

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE**

MARTIN AKERMAN,
Appellant,

DOCKET NUMBER
DC-0752-23-0457-I-1

v.

DEPARTMENT OF THE ARMY,
Agency.

DATE: May 16, 2023

**NOTICE TO THE PARTIES, ORDER TO CLARIFY CLAIM, THIRD
ORDER TO SHOW CAUSE, AND ORDER ON THE APPELLANT'S
MOTIONS**

On May 15, 2023, the appellant filed his jurisdictional and timeliness response wherein he identified three issues in this appeal: (1) an involuntary or constructive discharge; (2) a retirement appeal; and (3) Uniformed Services Employment and Reemployment Rights Act (USERRA) appeal. *See* Appeal File (AF), Tab 19. I previously provided the appellant notice of his burden(s). *See* AF, Tab 3 (constructive discharge); AF, Tab 4 (timeliness); AF, Tab 14 (Board jurisdiction and disability retirement).

NOTICE TO THE PARTIES

As to the appellant's first claim, in response to the first Order to Clarify Claim, AF, Tab 12, he stated, "The Pro Se Petitioner is not seeking double remedy and the Constructive Dismissal is already before the 4th Circuit On Appeal, having been exhausted through EEOC." *Id.* (grammar, punctuation, syntax, etc. as in the original). Nevertheless, in his most recent filing, he again raises a constructive discharge claim. AF, Tab 19. As it appears the appellant is

unsure as to whether he wishes to pursue a constructive discharge claim – *compare* AF, Tab 12 *with* AF, Tab 19 – I will consider this claim.

Requirement to Confer on Motions, Requests, and Other Pleadings

Prior to filing a non-dispositive motion, the filing party shall confer with the non-filing party to obtain the non-filing party's position on the motion or request for relief. The filing party must include in their motion the non-filing party's position on the motion, and, if the non-filing party objects or otherwise opposes the motion, a brief statement as to why the non-filing party objects. Accordingly, the filing party may attach to their motion any written communication with the non-filing party that includes the non-filing party's position on that motion. **The filing party shall not include extraneous attachments, including written communications between the parties.** If the filing party is unable to confer, they shall state in their motion the reason(s) why they were unable to confer with the non-filing party.

ORDER TO CLARIFY CLAIM

Turning to the appellant's recent claim that the agency violated USERRA, it appears from the record that he is not a member or former member of the uniformed services, and he has not alleged any facts to support a USERRA claim. *See* AF, Tabs 1 and 19. The Board's jurisdiction under USERRA does not extend beyond discrimination or retaliation **because of military or related status, or your reemployment rights**, does not allow for a decision on the merits of the underlying matter, or for review of the facts concerning that matter except to the extent necessary to address the USERRA claim, and does not include a review of other claims of prohibited personnel practices such as discrimination or retaliation.

The appellant is **ORDERED** to clarify his USERRA claim no later than **May 22, 2023**. Depending on the appellant's response, I may docket a new USERRA appeal and issue a jurisdictional order.

THIRD ORDER TO SHOW CAUSE

On November 3, 2022, the United States District Court for the Eastern District of Virginia issued a decision on the appellant's constructive discharge claim. *See Akerman v. Austin*, 2022 WL 16700382 (E.D.Va. Nov. 3, 2022). The court determined that the Supreme Court's decision in *Department of the Navy v. Egan*, precluded its review of the appellant's constructive discharge claim. 484 U.S. 518, 529, 530-32. In *Egan*, the Supreme Court recognized that the "[p]redictive judgment" involved in a security clearance determination "must be made by those with the necessary expertise in protecting classified information," and therefore "the protection of classified information must be committed to the broad discretion of the agency responsible[.]" 484 U.S. 518, 529 (1988). Accordingly, the Supreme Court reasoned that review by an "outside nonexpert body" of the "substance of such a judgment" is not appropriate and held that the MSPB did not have the authority to review a security clearance determination, absent an indication to the contrary from Congress, which did not exist in the CSRA. *Id.* at 529, 530-32.

Legal Standard

Res Judicata

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. *See Noble v. U.S. Postal Service*, 93 M.S.P.R. 693, ¶ 5 (2003). It is applicable only 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.* An appellant may not relitigate issues or arguments that were, or could have been, raised in a prior action. *See Sabbagh v. Department of the Army*, 110 M.S.P.R. 13, ¶ 13 n.2 (2008); *Cooke v. U.S. Postal Service*, 69 M.S.P.R. 259, 262 (1996) (quoting *Brown v. Felsen*, 442 U.S. 127, 131 (1979) ("Res judicata prevents

litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding.”)).

Collateral Estoppel

Under the doctrine of collateral estoppel, “once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.” *Allen v. McCurry*, 449 U.S. 90, 94 (1980). “It is well established that collateral estoppel, also known as issue preclusion, applies in the administrative context.” *SynQor, Inc. v. Vicor Corp.*, 988 F.3d 1341, 1347 (Fed. Cir. 2021) (quoting *MaxLinear, Inc. v. CF CRESPE LLC*, 880 F.3d 1373, 1376 (Fed. Cir. 2018)); *see also Thomas v. GSA*, 794 F.2d 661 (Fed. Cir. 1986) (“Like other judicial or quasi-judicial tribunals deciding on the basis of an adversary, litigated record, the MSPB can apply the doctrine of issue preclusion in the appropriate circumstances.”). “Thus, administrative decisions have preclusive effect ‘[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate.’” *SynQor*, 988 F.3d at 1347 (quoting *B&B Hardware, Inc. v. Hargis Indus.*, 575 U.S. 138, 148–49 (2015)).

Collateral estoppel is applicable when the following criteria are met: (i) the issue previously adjudicated is identical to the issue currently presented; (ii) the issue was actually litigated in the prior case; (iii) the previous determination of the issue was necessary to the resulting judgment; and (iv) the party to be precluded had a full and fair opportunity to litigate the issue in the prior action. *See Kroeger v. U.S. Postal Serv.*, 865 F.2d 235, 239 (Fed. Cir. 1988).

Accordingly, I **ORDER** the appellant to file evidence and argument establishing why his appeal should not be dismissed on the basis of res judicata and/or collateral estoppel. The appellant’s submission is due no later than **June 8, 2023**. The agency may file a response no later than **June 20, 2023**.

Close of Record

Unless I notify the parties to the contrary, the record on jurisdiction, timeliness, res judicata, collateral estoppel, and any other preliminary matters will close on **June 20, 2023**, or when the agency files its response – whichever is earlier. If, however, the appellant fails to timely respond to my orders herein, the record will close on June 8, 2023. I will not accept evidence or argument on this issue filed after the close of record unless a party shows it is new and material evidence that was unavailable before the record closed. Any rebuttal under this rule must be received within 5 days of the other party's filing.

ORDER ON THE APPELLANT'S MOTIONS

On May 8, 2023, the appellant filed a motion to have the agency file a proper designation of representative. *See* AF, Tab 17. After reviewing his motion and the agency's submission, the appellant's motion is **DENIED**.

On May 15, 2023, the appellant filed a motion to pause these proceedings wherein he provided an update on his efforts to obtain legal representation. *See* AF, Tab 18. After review of his motion and supporting documents, I find the appellant failed to establish good cause for any further delay in these proceedings. Accordingly, his motion is **DENIED**.

FOR THE BOARD:

/S/
Joshua Henline
Administrative Judge

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent as indicated this day to each of the following:

Appellant

Electronic Mail Martin Akerman
2001 North Adams Street
Unit 440
Arlington, VA 22201

Agency Representative

Electronic Mail Jenny Lin Naylor
Department of the Army
111 S. George Mason Dr., Bldg 2
Arlington, VA 22204

May 16, 2023
(Date)

/s/

Tonya Holman
Paralegal Specialist