

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

**2011 MSPB 37**

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Docket No. SF-0831-10-0264-I-1

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**Facundo S. Encarnado,  
Appellant,**

**v.**

**Office of Personnel Management,  
Agency.**

March 9, 2011

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Rufus F. Nobles, Zambales, Philippines, for the appellant.

Karla W. Yeakle, Washington, D.C., 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 challenging the final decision of the Office of Personnel Management (OPM) that denied his request to make a deposit pursuant to the Civil Service Retirement System (CSRS) for federal civilian service he performed with the Department of the Navy (Navy) from 1971 to 1985. For the reasons explained below, we deny the appellant's petition for review and DISMISS his appeal based on res judicata and collateral estoppel.

## BACKGROUND

¶2 The material facts are undisputed. The Navy employed the appellant at the U.S. Naval Regional Medical Center in Subic Bay, Philippines under an excepted indefinite appointment from December 1, 1971 through October 4, 1980, and then (through a promotion) from October 5, 1980 to February 1, 1985, when he was terminated based on his disability/physical inability to perform the duties of his position. Initial Appeal File (IAF), Tab 4, Subtab 6. The Standard Form (SF) 50 documenting his termination reflects that he was entitled to 13 months of severance pay based on his 13 years, two months, and one day of “creditable service with the US Forces, Phil[ippines,]” and a lump sum payment for accrued sick leave in accordance with terms of a collective bargaining agreement. *Id.* In section 8 of the termination SF 50, the applicable retirement system is shown as “other”, and section 35 reflects that the appellant’s position was in the excepted service. *Id.* On the SF 50 documenting the appellant’s excepted-indefinite appointment effective December 1, 1971, section 10 pertaining to “Retirement” is blacked out. IAF, Tab 4, Subtab 6. However, on the SF 50 documenting the appellant’s promotion effective October 5, 1980, as well as SF 50s documenting reassignments effective in 1973 and 1981, the applicable retirement system is shown as either “None” or “Other.” *Id.*<sup>1</sup>

¶3 At some point, the appellant applied for a retirement annuity under the CSRS. In a reconsideration decision dated April 30, 2001, OPM affirmed its initial decision finding that the appellant was not entitled to an annuity under the CSRS. IAF, Tab 4, Subtab 3. The appellant filed an appeal with the Board challenging OPM’s April 2001 final decision finding him ineligible for a CSRS

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<sup>1</sup> The record further reflects that the appellant also served under an indefinite “FEPI” appointment effective June 15, 1964, which ended when he was separated under a reduction in force effective June 10, 1971. IAF, Tab 4, Subtab 3. “FEPI” stands for “Filipino Employment Personnel Instructions.” See *Quiocson v. Office of Personnel Management*, [490 F.3d 1358](#), 1359 (Fed. Cir. 2007).

annuity. See *Encarnado v. Office of Personnel Management*, MSPB Docket No. SE-0831-01-0274-I-1 (Initial Decision, August 30, 2001) (*Encarnado-1*). The Board's administrative judge affirmed OPM's decision, finding that none of the appellant's federal service was in a position covered by the CSRS. *Id.* The August 30, 2001 initial decision became the Board's final decision when the Board denied the appellant's petition for review on May 29, 2002. *Encarnado v. Office of Personnel Management*, [91 M.S.P.R. 666](#) (2002) (Table). On February 26, 2003, the Board's reviewing court dismissed the appellant's petition for review of the Board's final decision. *Encarnado v. Office of Personnel Management*, 57 F. App'x 433 (Fed. Cir. 2003) (NP).<sup>2</sup>

¶4 The appellant later completed an Application to Make Deposit or Redeposit into the CSRS fund for his service from December 1, 1971 to February 1, 1985. IAF, Tab 4, Subtab 5. In an initial decision letter dated March 30, 2007, OPM informed the appellant that it was denying his application to make a deposit under the CSRS. *Id.*, Subtab 4. By letter dated June 16, 2008, the appellant sought "further reconsideration of [his] case," referring to OPM's denial of his request to make a deposit into the CSRS fund, and by letter to OPM dated November 25, 2008, he requested a final decision on his request to make a service deposit. *Id.*, Subtab 3. OPM responded to the appellant in a letter dated February 17, 2009, referencing the November 25, 2008 reconsideration request as well as its April 30, 2001 final decision finding the appellant ineligible for a CSRS annuity, and stated: "This office can no longer continue to respond to the same question over and over. **This is the final decision of the Office of Personnel Management regarding this matter.**" *Id.* (emphasis in original).

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<sup>2</sup> On November 24, 2009, the Clerk of the Board received a letter dated September 27, 2009 from the appellant seeking to reopen Docket No. SE-0831-01-0274-I-1. The Board denied the request, and that appeal remains closed with a final decision date of May 29, 2002.

¶5 In a February 28, 2009 letter to OPM, the appellant sought “further reconsideration” of OPM’s March 30, 2007 decision, and in another letter to OPM dated March 25, 2009, the appellant stated that he was “seek[ing] retirement benefits based on my more than five years of federal civilian service, 5 U.S.C. section 2105(a) ending on 02-01-85, 5 USC 8332(b), only.” IAF, Tab 4, Subtab 3 (wording and punctuation as in original). In his March 25, 2009 letter to OPM, the appellant contended that the last two years of his federal civilian service were under an indefinite appointment that was covered under the CSRS; that he met the minimum age requirement for a deferred annuity under [5 U.S.C. § 8338\(a\)](#); and that he was therefore entitled to pay a deposit for the period of service during which no retirement deductions were made. *Id.* He also submitted an Application for Deferred Retirement, which he signed on March 25, 2009. *Id.*

¶6 The appellant then filed an appeal with the Board challenging OPM’s February 17, 2009 final decision. *See Encarnado v. Office of Personnel Management*, MSPB Docket No. SF-0831-09-445-I-1 (Initial Decision, July 30, 2009) (*Encarnado-2*). In the course of that appeal, OPM rescinded its February 17, 2009 decision. The administrative judge thus dismissed *Encarnado-2* for lack of jurisdiction in an initial decision dated July 30, 2009. *Id.*<sup>3</sup> OPM later issued a new reconsideration decision on October 22, 2009, affirming its initial decision finding the appellant ineligible to make a deposit. IAF, Tab 1; Tab 4, Subtab 2. This appeal followed. *Id.*, Tab 1. The appellant did not request a hearing, and the administrative judge decided the appeal based on the written record. The administrative judge dismissed the current appeal based on res judicata. The appellant has filed a petition for review, and OPM has responded.

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<sup>3</sup> The July 30, 2009 initial decision became the Board’s final decision on September 3, 2009, when neither party filed a petition for review.

## ANALYSIS

The appellant's federal service with the Navy from 1971 to 1985 was not "covered service" under the CSRS.

¶7 The appellant's entitlement to an annuity, as well as his right to make a service deposit under the CSRS, is governed by Chapter 83 of Title 5 of the U.S. Code. Two types of Federal service are pertinent to a determination of whether an individual is entitled to a CSRS retirement annuity, "creditable service" and "covered service." See *Noveloso v. Office of Personnel Management*, [45 M.S.P.R. 321](#), 323 (1990), *aff'd*, 925 F.2d 1478 (Fed. Cir. 1991) (Table). "Almost all federal civilian service is creditable service. Covered service is more limited in scope," referring to the status of federal employees who are subject to the CSRS and are thus required to deposit part of their basic pay into the Civil Service Retirement and Disability Fund. *Noveloso*, 45 M.S.P.R. at 324. Completion of five years of creditable civilian service, ending with at least one out of the last two years in a position *covered by the CSRS*, is a prerequisite for a civil service retirement annuity based on a separation after August 31, 1954. [5 U.S.C. §§ 8331](#)(12), 8333(a) and (b), 8336 and 8338; see *Portacio v. Office of Personnel Management*, [52 M.S.P.R. 396](#), 399 (1992); *Noveloso*, 45 M.S.P.R. at 324.

¶8 Temporary, intermittent, term and excepted indefinite appointments have been excluded from CSRS coverage, first by presidential executive order (Exec. Order No. 10,180) in 1950 and since 1956, by statute and regulation. The regulations are currently codified at [5 C.F.R. §§ 831.201](#)(a)(1), (2), (6), (13) and (14). See *Rosete v. Office of Personnel Management*, [48 F.3d 514](#), 519 (Fed. Cir. 1995) (upholding the regulatory exclusion of indefinite appointments from CSRS coverage); see also *De Jesus v. Office of Personnel Management*, [63 M.S.P.R. 586](#), 592-594 (1994), *aff'd*, 62 F.3d 1431 (Fed. Cir. 1995) (Table). While service

under an indefinite appointment is usually creditable service,<sup>4</sup> it is not covered service, because indefinite appointments have consistently been excluded from CSRS retirement coverage under executive order, statute and regulations. In *Encarnado-1*, the Board found that all of the appellant's federal service, including the service from June 10, 1971, to February 1, 1985, for which he seeks to make a deposit in this appeal, was performed pursuant to indefinite appointments that were excluded from CSRS coverage.

¶9 Generally, only an “employee” credited with civilian service for which CSRS deductions or deposits have not been made may make a deposit with interest for that service. [5 U.S.C. § 8334](#). The term “employee” is defined in applicable OPM regulations as follows:

- (1) A person currently employed in a position subject to the civil service retirement law;
- (2) A former employee (whose annuity has not been finally adjudicated) who retains civil service retirement annuity rights based on a separation from a position in which retirement deductions were properly withheld and remain (or have been redeposited in whole or in part) in the Civil Service Retirement and Disability Fund.

[5 C.F.R. § 831.112](#)(a). Thus, under the regulatory definition, an individual must be currently employed in a covered position,<sup>5</sup> or eligible for a CSRS annuity based on covered service, to make a deposit in the CSRS fund. Furthermore, “a retroactive deposit does not convert a non-covered position into a covered position.” *Quiocson v. Office of Personnel Management*, [490 F.3d 1358](#), 1360 (Fed. Cir. 2007).

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<sup>4</sup> See, e.g., *Noveloso*, 45 M.S.P.R. at 324 n. 3.

<sup>5</sup> Throughout the various claims filed with OPM and his several Board appeals, the appellant has never alleged that he is “currently employed in a position” covered by the CSRS. It is undisputed he has never been reemployed after February 1, 1985.

The appellant's current appeal is barred by the doctrine of res judicata.

¶10 Under the doctrine of res judicata (also known as “claim preclusion”), 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); see *Muyco v. Office of Personnel Management*, [114 M.S.P.R. 694](#), ¶ 9 (2010). 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*, 66 M.S.P.R. at 337.

¶11 Res judicata therefore prevents Mr. Encarnado from raising a new claim that could have been advanced in *Encarnado-I*. For claim preclusion to bar a new claim, it must be based on the same set of transactional facts as the earlier one. *International Air Response v. U.S.*, [302 F.3d 1363](#), 1368 (Fed. Cir. 2002); *Jet Inc. v. Sewage Aeration Systems*, [223 F.3d 1360](#), 1363 (Fed. Cir. 2000) (explaining that “courts have defined ‘transaction’ in terms of a ‘core of operative facts,’ the ‘same operative facts,’ or the ‘same nucleus of operative facts,’ and ‘based on the same, or nearly the same, factual allegations.’”).

¶12 The appellant effectively acknowledges that his goal in bringing the present “deposit” claim is to receive a CSRS retirement annuity based on the same years of Navy service at issue in *Encarnado-I*. In the current appeal he seeks to pay a deposit to the CSRS fund for his service with the Navy from December 1, 1971, through February 1, 1985, and thereby be entitled to a deferred annuity under the CSRS. To be entitled to make a service deposit under [5 U.S.C. § 8334](#), though, he would need to meet the definition of “employee” under [5 C.F.R. § 831.112\(a\)\(2\)](#), which requires that he already have “civil service retirement annuity rights” based on CSRA covered service. See *Dela Rosa v. Office of Personnel Management*, [583 F.3d 762](#), 764-65 (Fed. Cir. 2009). As discussed

above, in its decision in *Encarnado-1* the Board found that none of the appellant's federal service was "covered service." The criteria for the application of res judicata thus are met here,<sup>6</sup> because in *Encarnado-1*: (1) The Board had jurisdiction to decide the appeal under [5 U.S.C. § 8347\(d\)](#) and [5 C.F.R. § 831.110](#) (as in the instant appeal); (2) its decision was a final judgment on the merits; and (3) the same parties and cause of action (*i.e.*, the appellant's entitlement to CSRS benefits based on his prior federal service from 1971 to 1985) were involved, as in the instant appeal. Although the appellant may not have raised his entitlement to make a deposit to the CSRS fund in *Encarnado-1* based on his 1971 to 1985 service, he could have done so. Furthermore, he seeks the same end in both appeals, *i.e.*, a CSRS retirement annuity.

The appellant is precluded by collateral estoppel from relitigating the Board's determination in *Encarnado-1* that his federal civilian service with the Navy was not CSRS-covered service.

¶13 Even if res judicata did not bar the appellant's claim, he cannot relitigate the underlying issue of whether he performed the required covered service to qualify for a CSRS annuity because of the doctrine of collateral estoppel. 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 against whom issue preclusion is sought had a full and fair opportunity to litigate the issue in the prior action, either as a party or as one whose interests were otherwise fully represented in that action. *Kroeger v. U.S. Postal Service*, [865 F.2d 235](#), 239

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<sup>6</sup> Our decision in this appeal is consistent with our reviewing court's nonprecedential decision in *Nobles v. Office of Personnel Management*, 281 F. App'x 972 (Fed. Cir. 2008) (NP). The Board may rely on nonprecedential Federal Circuit decisions if it finds the court's reasoning persuasive, which it does here. *See Vores v. Department of the Army*, [109 M.S.P.R. 191](#), ¶ 21 (2008), *aff'd*, 324 F. App'x 883 (Fed. Cir. 2009).

(Fed. Cir. 1988); *Metallo v. Department of Defense*, [110 M.S.P.R. 229](#), ¶ 12 (2008); *McNeil v. Department of Defense*, [100 M.S.P.R. 146](#), ¶ 15 (2005).

¶14 Collateral estoppel precludes the appellant from litigating whether his Navy service was CSRS “covered service” because: (1) The issue in this appeal of whether the appellant performed covered service under the CSRS is identical to the same issue involved in *Encarnado-1*; (2) the issue was actually litigated in *Encarnado-1*; (3) the determination of the issue in *Encarnado-1* was necessary to the resulting judgment; and (4) the party precluded (*i.e.*, the appellant) was fully represented in *Encarnado-1*.

¶15 For all of the above reasons, the appellant’s appeal of OPM’s final decision denying his request to make a CSRS deposit should be DISMISSED.<sup>7</sup>

#### ORDER

¶16 The appeal is DISMISSED. 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

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<sup>7</sup> To the extent the appellant requests the Board to review OPM’s regulations, the Board exercises its discretionary authority and DENIES the request. *See generally Lynch v. Office of Personnel Management*, 2011 MSPB 2, ¶¶ 6-8, 11 n.4 (January 5, 2011).

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.