*, the administrative judge's decision on the merits of that IRA appeal became the Board's final decision. *Id.* at 3. As for the third criteria for applying res judicata, the administrative judge found that the parties in both *Inman I* and this appeal are the same and the cause of action, the appellant's non-selection for promotion, is the same. *Id.*

¶15 The administrative judge erred in finding that the cause of action in *Inman I* is the same as the cause of action in this appeal. While the cause of action in *Inman I* was the agency's failure to select the appellant for the VSCM position, the cause of action in this appeal is the agency's failure to provide the appellant performance evaluations for FY 2006 and 2007. These are different causes of action. Accordingly, we find that the appellant's allegations in this appeal are not barred by res judicata.

The administrative judge correctly dismissed this appeal as untimely filed.

¶16 An appellant must file an IRA appeal within 60 days of receipt of OSC's written notification that it is terminating its investigation into the alleged whistleblowing retaliation. [5 U.S.C. § 1214\(a\)\(3\)\(A\)\(ii\)](#); [5 C.F.R. § 1209.5\(a\)\(1\)](#). Here, OSC's June 6, 2008 letter notified the appellant that OSC had terminated its investigation into his allegations of whistleblower reprisal. IAF3, Tab 8, Exhibit 6. Although OSC's letter also notified the appellant that OSC was continuing to investigate whether the agency had violated [5 U.S.C. § 2302\(b\)\(12\)](#) by failing to issue the performance evaluations, it clearly stated that the [5 U.S.C. § 2302\(b\)\(8\)](#) (whistleblowing) investigation had ended. *Id.* It also clearly explained his right to file an action with the Board concerning his whistleblower claim within 65 days after the date of that letter. *Id.* Thus, the fact that OSC ended its (b)(12) investigation on September 1, 2009, based on its finding that the agency had taken appropriate corrective action by issuing the evaluations, does not show that OSC ever reopened its (b)(8)-related investigation so as to make this IRA appeal timely filed. Accordingly, the AJ correctly found that this IRA appeal was untimely because it was filed approximately fifteen months after OSC informed the appellant that it was concluding its investigation and he had the right to file an IRA appeal with the Board.

¶17 Accordingly, we affirm the dismissal of this appeal as untimely filed.

ORDER

¶18 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, 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:

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