

Edward R. Tekeley v. U.S. Government Accountability Office

Docket No. 06-16

Date of Decision: August 9, 2007

Cite as: Tekeley v. GAO, No. 06-16 (8/9/07)

Before: Steven H. Svartz, Administrative Judge

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DECISION ON RESPONDENT'S MOTION TO DISMISS AND FOR SUMMARY JUDGMENT

I. INTRODUCTION

This matter is before the Personnel Appeals Board (PAB or Board) as a result of a Petition filed *pro se* by Edward Tekeley (Petitioner) on December 21, 2006. As set forth more fully below, Petitioner challenges certain actions and alleged inactions of the Government Accountability Office (GAO or the Agency) with respect to the retirement system in which he was placed. The Agency filed a Motion to Dismiss and for Summary Judgment (Motion) on April 9, 2007. Petitioner filed his Response to Respondent's Motions for Summary Judgment and Dismissal (Response) on May 4, 2007. For the reasons stated below, the Petition is dismissed.

A. BACKGROUND

1. Events Prior to 2005

From 1979 until 1985, Petitioner worked for the United States Postal Service. Petition (Pet.) ¶2. In 1985, he resigned from the Federal service, withdrew his Civil Service Retirement System (CSRS) retirement contributions, and took a job in the private sector. *Tekeley v. GAO*, MSPB DC-0839-05-0059-I-1 (Mar. 4, 2005) (*Tekeley I*) at 1-2 [Motion Ex. 3]. In January 1990, he accepted a position at GAO. Pet. ¶4; *Tekeley I* at 2.

In 1995, Petitioner transferred to a position with the Department of the Treasury. *Tekeley I* at 2. On September 30, 1996, he transferred back to GAO. *Id.* Upon his return, GAO discovered that Petitioner had been placed in the wrong retirement system when he had first started working for GAO in 1990. *Id.* Specifically, in 1996 GAO discovered that it had erroneously placed Petitioner in the Federal Employees Retirement System (FERS) instead of the CSRS-Offset retirement system when he had re-entered Federal service in 1990. *Id.*

GAO asserts that by letter dated November 4, 1996, and sent to Petitioner's home address of record, the Chief of the Personnel Operations Branch informed Petitioner of the retirement system placement error and further informed him that he had a right to elect to retroactively transfer to coverage under CSRS-Offset instead of FERS. *See* Motion at 12 n.4; Letter of Oct. 8, 2004 [Motion Ex. 1]; *Tekeley* Deposition (Dep.) at 46-53 [Motion Ex. 10]. Petitioner denies having received this letter. *Tekeley* Dep. at 53-54. GAO also asserts that its records contain handwritten notes by an Employee Relations Specialist, dated December 11, 1996, stating that Petitioner had requested redeposit information in connection with having to choose between FERS and CSRS-Offset. Motion Ex. 1. Petitioner denies having had this conversation. *Tekeley* Dep. at 58. GAO also asserts that the same Employee Relations Specialist sent Petitioner a letter dated May 6, 1997, setting forth various annuity estimates under both FERS and CSRS-Offset. *Id.* at 46-53; *see* Motion Ex. 1. Petitioner denies having received this letter. *Tekeley* Dep. at 51-54.

Petitioner contends that he first received notice of the retirement placement error and his election rights in 2004, when he was considering whether to retire from GAO under a voluntary early retirement program. *Tekeley v. GAO*, 173 Fed. Appx. 820, 822 (2006) (*Tekeley III*). In the fall of 2004, Petitioner asked GAO to place him retroactively in CSRS-Offset instead of FERS. *Tekeley I* at 3. In a meeting with GAO to discuss his request to transfer to CSRS-Offset, Petitioner was shown the two letters that GAO claimed had been sent to Petitioner notifying him of the retirement error. *Tekeley* Dep. at 46-53. By letter dated October 8, 2004, GAO denied Petitioner's request that GAO retroactively place him in CSRS-Offset. Motion Ex. 1 at 2. The letter stated that “[p]ursuant to 5 C.F.R. §839.221 (2004), employees who were placed in FERS in error, but were later afforded the opportunity to choose or decline retirement coverage, cannot

now make another election.” *Id.*¹ Petitioner acknowledges that he received this letter in October 2004. Tekeley Dep. at 57-58.

2. Proceedings before the Merit Systems Protection Board

On January 14, 2005, Mr. Tekeley filed his brief on appeal of GAO’s decision with the Merit Systems Protection Board (MSPB). Motion Ex. 2. In his pleading before the MSPB, Petitioner argued that he was “an employee who is erroneously covered by FERS and who in 1990 had the right under statute to elect his retirement system.” *Id.* at 1. He further asserted that he had been “deemed by the Agency to have made an election of FERS.” *Id.* In support, Petitioner claimed generally that: 1) the Agency’s letters of November 4, 1996, and May 7, 1997, as well as any conversations, did not constitute an election notice; 2) he did not receive written notice; 3) the Agency erred in applying required administrative procedures; 4) he was harmed by Agency error; and 5) he exercised due diligence once he was informed. *Id.* at 2.

More specifically, Petitioner contended before the MSPB that he was harmed because he had been prevented from making a retirement election and was deprived of being placed in CSRS-Offset (*id.* at 22-25); that he was entitled to be placed in CSRS-Offset because he had not received the notice required under 5 C.F.R. §846.204 of his right to opt out of FERS (*id.* at 2); that GAO should have granted his 2004 request to be retroactively placed in the CSRS-Offset retirement system (*id.*); that GAO’s evidence regarding his receipt of actual notice of his election opportunity was inaccurate (*id.* at 6-7); that GAO erred in applying administrative procedures because it failed to provide him with the notice required under 5 C.F.R. §846.204(b)(1), which provides for the correction of administrative errors related to retirement system elections (*id.* at 13-15); and that he would lose \$1,403 per month in retirement benefits if he were not permitted to correct his retirement coverage (*id.* at 25).

On March 4, 2005, an Administrative Judge (AJ) of the MSPB issued an Initial Decision on Petitioner’s claims. *Tekeley I.* The AJ noted that, under the Federal Erroneous Retirement Coverage Corrections Act, Pub. L. No. 106-265 (2000) (FERCCA) (codified at 5 U.S.C. §8331 note), employees who were mistakenly enrolled in the wrong retirement plan by their employing agencies for a period of at least 3 years after December 31, 1986 are given the opportunity to correct the placement error and in many cases choose between retirement plans. *Id.* at 3. However, the AJ further noted that the applicable regulations (5 C.F.R. §839.221) “state that if the employee was put into FERS by mistake, notified of the error, and given the opportunity to correct the mistake, he is not entitled to another opportunity later to elect a different retirement system based on the same mistake.” *Id.* The AJ stated that “[i]t is just such an additional opportunity that the agency alleges the [Petitioner] is seeking here. By contrast, the [Petitioner] asserts that he was not informed of any previous opportunity to correct his retirement coverage and so should be allowed to exercise his option pursuant to FERCCA.” *Id.* at 3-4.

¹ The letter also advised Petitioner that, pursuant to 5 C.F.R. §846.205 (2004), he could request the Office of Personnel Management (OPM) to reconsider GAO’s decision. The record reflects that OPM did not make any reconsideration decision in this regard, and that OPM was “never a part of the decision or appeal process at any point in time.” Response Ex. 7.

On review of the record before her, the AJ held that GAO's "evidence that it did inform [Petitioner] of his opportunity to choose to transfer to another retirement system in late 1996 and early 1997 outweighs [Petitioner's] evidence to the contrary." *Id.* at 9. The AJ concluded that because, under FERCCA, "an employee is allowed only one opportunity to correct a retirement coverage error" (citing 5 C.F.R. §839.221), Petitioner's "election at that time, or deemed election if he fails to act, is irrevocable. See 5 C.F.R. §§839.602, .603, .621." *Id.* Accordingly, the AJ affirmed GAO's decision. *Id.*

Petitioner appealed the AJ's decision to the MSPB. *Tekeley II* [Motion Ex. 4]. On August 5, 2005, the MSPB affirmed the AJ's decision, finding that there was "no new, previously unavailable, evidence and that the [AJ] made no error in law or regulation that affects the outcome." *Id.* at 1.

3. Proceedings before the United States Court of Appeals for the Federal Circuit

Petitioner appealed the MSPB decision to the United States Court of Appeals for the Federal Circuit, filing his brief on October 21, 2005. Pet. Br. to Fed. Cir. [Motion Ex. 5]. In his brief, Petitioner argued that the MSPB's holding was in error because the FERCCA, which was enacted in 2000, could not apply to him retroactively. *Id.* at 1, 11-13. Petitioner also argued, citing *Dandridge v. Williams* (397 U.S. 471 (1970)), that GAO violated the Fifth Amendment to the Constitution because the Agency's treatment of him resulted in invidious discrimination between two like classes: employees who were entitled to be placed into FERS, but were not, and those employees who were correctly placed in FERS. *Id.* at 14-15. Further, Petitioner claimed that the MSPB had failed to consider other important grounds for relief, including GAO's alleged violation of statute, equitable tolling, and the doctrine of equitable consideration. *Id.* at 1, 22-27. Finally, Petitioner contended that the MSPB decision was improper because it stated that it was affirming "OPM's reconsideration decision," when, in fact, the appeal had been of GAO's final decision. *Id.* at 2. As relief, Petitioner requested the Court to direct the appropriate administrative body to provide him with CSRS-Offset retirement coverage. *Id.*

On March 10, 2006, the Federal Circuit affirmed the decision of the MSPB. *Tekeley v. GAO*, 173 Fed. Appx. 820 (2006) (*Tekeley III*). The Court stated:

Although Mr. Tekeley fashions his appeal through the lens of various regulatory, statutory, Constitutional, and equitable arguments, each of those arguments hinges on the question whether he received proper notice in 1996 of the [A]gency's error and of his right to decline FERS coverage. If he received proper notice in 1996, he is not entitled to a second opportunity to correct the retirement coverage error.

Id. at 822. The Court found that Mr. Tekeley had received proper notice in 1996, and it upheld the MSPB's decision that he "was not improperly denied his right to elect a retirement option other than FERS." *Id.* at 824.

Petitioner thereafter sought a rehearing of the Federal Circuit decision. The Court denied the motion for rehearing on March 31, 2006. *Tekeley v. GAO*, No. 05-3374 (Mar. 31, 2006) (*Tekeley IV*) [Motion Ex. 6]. The Court specifically addressed one of the issues raised by Petitioner,

namely, whether OPM had exceeded its statutory authority when it adopted 5 C.F.R. §846.204(b)(2) (1996). The Court found that OPM had acted within its statutory authority in promulgating the regulation, and noted that “Congress subsequently endorsed the approach taken in that regulation when it enacted” the FERCCA. *Id.*, slip op. at 2. Additionally, the Court stated that “[e]ven if the 1996 regulation had not been within OPM’s statutory authority, Mr. Tekeley would not be entitled to a second opportunity to correct his retirement coverage” in 2004 because he had already been given such an opportunity. *Id.*

On February 27, 2007, Petitioner filed a document with the Federal Circuit entitled “Motion to Vacate.” Motion Ex. 7. By letter dated March 21, 2007, the Clerk of the Federal Circuit responded, stating that the Court had already denied Petitioner’s petition for rehearing, and that repetitive motions for rehearing or reconsideration are not permitted under the Court’s rules. Motion Ex. 8.

On March 24, 2007, Petitioner wrote a letter to the Federal Circuit, suggesting that the Clerk get a “second opinion” regarding the Court’s rejection of Petitioner’s “Motion to Vacate.” Motion Ex. 9. The record in the instant case does not indicate whether there was any response to this letter.

B. PETITIONER’S CONTENTIONS BEFORE THE PAB

Petitioner filed his Petition in this matter on December 21, 2006, following receipt of a Right to Petition letter from the Board’s Office of General Counsel (PAB/OGC) on December 2, 2006. The Petition was premised on a Charge filed with the PAB/OGC on March 17, 2006.

Petitioner asserts that from 1990 to the present, GAO has failed to provide him with a valid remedy for its failure to exclude him from automatic FERS coverage. Pet. ¶7. He asserts that GAO relies on an OPM regulation, 5 C.F.R. §846.204(b)(2)(i) (1996) (the OPM regulation), which Petitioner contends is “substantively invalid” because it is contrary to 5 U.S.C. §8402(b). Pet. ¶8. Petitioner also argues that the OPM regulation violates the Fifth Amendment to the Constitution, “with respect to the principle of equal protection under the law and the test articulated in *Dandridge v. Williams.*” Pet. ¶9. Petitioner asserts that the “inequity” harms him by reducing his retirement benefits “from the more generous benefits of CSRS-Offset to the lesser benefits of FERS.” Pet. ¶10. For relief, Petitioner requests compensation in the amount of “the net present value difference between CSRS-Offset retirement benefits and FERS retirement benefits when compared as two annuities over [his] lifetime, making equitable adjustments for differences in inflation protection, TSP [Thrift Savings Plan] and retirement contributions.” Pet. ¶11.

C. RESPONDENT’S MOTION TO DISMISS AND FOR SUMMARY JUDGMENT

1. Summary of Arguments

The Agency presents two arguments in support of its Motion for Summary Judgment, and one argument in support of its Motion to Dismiss:

1) GAO asserts that it is entitled to summary judgment under the doctrine of *res judicata* with regard to Petitioner’s claims. According to the Agency, *res judicata* precludes a second action involving the same parties based on the litigation of claims that were, or could have been, asserted in a prior proceeding. GAO asserts that Petitioner has already litigated the matter of his retirement coverage before the MSPB and the Federal Circuit, and, therefore, Petitioner’s claims are now barred.

2) The Agency also contends that it is entitled to summary judgment because the Petition is untimely. GAO states that under 4 C.F.R. §28.11(b), Petitioner was required to file a charge with the PAB/OGC within 30 days of the effective dates of the actions alleged or Petitioner’s knowledge of them.² According to the Agency, the actions about which Petitioner complains occurred in 1996, and he was aware of them no later than 2004; therefore, the Petition is untimely.

3) In support of its Motion to Dismiss, GAO contends that Petitioner’s claims should be dismissed as they relate solely to retirement coverage decisions, which do not fall within the PAB’s jurisdiction.

These arguments are described more fully below.

a. *Res Judicata*

The Agency asserts that the doctrine of *res judicata*, or “claim preclusion,” precludes a second action involving the same parties based on the same cause of action that was, or could have been, asserted in a prior proceeding. According to GAO, even if an employee argues a different cause of action than one that was raised in a previous proceeding, the claim is barred by *res judicata* if that cause of action could have been raised in the prior proceeding. Motion at 7.

The Agency contends that in his MSPB case, Petitioner argued that GAO should have granted his 2004 request to be retroactively placed in the CSRS-Offset retirement system. Motion at 7; *see* App. Br. to MSPB [Motion Ex. 2] at 2. The Agency further asserts that Petitioner made the following claims before the MSPB (Motion at 7-8): 1) he was entitled to be placed in CSRS-Offset because he had not received the notice required under 5 C.F.R. §846.204 of his right to opt out of FERS, which GAO claimed was sent in 1996; 2) the 1996 letters sent by GAO did not constitute an election opportunity; 3) GAO’s evidence regarding his receipt of actual notice of his election opportunity was inaccurate; 4) GAO erred in applying administrative procedures because it failed to provide him with the notice required under 5 C.F.R. §846.204(b)(1), which

² 4 C.F.R. §28.11(b) (“When to file”) states:

- (1) Charges relating to adverse and performance-based actions must be filed within 30 days after the effective date of the action.
- (2) Charges relating to other personnel actions must be filed within 30 days after the effective date of the action or 30 days after the charging party knew or should have known of the action.
- (3) Charges which include an allegation of prohibited discrimination shall be filed in accordance with the special rules set forth in §28.98.
- (4) Charges relating to continuing violations may be filed at any time.

provides for the correction of administrative errors related to retirement system elections; 5) he was harmed because he was prevented from making a retirement election and was deprived of being placed in CSRS-Offset; and 6) as a result he stood to lose \$1,403 per month in retirement benefits. The Agency notes that the MSPB found in GAO's favor. Motion at 7-8.

Additionally, GAO asserts that, in his appeal to the Federal Circuit, Petitioner argued that: 1) the MSPB's holding was in error because the FERCCA, which was enacted in 2000, could not apply to him retroactively; 2) GAO violated the due process clause and the Fifth Amendment to the Constitution, based on *Dandridge v. Williams*, because GAO's treatment of him resulted in invidious discrimination between two like classes: employees who were entitled to be placed into FERS, but were not, and those employees who were correctly placed in FERS; 3) the MSPB failed to consider other important grounds for relief, including GAO's violation of statute, equitable tolling, and the doctrine of equitable consideration; and 4) the MSPB decision was improper because it stated that it was affirming "OPM's reconsideration decision," when, in fact, the appeal had been of GAO's final decision. Motion at 8.

The Agency asserts that in his deposition as part of the instant proceeding, Petitioner attempted to distinguish his claims in this case from those he made before the MSPB and the Federal Circuit. According to GAO, Petitioner's deposition characterized his argument in the MSPB proceeding as disputing whether he had ever received the notice that GAO was required, under 5 C.F.R. 846.204(b)(2) (1996), to send upon discovery of his retirement system placement error. In contrast, Petitioner's deposition asserts that, in the instant case, he is challenging GAO's reliance on that OPM regulation, which he claims is contrary to 5 U.S.C. §8402.³ Motion at 8-9.

GAO acknowledges that in the MSPB case, Petitioner did not argue that 5 C.F.R. §846.204 was contrary to 5 U.S.C. §8402. Motion at 8-9. However, the Agency asserts that this argument is one that Petitioner could have made in the MSPB case. According to GAO, Petitioner admitted that he had read and knew about 5 C.F.R. §846.204 prior to bringing his MSPB case. Motion at 9; *see* Tekeley Dep. at 114. In addition, the Agency asserts that Petitioner was also aware of 5 U.S.C. §8402, since he argued in his Federal Circuit brief that "Petitioner is an individual described in 5 U.S.C. §8402(b)(2)." Motion at 9. Thus, GAO contends that even if Petitioner's new approach were to be construed as a new claim, this claim is one that could have been raised in Petitioner's prior cases. As such, the Agency contends that relevant precedent demonstrates that Petitioner's claims are precluded from being raised now because they are governed by the doctrine of *res judicata*. Motion at 9-10.

³ GAO further contends that, rather than being inconsistent with 5 U.S.C. §8402, 5 C.F.R. §846.204 provides the remedy for violations of 5 U.S.C. §8402. The Agency notes that, in 2000, Congress enacted FERCCA, which contained an identical remedy to 5 C.F.R. §846.204. *See* FERCCA §2132 (codified at 5 U.S.C. §8331 note) ("If an individual was prevented from electing FERS coverage because the individual was erroneously FERS covered during the period when the individual was eligible to elect FERS under title III of the Federal Employees Retirement System Act, the individual—(A) is deemed to have elected FERS coverage; and (B) shall remain covered by FERS, unless the individual declines, under regulations prescribed by the Office, to be FERS covered"). The Agency contends that, under FERCCA §2133, Petitioner was ineligible to make an election of a retirement system because he had already had the opportunity to make an election under 5 C.F.R. §846.204. Motion at 9 n.3.

In GAO's view, Petitioner's argument that 5 C.F.R. §846.204 is contrary to 5 U.S.C. §8402 is merely another attempt to challenge his retirement system placement. Motion at 11. In this regard, the Agency notes (Motion at 11) that in the MSPB case, Petitioner argued that he had been "erroneously covered by FERS and . . . in 1990 had the right under statute to elect his retirement system," and that Petitioner is making the same claim in the instant case. App. Br. to MSPB at 1; *see* Tekeley Dep. at 92. The Agency contends that because in the MSPB and Federal Circuit proceedings Petitioner has already unsuccessfully asserted his claim that his placement into FERS was erroneous, he should not be given the opportunity to assert that claim again. Motion at 11.

Further, GAO contends that Petitioner's claim in the instant case regarding the Fifth Amendment to the Constitution is also barred because this claim is virtually identical to those he raised on appeal to the Federal Circuit. According to the Agency, in both cases Petitioner has claimed that his placement in FERS has resulted in Constitutional violations by creating class discrimination; and in both cases Petitioner relies on the same legal authority—*Dandridge v. Williams*. Motion at 11. As Petitioner's Constitutional claim has already been fully litigated and has been held to be meritless, GAO contends that *res judicata* precludes Petitioner from relitigating this claim here. Motion at 11 (citing *Tekeley III*).

In sum, GAO contends that, because all of Petitioner's claims were or could have been raised in earlier proceedings before the MSPB and the Federal Circuit, *res judicata* precludes Petitioner's claims before the PAB. Motion at 12.

b. Timeliness

The Agency asserts that under the time limits set forth in 4 C.F.R. §28.11(b), Petitioner's Petition is untimely. GAO notes that, under this regulation, charges relating to personnel actions must be filed within 30 days after the effective date of the action or 30 days after the charging party knew or should have known of the action, and charges relating to continuing violations may be filed at any time. Motion at 12.

The Agency argues that Petitioner is, in effect, challenging at most three discrete actions: his erroneous placement in the FERS retirement system in 1990, his deemed election of FERS in 1996, and GAO's failure to retroactively place him in CSRS-Offset pursuant to his request in 2004. Because Petitioner did not file within 30 days of the effective dates of any of these actions, or, as evidenced by his MSPB and Federal Circuit filings, within 30 days of his knowledge of these actions, the Agency contends that the Petition is untimely. Motion at 12.

Specifically, GAO takes the position that even assuming, contrary to the findings of the MSPB and the Federal Circuit, that Petitioner did not know in 1996 of his mistaken placement in FERS, it is clear that he was aware of it by 2004, as evidenced by his request that GAO transfer him to CSRS-Offset and his subsequent appeal of GAO's denial of that request to the MSPB and the Federal Circuit. However, the Agency states that Petitioner did not file a Petition with the PAB until December 2006, more than two years after GAO's October 2004 decision letter informing

Petitioner that he would remain in FERS.⁴ Motion at 12-13; *see* Tekeley Dep. at 57-58. In GAO's view, the Petition is, therefore, untimely and should be dismissed.

In addition, the Agency disputes Petitioner's claims that GAO has committed a continuing violation and that the Petition is timely under 4 C.F.R. §28.11(b)(4), which allows continuing violations to be filed at any time. Motion at 13. Specifically, GAO notes Petitioner's statement (Pet. ¶7) that "[c]ontinuously between the years January 14, 1990 and the present, GAO has failed to provide me with a valid remedy." GAO asserts that, contrary to Petitioner's contention, GAO's alleged action does not constitute a continuing violation.

Citing several decisions from the courts of appeals, the Agency contends that a plaintiff may not use the continuing violation theory to challenge discrete actions that occurred outside the limitations period even though the impact of the acts continues to be felt; rather, a continuing violation is occasioned by continual unlawful acts, not by continual ill effects from the original violation. According to GAO, Petitioner is challenging allegedly unlawful actions that occurred in 1990, 1996, and 2004, and the fact that he continues to feel the ill effects of those actions does not convert them into a continuing violation. Motion at 13.

In sum, the Agency asserts that Petitioner did not file his Petition within 30 days of the effective dates of any of the allegedly unlawful actions or 30 days after he knew or should have known of the actions, and the continuing violation theory does not correct these deficiencies. Therefore, GAO contends that the Petition is barred by the time limits set forth in 4 C.F.R. §28.11(b), and GAO is entitled to summary judgment. Motion at 14.

c. Jurisdiction

The Agency asserts that under 4 C.F.R. §28.2(b), the PAB does not have jurisdiction to adjudicate retirement matters.⁵ According to GAO, retirement matters for GAO employees are

⁴ The December 2006 Petition was timely with respect to the Right to Petition letter. Under the cited regulation, Petitioner was required to file his Charge with the PAB/OGC within 30 days of the triggering event. Elsewhere in the Motion, the Agency correctly cites the March filing with the PAB/OGC as the untimely event. *See* Motion at 2.

⁵ Section 28.2(b) states that the PAB has jurisdiction to hear an action brought by any person in one of seven subject areas:

- (1) An officer or employee petition involving a removal, suspension for more than 14 days, reduction in grade or pay, or furlough of not more than 30 days;
- (2) A prohibited personnel practice under 31 U.S.C. 732(b)(2);
- (3) The appropriateness of a unit of employees for collective bargaining;
- (4) An election or certification of a collective bargaining representative;
- (5) A matter appealable to the Board under the labor-management relations program under 31 U.S.C. 732(e), including an unfair labor practice under 31 U.S.C. 732(e)(1);
- (6) An action involving discrimination prohibited under 31 U.S.C. §732(f)(1); and
- (7) An issue about GAO personnel which the Comptroller General by regulation decides the Board shall resolve.

The Board also has jurisdiction in disciplinary proceedings brought by the PAB General Counsel against an employee for alleged prohibited personnel practices or alleged prohibited political activity. *See* 31 U.S.C. §753(a); 4 C.F.R. §28.2(a)(3).

governed by executive branch law and regulation, and under applicable statutory and regulatory provisions the MSPB had jurisdiction to consider Petitioner’s retirement claims and the Federal Circuit had exclusive jurisdiction to hear Petitioner’s appeal of the MSPB’s decision. In the Agency’s view, there is no basis to find that the PAB serves as a dual forum to hear Petitioner’s claims. Motion at 14-15.

GAO notes that 4 C.F.R. §28.2(b)(2) references Board jurisdiction over allegations of a prohibited personnel practice under 31 U.S.C. §732(b)(2), and that §732(b)(2), in turn, prohibits “personnel practices prohibited under section 2302(b) of title 5.” Motion at 15. However, the Agency asserts that Petitioner’s claims—that GAO committed a prohibited personnel practice by relying on an OPM regulation that is contrary to 5 U.S.C. §8402(b) and the Fifth Amendment to the Constitution—are not covered by any of the prohibitions set forth in §2302(b). Motion at 16.

As an initial matter, GAO contends that Petitioner’s claims do not fall under any of the prohibited personnel practices set forth in 5 U.S.C. §2302(b)(1)-(11) . Further, the Agency contends that Petitioner’s claims cannot be construed to fall within § 2302(b)(12), which prohibits personnel actions that violate “any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of [Title 5].” 5 U.S.C. §2302(b)(12). GAO asserts that, even if construed in a light most favorable to Petitioner, Petitioner’s claims fail to satisfy the requirements of §2302(b)(12) because Petitioner has failed to allege the violation of any law, rule, or regulation implementing or directly concerning a merit system principle. Motion at 16-17.

In this regard, the Agency states that the MSPB has consistently held that in order to establish a prohibited personnel practice under §2302(b)(12), “[i]t must be shown by a two-step process that the action violates a law, rule, or regulation and that the violated law, rule, or regulation is one which implements or which directly concerns the merit system principles.” Motion at 17 (quoting *Thompson v. OPM*, 87 M.S.P.R. 184, 189-90 (2000)). According to GAO, Petitioner’s allegations of a violation of 5 U.S.C. §8402 and a violation of the Fifth Amendment are not sufficient to satisfy the two-step process required to show jurisdiction under §2302(b)(12) because, even assuming that they satisfied the first requirement (that the action violates a law, rule, or regulation), they fail to satisfy the second requirement—that the violated law is one that implements or directly concerns the merit system principles. Motion at 18-19.

Accordingly, the Agency contends that because Petitioner has failed to identify any basis upon which the PAB may consider his claims, the Petition should be dismissed for lack of jurisdiction.

D. PETITIONER’S RESPONSE TO RESPONDENT’S MOTIONS FOR SUMMARY JUDGMENT AND DISMISSAL

1. Summary of Petitioner’s Arguments

Petitioner disputes the arguments set forth in the Agency’s Motions, and requests that the Motions be denied. In response to GAO’s three arguments, Petitioner generally claims the following:

1) As to the Agency's *res judicata* argument, Petitioner asserts:

Strict issue preclusion requires that the particular issue decided in a previous case is identical to the same relevant issue in the present case. It is not.

Cause of action preclusion requires that the specific cause of action in a previously decided case is identical to the relevant cause of action in this case. It is not.

The wider form of issue preclusion requires that the present case is unjust harassment of GAO and an abuse of the judicial process. It is not.

Response at 29.

2) As to GAO's argument that the Petition is untimely, Petitioner asserts that he has filed a "timely and relevant Petition." *Id.* In this regard, Petitioner states:

GAO's argument for an untimely filing rests on its arguments for cause of action preclusion and the wider form of issue preclusion. These arguments fail for the reasons shown [in that portion of Petitioner's Response].

Id.

3) As to the Agency's argument that the PAB lacks jurisdiction over the Petition, Petitioner contends that this argument

seeks to unduly restrict the subject matter that is afforded protection from prohibited personnel practices. Where the statutes and regulations fail to explicitly exclude a subject from the scope of jurisdictional authority, there is no basis for reading such exclusion into them.

Id.

In addition, Petitioner contends that, contrary to GAO's assertion that there are no material facts in dispute, there are "new material facts in this case that are critical to establishing [A]gency failure to act with respect to implementing the statutory provisions for the exclusion of automatic FERS coverage and the continuity of that failure." *Id.* Finally, Petitioner asserts that all of the Agency's arguments "conflate retirement benefit questions with questions concerning prohibited versus legitimate personnel practice[s]." *Id.*

Petitioner's arguments are set forth more fully below.

2. Background

Petitioner states that the MSPB proceeding answered the question whether he was eligible under FERCCA to elect his retirement system. *Id.* at 4. He acknowledges that the MSPB decided that

he was not eligible to receive more than one election opportunity, and that the Federal Circuit upheld this decision on appeal. Petitioner “accepts the judgment of the court that an election of retirement coverage under FERCCA is foreclosed.” *Id.*

However, according to Petitioner, the instant case does not seek a retirement coverage election under FERCCA. *Id.* Rather:

This case is about the merit system principle of fairness: all employees should be treated fairly in all aspects of personnel management with proper regard for their [C]onstitutional rights. The prohibited personnel practices that impact this principle have accrued continuously. GAO has continuously violated statutes, regulations, implemented invalid regulations under the guise of a fair remedy, and has continuously failed to correct its failures with a valid remedy.

GAO has continuously failed to remedy its failure to provide the Petitioner with the opportunity to participate in Thrift Savings Plan contributions effective with the date of his hire, as required by the Petitioner’s statutory right to be excluded from automatic FERS coverage. Since the date of that lost opportunity, GAO has continuously failed to remedy the cost of that lost opportunity which has also accrued continuously. GAO has continuously failed to remedy its failure to provide the Petitioner with his fair share of automatic Agency contributions, as required by the effective date of the Petitioner’s deemed FERS election. Since the effective date of the deemed FERS election, GAO has continuously failed to remedy the cost of those lost automatic Agency contributions and has continuously failed to remedy the fair value of lost earnings on those contributions as they have continuously accrued. Beginning with the effective date of the Petitioner’s hire on January 14, 1990, GAO continuously failed to implement statutory provisions that granted the Petitioner default CSRS-offset coverage and GAO has continuously failed to grant the Petitioner the liberty provided in statute to abstain from participating in an election of FERS. Each of these distinct and continuous failures stems from GAO’s failure to provide a valid remedy for failing to exclude the Petitioner from automatic FERS coverage.

Id. at 4-5.

3. Petitioner’s Response to GAO’s *Res Judicata* Arguments

a. *Res judicata* and Strict Issue Preclusion

Petitioner asserts that a judgment on the grounds of *res judicata* with respect to strict issue preclusion requires that the particular issue decided in a previous case be identical to the same relevant issue in the present case. Further, according to Petitioner, the same issue is relevant to both cases when a particular issue that forms a necessary ingredient to a cause of action has been litigated and decided. *Id.* at 5.

Petitioner asserts that the issues in the present case are different from the issue in the MSPB case. According to Petitioner, at issue in the MSPB case was his right to retirement system correction

under FERCCA. Petitioner contends that the issues in the present case are:

[1] whether GAO provided a fair and valid remedy that makes the Petitioner whole with respect to all GAO's outstanding obligations triggered by the Petitioner's statutory right to be excluded from automatic FERS coverage; . . .

[2] whether GAO acted under color of law in failing to provide the Petitioner with a fair and valid remedy with respect to all the rights and privileges and benefits that flow from the statutory right to exclusion from automatic FERS coverage; . . .
[and]

[3] whether GAO acted negligently or willfully in its violation of statutes and regulations, particularly those that pertain to the Thrift Savings Plan (TSP) and GAO's fiduciary responsibilities respecting automatic contributions, correcting errors with respect to automatic contributions and earnings on those contributions, providing a timely and fair opportunity to participate in the TSP, and failing to provide a remedy for lost opportunity earnings on individual contributions that were unlawfully barred, and failing to provide a remedy for the lost opportunity of agency matching contributions and earnings on those matching contributions.

Id. at 5-6.

Petitioner further asserts that the issues in this case are not identical to the issue in the MSPB case

because the obligations that flow from each issue are not identical. This point is the substance of the allegation in the present case. The remedy provided by GAO fulfilled its regulatory obligation to provide an opportunity to decline FERS but it failed to make the Petitioner whole with respect to all the additional rights and benefits and privileges that are tied to the Petitioner's statutory right to be excluded from automatic FERS coverage.

Id. at 6. Petitioner then states that the "right to retirement system correction under FERCCA, and the historical facts defining that issue" in the MSPB case, "make absolutely clear that the present issues and previous issues are not one and the same." *Id.*; see Response at 6-10. In essence, Petitioner contends that the issue of whether he was given proper regulatory notice of a FERS election opportunity—the issue that was decided in the MSPB proceeding—is irrelevant to the claims in the instant case. As such, Petitioner asserts that strict issue preclusion does not apply in this case.

b. Res Judicata and Cause of Action Preclusion

Petitioner asserts that

[c]ause of action preclusion requires that the specific cause of action in a previously decided case is identical to the relevant cause of action in this case.

Where separate and distinct rights are at issue, the cause of action cannot be the same. The rights involved in this case include the regulatory right to various TSP benefits and opportunities, the statutory right to be excluded from automatic coverage and the statutory right to freely abstain from participating in an election opportunity of FERS. The right involved in the prior case was the right to an election opportunity of FERS and the right to written notice of that opportunity. These rights are not equivalent.

Id. at 10.

According to Petitioner,

[t]he cause of action for the claims involving the lost TSP opportunity and lost TSP benefits associated with an election of FERS is GAO's failure to notify the Petitioner that his retirement coverage had been changed from automatic FERS coverage to either elected FERS coverage or default CSRS-Offset coverage.

Id. at 12.

Petitioner further asserts that if GAO had provided him with such a personnel action notice, such a notice

would have triggered further [A]gency actions to remedy the Petitioner's TSP accounts, since the Petitioner's records would have been corrected to show elected FERS coverage, rather than automatic FERS coverage, effective on the date of his hire, January 14, 1990. This was not done.

Id. at 13.

c. *Res Judicata* and the Wider Form of Issue Preclusion

According to Petitioner,

[t]he wider form of issue preclusion requires that the present case is unjust harassment of GAO and an abuse of the judicial process. It is not; this case involves no collateral attack on the judgment of the previous case, the facts of the case show merit, there is no repetition of claims, and the rights and obligations at issue not only could not have been raised, they should not have been raised earlier.

Id. at 14.

In this regard, Petitioner contends that he is not "carrying repetitive claims from" the MSPB case "over to the present case." *Id.* Further, Petitioner disputes GAO's contention that he should have presented his argument as to 5 U.S.C. §8402 in the MSPB case. *Id.* In addition, as to his "color of law" claim, Petitioner contends that this claim has nothing to do with the previous case

and could not, and should not, have been raised earlier. In Petitioner's view, this contention alleges a prohibited personnel practice in connection with "the invalid OPM regulation" (5 C.F.R. §846.204(b)(2)(i)), by which GAO acted under color of law to violate his statutory rights to a) freely abstain from participating in an election of FERS without adverse consequences and b) default CSRS-Offset coverage. *Id.* at 15. In support, Petitioner states that he "only recently discovered Title 18, U.S.C., Section 242 (Deprivation of Rights Under Color of Law)" and that, "[w]ithout this knowledge, the Petitioner could not have known that GAO's failure to act was a prohibited personnel practice." *Id.* Finally, Petitioner sets forth ten other reasons "why the Respondent's arguments for the wider form of issue preclusion are defective." *Id.* at 16-17.

In sum, Petitioner states:

The GAO is confusing context and remedy with cause of action and rights. GAO's failure to provide the Petitioner with information on the TSP rights that flow from his right to be excluded from automatic FERS coverage is not caused by any act or failure to provide an opportunity to elect retirement coverage under FERCCA. It is and has been continuously caused by a negligent and willful failure to comply with statutes to exclude the Petitioner from automatic FERS coverage.

Id. at 17.

4. Timeliness

Petitioner asserts that his filing is timely. According to Petitioner, the Agency's failure to exclude him "from automatic coverage of FERS on the date of his hire, January 14, 1990, and continuously thereafter . . . is a non-event." *Id.* at 20. In this regard, Petitioner further states:

The information about the rights and benefits and opportunities that should have flowed from discharging GAO's statutory obligation became available to the Petitioner just recently. This information came from discussions held in December of [2006] with the General Counsel of the PAB, from research thereafter, from discovery thereafter and from responses to Freedom of Information Act inquiries and Administrative Procedures Act inquiries in January and February of this year and responses to other inquiries in March of this year. It forms the basis of the charge in the timely Petition that was filed.

Id. at 22.

5. New Material Facts

Petitioner contends that there are

new material facts in this case that are critical to establishing agency failure to act with respect to implementing the statutory provisions for the exclusion of automatic FERS coverage and the continuity of that failure. These facts were

only recently obtained in March 2007 after a request to the Thrift Savings Plan Service Office in Birmingham Alabama. These facts are irrelevant to the prior case. These facts pertain to Thrift Savings Plan rights and benefits defined in regulation for employees excluded from automatic FERS coverage. These facts prove that the Petitioner never received these rights and benefits and, as a result, prove that GAO acted contrary to applicable laws and regulations that require GAO (a) to exclude the Petitioner from automatic FERS coverage and (b) correct the failure to exclude the Petitioner from automatic FERS coverage.

Id. at 23.

In this regard, Petitioner asserts that he

did not receive Agency automatic contributions as required by regulation and was improperly barred from making employee contributions and receiving Agency matching contributions from January 14, 1990 through February 6, 1991. . . . By improperly barring the Petitioner from making individual contributions between January 14, 1990 and February 6, 1991, the Petitioner was harmed by the lost opportunity to receive earnings, tax breaks, [A]gency matching contributions and earning on those [A]gency matching contributions. This is in addition to the lost [A]gency automatic contributions and lost earnings on those automatic contributions. The Petitioner's TSP records show the lost benefits and opportunities for benefits during this period should have resulted in recurring earnings subject to compound growth for over 17 years.

Id. at 24-25.

According to Petitioner,

[t]he FERS election, if implemented correctly, would have changed the Petitioner's retirement coverage status from automatic FERS coverage to elected FERS coverage. The relevant laws and regulations require that specific TSP rights and benefits be corrected as part of an elected transfer to FERS and as part of a correction to a retirement misclassification error. The effective date of the FERS election is retroactive to the date of the Petitioner's hire, the date on which he was first erroneously placed in automatic FERS coverage.

Id. at 26.

In sum, Petitioner asserts that the "TSP regulations require correction for contributions consistent with exclusion from automatic FERS coverage." *Id.*

6. Jurisdiction

Petitioner reiterates his argument that, "[b]y conflating retirement benefit questions with questions concerning prohibited versus legitimate personnel practice[s], GAO seeks to unduly

restrict the subject matter that is afforded protection from prohibited personnel practices.” *Id.* at 27.

In addition, Petitioner states the following:

The Petitioner concedes, however, that there is a jurisdictional issue for his challenge of the regulatory provision at 5 C.F.R. §846.204(b)(2)(i) (1996) as invalid and contrary to statute. The Administrative Procedures Act at 5 U.S.C. §553(a)(2) and 5 U.S.C. §553(e) does not provide an administrative scheme for challenging regulations that pertain to benefits and appears to bar such a challenge. The Constitution, however, guarantees the Petitioner access to the courts to challenge the regulation. The Petitioner contends that the invalidity of this regulation enabled GAO to act under color of law to deny the Petitioner his statutory rights to FERS exclusion and the liberty to abstain from participating in an election of FERS.

While 5 C.F.R. §1605.16 grants jurisdiction over appeals of agency decisions involving TSP retirement misclassification errors to the district courts as a civil action via 5 U.S.C. §8472, the issues of willful negligence and failure to implement a regulation while acting under the color of law (Title 18, U.S.C., Section 242) falls under the jurisdiction of this Board as a prohibited personnel practice, even if it is decided that the GAO is a fiduciary as defined in 5 U.S.C. §8477:

“any person who has or exercises discretionary authority or discretionary control over the management or disposition of the assets of the Thrift Savings Fund” 5 U.S.C. §8477(a)(3)(C)

While GAO certainly has, had, exercises and exercised discretionary authority and control of the disposition of assets into the Thrift Savings Fund, as automatic contributions, matching contributions and individual contributions, it is unclear whether the automatic and matching contributions that are required by law are considered as properly belonging to the Thrift Savings Fund or as properly part of the Thrift Savings Fund when these assets failed to make their proper way into the Fund in a timely manner, owing to agency negligence or willful misconduct.

In addition, it is unfair that the Petitioner should be denied to recover lost opportunity costs from the contributions and earnings that would have taken place had GAO properly notified the Petitioner of his eligibility and permitted the Petitioner to contribute the maximum amount (either 5% or 10% of his earnings, depending on the retirement system) during the period of time between January 14, 1990 and February 6, 1991. There is evidence that this failure and subsequent failure to act to correct this failure was either negligence or willful negligence.

The Petitioner requests that the administrative judge for this case determine whether GAO is a fiduciary under 5 U.S.C. § 8477(a)(3)(C), and reserves the right to file a civil suit on grounds of fiduciary malfeasance as a separate issue

from the issues of prohibited personnel practice[s] that are pending before the Board.

Id. at 27-28.

II. ANALYSIS⁶

A. JURISDICTION⁷

GAO has moved to dismiss Petitioner's allegations for lack of subject matter jurisdiction. As subject matter jurisdiction must exist in order to consider the Petition in this case, this matter is addressed at the outset.

Under the GAO Personnel Act, the Board has jurisdiction over the following matters:

- 1) An officer or employee petition involving a removal, suspension for more than 14 days, reduction in grade or pay, or furlough of not more than 30 days;
- 2) A prohibited personnel practice under 31 U.S.C. 732(b)(2);
- 3) A prohibited political activity under 31 U.S.C. §732(b)(3);
- 4) The appropriateness of a unit of employees for collective bargaining;
- 5) An election or certification of a collective bargaining representative;
- 6) A matter appealable to the Board under the labor-management relations program under 31 U.S.C. 732(e), including an unfair labor practice under 31 U.S.C. 732(e)(1);
- 7) An action involving discrimination prohibited under 31 U.S.C. §732(f)(1); and
- 8) An issue about GAO personnel which the Comptroller General by regulation decides the Board shall resolve.

31 U.S.C. §753(a); 4 C.F.R. §28.2.

Petitioner asserts that the Board has jurisdiction under 4 C.F.R. §28.2(2), because this case involves a prohibited personnel practice within the meaning of 31 U.S.C. 732(b)(2).⁸ Section 732(b)(2) of Title 31 identifies prohibited personnel practices as those "personnel practices [that are] prohibited under section 2302(b) of title 5" of the U.S. Code.⁹

⁶ Petitioner's claim regarding the Agency's alleged errors as to TSP contributions from January 14, 1990 through February 6, 1991 is addressed separately in Part IIC below.

⁷ GAO raised lack of jurisdiction as the basis for its Motion to Dismiss. In reviewing a motion to dismiss, the Board must construe the pleadings in a light most favorable to the Petitioner and may only dismiss the claim if, based on the facts, no claim may be found. *See Williams v. Meese*, 926 F.2d 994, 997 (10th Cir. 1991).

⁸ Petitioner does not assert any other basis under §28.2 for jurisdiction. Accordingly, the other provisions of §28.2 will not be discussed.

⁹ 5 U.S.C. §2302(b) contains 12 subsections. Subsections (1) through (11) include such claims as race, sex, age, or disability discrimination, willful obstruction of the right to compete for employment,

Petitioner’s claims in this case do not raise any matters that come within the purview of subsections (1) through (11) of §2302(b) of Title 5. Rather, insofar as Petitioner is contending that GAO has failed to comply with applicable laws and regulations concerning retirement matters, his claim constitutes an assertion that GAO has committed a prohibited personnel practice in violation of §2302(b)(12)—namely, that it “has take[n] or fail[ed] 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 system principles contained in section 2301 of this title.”

In order to establish a violation of §2302(b)(12), long-established precedent holds that two requirements must be met: 1) the personnel action must be shown to violate a law, rule, or regulation; and 2) the law, rule, or regulation that has been violated must be one which implements, or directly concerns, the merit system principles identified in §2301.¹⁰ *See, e.g.,*

whistleblower reprisal, and the taking of personnel actions in violation of a veterans preference requirement. Subsection (12) makes it a prohibited personnel practice for an agency 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 system principles contained in section 2301 of this title.”

¹⁰ The merit system principles identified in 5 U.S.C. §2301(b) are as follows:

Federal personnel management should be implemented consistent with the following merit system principles:

- (1) Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity.
- (2) All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and Constitutional rights.
- (3) Equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition should be provided for excellence in performance.
- (4) All employees should maintain high standards of integrity, conduct, and concern for the public interest.
- (5) The Federal work force should be used efficiently and effectively.
- (6) Employees should be retained on the basis of the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards.
- (7) Employees should be provided effective education and training in cases in which such education and training would result in better organizational and individual performance.
- (8) Employees should be—
 - (A) protected against arbitrary action, personal favoritism, or coercion for partisan political purposes, and
 - (B) prohibited from using their official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for election.
- (9) Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences—
 - (A) a violation of any law, rule, or regulation, or

Davis v. GAO, PAB Docket Nos. 00-05 and 00-08, (Jul. 26, 2002), *aff'd en banc*, Jul. 11, 2003; *Turner v. GAO*, PAB Docket No. 94-07 (Jul. 3, 1995).

Petitioner contends that GAO committed a prohibited personnel practice by relying on an OPM regulation (5 C.F.R. §846.204(b)(2)(i) (1996)) that, in Petitioner's view, is contrary to 5 U.S.C. §8402(b) and the Fifth Amendment to the Constitution. Pet. ¶¶8-9; *Tekeley Dep.* at 66-67. In essence, Petitioner acknowledges that GAO acted in accordance with the regulation, but contends that the regulation is invalid.

As noted above, in order to establish a violation of 5 U.S.C. §2302(b)(12), it must be shown not only that a personnel action violated a law, rule, or regulation, but also that the violated law, rule, or regulation is one which implements, or directly concerns, the merit system principles identified in 5 U.S.C. §2301. Thus, even assuming that GAO's compliance with the regulation was an action that violated 5 U.S.C. §8402(b)¹¹ and/or the Fifth Amendment to the Constitution, that in and of itself would not be sufficient to establish a violation of §2302(b)(12). Rather, Petitioner would also have to establish that 5 U.S.C. §8402(b) and/or the Fifth Amendment to the Constitution implement, or directly concern, the merit system principles identified in §2301. For the following reasons, I find, in agreement with the Agency, that Petitioner has not established that 5 U.S.C. §8402(b) or the Fifth Amendment to the Constitution implements, or directly concerns, the merit system principles identified in §2301.¹²

First, with respect to the claimed violation of 5 U.S.C. §8402(b), that statutory provision excludes certain employees from FERS coverage. Nothing in that provision states or suggests that it implements or directly concerns the merit system principles identified in §2301. In addition, Petitioner cites no case law, and none is apparent, in support of the proposition that §8402(b) implements or directly concerns the merit system principles identified in §2301. Accordingly, even assuming, without deciding, that GAO violated 5 U.S.C. §8402(b) by acting consistent with the OPM regulation, there has been no demonstration that §8402(b) is a law that implements or directly concerns the merit system principles identified in §2301. Consequently, the alleged violation of §8402(b) does not satisfy the requirements to establish subject matter jurisdiction under 5 U.S.C. §2302(b)(12).

Second, with respect to the claimed violation of the Fifth Amendment to the Constitution, there has been no showing that it implements or directly concerns the merit system principles identified in §2301. Nothing in the Fifth Amendment states or suggests that it implements or directly concerns the merit systems principles identified in 5 U.S.C. §2301. In addition,

(B) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. 5 U.S.C. §2301(b).

¹¹ It is noted that in *Tekeley IV*, discussed above, the Federal Circuit specifically found that the OPM regulation was promulgated pursuant to OPM's statutory authority.

¹² Petitioner "concedes . . . that there is a jurisdictional issue for his challenge" to the OPM regulation on the ground that it is contrary to statute, and states that his challenge appears to be barred. Response at 27. Although this statement may be construed as a withdrawal of his argument in this regard, Petitioner's argument will nonetheless be addressed.

Petitioner cites no case law, and none is apparent, in support of the proposition that the Fifth Amendment implements or directly concerns the merit system principles identified in §2301.

Indeed, relevant precedent suggests otherwise. In *Radford v. OPM*, 69 M.S.P.R. 250 (1995), an employee alleged that his Constitutional right to equal protection had been violated by an OPM regulation because the regulation created two classes of employees: those who were reemployed after a certain date, and those who were reemployed before that date. The employee claimed that OPM's regulation granting sick leave credit to only the former group was discriminatory and unfair, and therefore violated the equal protection clause of the Constitution. *Id.* at 254-55. The MSPB held that the employee had not established jurisdiction because he had not identified any law, rule, or regulation implementing or directly concerning a merit principle. *Id.* at 255 (citing *Pollard v. OPM*, 52 M.S.P.R. 566, 570 (1992) (rejecting equal protection challenge to OPM rule governing military leave because no law or regulation required identical treatment of Federal and private sector employees)). In so holding, the MSPB specified that "the Constitutional provision which the merit systems principle in section 2301(b)(2) incorporates cannot, of course, be both the merit systems principle and the violated law, rule, or regulation which implements or directly concerns the merit systems principle." *Radford*, 69 M.S.P.R. at 255 n.3.

Likewise, in the instant case, Petitioner argues that a violation of his Constitutional rights has occurred as a result of the creation of two classes of employees: those who were not excluded from FERS coverage and those who were. *See* Tekeley Dep. at 18. However, as the MSPB noted in *Radford*, the Constitutional provision which the merit systems principle in section 2301(b)(2) incorporates cannot be both the merit systems principle and the violated law which implements or directly concerns the merit systems principle. *Radford*, 69 M.S.P.R. at 255 n.3. Thus, Petitioner's allegations of a Constitutional violation are not sufficient to satisfy the two-step process required to show jurisdiction under §2302(b)(12).

Finally, Petitioner also cites 18 U.S.C. §242 as a basis for jurisdiction, stating that "willful negligence and failure to implement a regulation while acting under the color of law . . . falls under the jurisdiction of this Board as a prohibited personnel practice." Response at 27-28. While the Agency did not address this contention, it must be noted that the argument is misguided. Section 242 makes it a crime for anyone to misuse their authority to deprive a person of a right protected by the Constitution or laws of the United States. *See United States v. Lanier*, 520 U.S. 259, 271 (1997). Criminal actions are not within the jurisdiction of the PAB.

Accordingly, Petitioner has failed to establish that the PAB has subject matter jurisdiction over the Petition in this case under 31 U.S.C. §753(a) and 4 C.F.R. §28.2. Therefore, the Petition is dismissed for lack of subject matter jurisdiction. Nonetheless, in order to provide a record with respect to the other potentially dispositive issues raised in the pending Motion in the event that an appeal is filed in this matter and subject matter jurisdiction is found to exist, those other issues will now be addressed.

B. MOTION FOR SUMMARY JUDGMENT

1. There is No Genuine Issue as to any Material Fact

Summary judgment is appropriate under the guidelines of the Federal Rules of Civil Procedure if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Although the moving party bears the burden of demonstrating the absence of genuine issues of material fact, it can discharge this burden by showing an absence of evidence to support the nonmoving party's case. *Conroy v. Reebok Int'l*, 14 F.3d 1570, 1575 (Fed. Cir. 1994). *See also, Madson v. GAO*, PAB Docket No. 96-07 (Apr. 23, 1997), *aff'd en banc*, Dec. 2, 1997. Thus, a party opposing summary judgment must do more than show "some metaphysical doubt" as to the material facts to create a triable issue. *United States v. Newport News Shipbuilding & Dry Dock Co.*, 933 F.2d 996, 1000 (Fed. Cir. 1991) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) ("the nonmoving party must come forward with 'specific facts showing that there is a genuine issue for trial'")); *Gatlin-Brown v. GAO*, PAB Docket No. 00-02 (Mar. 23, 2001), *aff'd en banc*, Nov. 9, 2001.

Petitioner contends that there are "new material facts in this case" which "were only recently obtained in March 2007 after a request to the Thrift Savings Plan Service Office in Birmingham Alabama." Response at 23. According to Petitioner,

[t]hese facts pertain to Thrift Savings Plan rights and benefits defined in regulation for employees excluded from automatic FERS coverage. These facts prove that the Petitioner never received these rights and benefits and, as a result, prove that GAO acted contrary to applicable laws and regulations that require GAO (a) to exclude the Petitioner from automatic FERS coverage and (b) correct the failure to exclude the Petitioner from automatic FERS coverage.

Id.

To the extent that Petitioner is claiming that summary judgment is inappropriate in this case because of these "new material facts," this claim is rejected. By Petitioner's own description, the information that he recently obtained consists of descriptions of Thrift Savings Plan rights and benefits defined in regulation. Petitioner does not allege that there has been any relevant change in these regulations at any time pertinent to this proceeding, or that he was in any manner prevented from becoming aware of these regulations. Petitioner's recent discovery of this regulatory provision does not constitute a new material fact for purposes of determining whether summary judgment is appropriate. *See Coronel v. OPM*, 101 M.S.P.R. 407, 410-11 & n.9.

The material facts in this case are either undisputed—for example, the fact that Petitioner was placed in the incorrect retirement system in 1990—or have been conclusively established in the decisions by the MSPB and the Federal Circuit in *Tekeley I, II, III, and IV*. Accordingly, I find that there is no genuine issue as to any material fact, and that it is appropriate to address the matter of the timeliness of the Petition.

2. The Petition is Untimely

The Agency asserts that it is entitled to summary judgment because, under the PAB's time limits set forth in 4 C.F.R. §28.11(b), the Petition is untimely. Petitioner contends that his Petition is timely.

As set forth in note 2, *supra*, and as relevant here, §28.11(b) of the PAB's regulations states that charges relating to personnel actions must be filed within 30 days after the effective date of the action or 30 days after the charging party knew or should have known of the action, with the exception that charges relating to continuing violations may be filed at any time.

GAO contends that the Petition should be dismissed as untimely because Petitioner's underlying Charge was not filed with the PAB Office of General Counsel within 30 days of any of the only possible pertinent dates: 1990 (when GAO improperly placed Petitioner in FERS), 1996 (when Petitioner was deemed by GAO to have elected FERS), and 2004 (when GAO rejected Petitioner's request to retroactively place him in CSRS-Offset). Petitioner, on the other hand, contends that his Petition is timely because his claims demonstrate continuing violations that GAO has failed to remedy, beginning in 1990 and continuing to the present. For the reasons discussed below, I find that the "continuing violations" theory is inapplicable in determining the timeliness of the Petition and that the Petition is untimely.

For purposes of defining a continuing violation in order to compute time limits, there is a distinction between actions that a party takes and the impact of those actions. A party may not use the continuing violation theory to challenge discrete actions that occurred outside the limitations period even though the impact of the acts continues to be felt. *McCormick v. Farrar*, 147 Fed. Appx. 716, 720 (10th Cir. 2005) (unpublished). A continuing violation is occasioned by continual unlawful acts, not by continual ill effects from the original violation. *Bergman v. United States*, 751 F.2d 314, 317 (10th Cir. 1984). An employee's repeated requests for relief from one act cannot turn a discrete action into a continuing violation. *See Guerra v. Cuomo*, 176 F.3d 547, 551 (D.C. Cir. 1999); *Dasgupta v. University of Wisconsin Bd. of Regents*, 121 F.3d 1138, 1140 (7th Cir. 1997).

This case law demonstrates that Petitioner's claim of a continuing violation cannot serve to justify the Petition based upon a Charge filed seventeen months after GAO's denial of his request to be placed in CSRS-Offset. The fact that Petitioner continues to feel impact from the Agency's actions in 1990, 1996, and 2004 does not render his filing timely under the continuing violation theory. *See Bergman*, 751 F.2d 314. Under Petitioner's theory, there would be no time limit for filing a petition as long as GAO did not provide him the remedy that he seeks. This would permit a petition to be filed at any time, a result that would render the PAB's regulatory time limit meaningless.

The conclusion that the Petition is untimely is supported by the recent decision of the U.S. Supreme Court in *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S.Ct. 2162 (2007). In *Ledbetter*, the Court addressed the timeliness of a filing in an employment discrimination case. There, as here, the argument was made that a filing was timely based on a continuing violation theory. The Court rejected the argument, holding that the relevant charging period "is triggered

when a discrete unlawful practice takes place. A new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent non-discriminatory acts that entail adverse effects resulting from the past discrimination.” *Ledbetter*, 127 S.Ct. at 2169.

Similarly, in this case, the effects on Petitioner’s TSP earnings from the Agency’s allegedly unlawful actions do not give rise to a new cause of action; rather, timeliness must be measured from the allegedly discrete unlawful actions themselves. No matter how the allegedly discrete unlawful action is defined, the most recent applicable date would be in 2004, which renders the Petitioner’s March 2006 filing with the PAB Office of General Counsel untimely.

In sum, Petitioner did not file within 30 days of the effective date of the action or 30 days after he knew or should have known of the action. The continuing violation theory does not correct these deficiencies. Therefore, the Petition is barred by the time limits set forth in 4 C.F.R. § 28.11(b), and Respondent is entitled to summary judgment.

3. The Doctrine of *Res Judicata* Applies to Petitioner’s Claims

Under the doctrine of *res judicata*, or claim preclusion, a “final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.” *Federated Dep’t Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981); *Brown v. Felsen*, 442 U.S. 127, 131 (1979). By precluding parties in a subsequent proceeding from raising claims that were or could have been raised in a prior proceeding, *res judicata* “encourages reliance on judicial decisions, bars vexatious litigation, and frees the courts to resolve other disputes.” *Brown v. Felsen*, 442 U.S. at 131. In order to determine whether the doctrine applies in this case, it is necessary to examine the claims in the earlier proceedings and the claims in this case.

In the MSPB proceeding, Petitioner argued that he had never been given the opportunity to elect which retirement system he would be covered by, an opportunity to which he was entitled because of GAO’s admitted error in placing him in FERS in 1990. In that proceeding, he argued that: 1) GAO should have granted his 2004 request to be retroactively placed in the CSRS-Offset retirement system (Appellant’s Br. to MSPB at 2) [Motion Ex. 2]; 2) he was entitled to be placed in CSRS-Offset because he had not received the notice required under 5 C.F.R. § 846.204 of his right to opt out of FERS, which GAO claimed was sent in 1996 (*id.* at 5); 3) the 1996 letters sent by GAO did not constitute an election opportunity (*id.* at 5-6); 4) GAO’s evidence regarding his receipt of actual notice of his election opportunity was inaccurate (*id.* at 6-7); 5) GAO erred in applying administrative procedures because it failed to provide him with the notice required under 5 C.F.R. §846.204(b)(1), which provides for the correction of administrative errors related to retirement system elections (*id.* at 13-15); 6) he was harmed because he was prevented from making a retirement election and was deprived of being placed in CSRS-Offset (*id.* at 22-25); and 7) as a result he stood to lose \$1,403 per month in retirement benefits (*id.* at 25).

On appeal to the Federal Circuit, Petitioner argued that the MSPB’s holding was in error because FERCCA, which was passed in 2000, could not apply to him retroactively. Pet. Br. to Fed. Cir. [Motion Ex. 5] at 1, 11-13. Citing *Dandridge v. Williams*, Petitioner also argued that GAO

violated the due process clause and the Fifth Amendment to the Constitution because GAO's treatment of him resulted in invidious discrimination between two like classes: employees who were entitled to be placed into FERS, but were not, and those employees who were correctly placed in FERS. *Id.* at 15. Petitioner also claimed that the MSPB failed to consider important grounds for relief, including GAO's violation of statute, equitable tolling, and the doctrine of equitable consideration. *Id.* at 1, 22-27. Finally, Petitioner claimed that the MSPB decision was improper because it stated that it was affirming "OPM's reconsideration decision," when, in fact, the appeal had been of GAO's final decision. *Id.* at 2.

In the instant case, Petitioner argues that from 1990 to the present, GAO has failed to provide him with a valid remedy for its failure to exclude him from automatic FERS coverage. Pet. ¶7. Petitioner contends that as a result of GAO's actions, his retirement benefits have been reduced from the more generous benefits of CSRS-Offset to the lesser benefits of FERS. *Id.* ¶10. As a remedy, Petitioner seeks "compensation that amounts to the net present value difference between CSRS-Offset retirement benefits and FERS retirement benefits when compared as two annuities over [his] lifetime, making equitable adjustments for differences in inflation protection, TSP and retirement contributions." *Id.* at ¶11.

In substance, Petitioner is seeking the same relief that he sought, and failed to obtain, in the MSPB and Federal Circuit proceedings. There, he sought to be placed in CSRS-Offset for GAO's alleged errors following his improper retirement placement. Here, he seeks to obtain all of the financial benefits that would have resulted had he been placed in CSRS-Offset absent GAO's alleged errors following his improper retirement placement. This claim comes within the terms of the *res judicata* doctrine, and may not be raised in this proceeding.

Petitioner correctly concedes that he is bound by the earlier MSPB and Federal Circuit determinations finding that he had received notification concerning the election opportunity, and he states that he is not disputing that determination here. Petitioner contends that his claim in this case regarding the OPM regulation differs from his claim regarding the same regulation in the MSPB proceeding. According to Petitioner, in the MSPB case, he was disputing whether he had ever received the notice that GAO was required, under the OPM regulation, to send upon its discovery of his retirement system placement error. In contrast, Petitioner argues that in the instant case, he is challenging GAO's reliance on that regulation, which he claims is contrary to 5 U.S.C. §8402.¹³

Petitioner is correct that his current claim regarding the OPM regulation is different from the claim that he made in the MSPB proceeding. Moreover, as the Agency properly acknowledges, Petitioner did not make this argument in the MSPB proceeding. However, for purposes of determining whether *res judicata* applies, it is necessary to examine not just what arguments

¹³ 5 U.S.C. §8402 sets forth categories of individuals who are excluded from FERS. The OPM regulation provides a remedy for administrative errors that resulted in employees being placed in FERS, when, under 5 U.S.C. §8402, they should not have been so placed. The OPM regulation states that if an individual was erroneously placed in FERS, the employee should remain in FERS and be given the opportunity to opt out of FERS. 5 C.F.R. §846.204. *See also*, Deemed Elections of Coverage Under the Federal Employees Retirement System, 58 Fed. Reg. 47821 (Sept. 13, 1993).

were, in fact, made in the earlier proceeding, but also what arguments could have been made in that proceeding.

The record demonstrates that this argument is one that Petitioner could have made in the earlier proceeding. Petitioner does not assert that he was unaware of the OPM regulation or 5 U.S.C. §8402 in the earlier proceeding, or that he was unable to present the argument in that proceeding. As GAO points out, Petitioner admitted that he was aware of 5 C.F.R. §846.204 prior to bringing his MSPB case (Tekeley Dep. at 114), and he was aware of 5 U.S.C. §8402 because he had argued in his Federal Circuit brief that he was “an individual described in 5 U.S.C. §8402(b)(2).” Appellant’s Br. to Fed. Cir. at 9. Further, as the Agency notes, when Petitioner was asked at his deposition why he had not raised the instant claims in his MSPB case, he replied, “I didn’t see it,” but did not explain why. Tekeley Dep. at 109-12. Consequently, Petitioner’s claim regarding the OPM regulation is one that could have been raised in the earlier proceeding.

Petitioner’s claim that he had a statutory right to be excluded from automatic FERS coverage is also governed by the doctrine of *res judicata*. It constitutes, in essence, another attempt to challenge his retirement system placement and to obtain with financial relief from the effects of that placement. For example, in the earlier proceeding, Petitioner argued that he had been “erroneously covered by FERS and . . . in 1990 had the right under statute to elect his retirement system.” Appellant’s Br. to MSPB at 1. Petitioner is making the same claim in the instant case. Tekeley Dep. at 92. Petitioner has already unsuccessfully asserted his claim that his placement into FERS was erroneous, and that claim may not be raised again here.

Petitioner’s claim regarding the Fifth Amendment to the Constitution is also barred by claim preclusion. This claim is substantially similar to the claim he raised on appeal to the Federal Circuit. In both cases, Petitioner has asserted that his placement in the FERS retirement system has resulted in Constitutional violations by creating class discrimination. Tekeley Dep. at 17-18; Appellant’s Br. to Fed. Cir. at 15. In both cases, Petitioner has relied on the same decision of the U.S. Supreme Court—*Dandridge v. Williams*. See Pet. ¶9; Appellant’s Br. to Fed. Cir. at 14.

Petitioner contends that his Constitutional argument in the earlier proceeding was “misplaced.” Tekeley Dep. at 113. However, the fact that a party believes that an argument made in an earlier proceeding was misplaced has no relevance to a determination as to whether *res judicata* applies. Rather, as stated above, the appropriate analysis examines whether the claim is one that was made, or could have been made, in the earlier proceeding. Petitioner’s Constitutional claim has already been fully litigated and has been held to be without merit, see *Tekeley III*. Therefore, *res judicata* precludes the raising of that claim in this forum.

These conclusions are consistent with the MSPB’s application of the doctrine of *res judicata* in similar circumstances. For instance, in *Sabersky v. Department of Justice*, 91 M.S.P.R. 210 (2002), the appellant brought a second appeal based on the same removal, making a claim that he could have raised in the first appeal. The MSPB held that the second appeal should have been dismissed on grounds of *res judicata* because the appellant had an opportunity to raise his claim when he first challenged his removal, and his failure to do so did not entitle him to bring a second appeal based on the same removal. In this regard, the MSPB stated:

“Under the doctrine of *res judicata*, a valid, final judgment on the merits by a tribunal of competent jurisdiction bars a party from relitigating, in a second action, matters that were or could have been raised in the prior action.” *Rosado v. Department of the Air Force*, 68 M.S.P.R. 662, 665 (1995), *review dismissed*, 79 F.3d 1164 (Fed. Cir. 1996) (Table). . . .

[T]he final order rendered by the Board after the appellant’s first appeal precludes the appellant from now challenging the same personnel action under a new legal theory. *See Garduque v. Office of Personnel Management*, 84 M.S.P.R. 300, ¶2 (1999) (“The petitioners are not entitled to return to the Board on the basis that they have developed a new theory of their cases”), *review dismissed*, 230 F.3d 1379 (Fed. Cir. 2000) (Table); *Enrique v. Office of Personnel Management*, 82 M.S.P.R. 305, ¶5 (“To the extent that petitioner Enrique’s claims . . . in this proceeding are distinguishable from his claims made in the prior proceeding, the instant claim could have been raised in the earlier proceeding” and was thus barred), *review dismissed*, 217 F.3d 858 (Fed. Cir. 1999) (Table); *Lopez v. Department of Labor*, 57 M.S.P.R. 163, 167 (1993) (“Under the doctrine of *res judicata*, the appellant is precluded from bringing serial appeals based on the same compensable injury”).

91 M.S.P.R. at 212-13.

A similar result was reached in *Paderes v. OPM*, 104 M.S.P.R. 612, 614-15 (2007). In *Paderes*, the MSPB held that an employee was barred from challenging the validity of an OPM regulation regarding retirement coverage because the employee had previously contested OPM’s denial of his retirement benefits. The MSPB found that in the guise of challenging an OPM regulation, the employee was again attempting to challenge OPM’s determination that he was not entitled to an annuity. Therefore, the MSPB held that while the employee’s arguments regarding the allegedly improper exclusion of certain employees from CSRS coverage might be different from those presented in his previous appeal, he was not entitled to raise a new theory of his case. Further, the MSPB held that to the extent the claim of an invalid regulation was distinguishable from claims made in his prior retirement appeal, that claim could have been brought in the earlier proceeding. Consequently, *res judicata* precluded the employee’s claims.

In sum, a review of these claims demonstrates that the Federal Circuit’s statement regarding the claims that Petitioner made in *Tekeley III* is equally applicable here:

Although Mr. Tekeley fashions his appeal through the lens of various regulatory, statutory, Constitutional, and equitable arguments, each of those arguments hinges on the question whether he received proper notice in 1996 of the [A]gency’s error and of his right to decline FERS coverage. If he received proper notice in 1996, he is not entitled to a second opportunity to correct the retirement coverage error.

Tekeley III, 173 Fed. Appx. at 822. The MSPB and the Federal Circuit determined that Petitioner did, in fact, receive proper notice in 1996, and that determination may not be revisited here. Therefore, he cannot correct the retirement coverage error here, either directly or

indirectly, by seeking monetary relief in an amount equal to the difference in the financial value over the years between CSRS-Offset and FERS.

Accordingly, because these claims were or could have been raised in earlier proceedings before the MSPB and the Federal Circuit, *res judicata* precludes consideration of these claims by the PAB.

C. TSP CONTRIBUTIONS FROM JANUARY 14, 1990 THROUGH FEBRUARY 6, 1991

Petitioner asserts that he

did not receive Agency automatic contributions as required by regulation and was improperly barred from making employee contributions and receiving Agency matching contributions from January 14, 1990 through February 6, 1991. . . . By improperly barring the Petitioner from making individual contributions between January 14, 1990 and February 6, 1991, the Petitioner was harmed by the lost opportunity to receive earnings, tax breaks, agency matching contributions and earnings on those agency matching contributions. This is in addition to the lost agency automatic contributions and lost earnings on those automatic contributions. The Petitioner's TSP records show the lost benefits and opportunities for benefits during this period should have resulted in recurring earnings subject to compound growth for over 17 years.

Response at 24-25.

This claim does not constitute a challenge to Petitioner's retirement system placement. To the contrary, it starts from the premise that the Agency has properly deemed Petitioner to have elected FERS coverage, but goes on to assert that the Agency has not complied with applicable TSP regulations addressing treatment of employees who have been deemed to have elected FERS coverage. This claim was not raised in the MSPB and Federal Circuit proceedings. Moreover, as explained more fully below, this claim could not have been raised in those proceedings because neither the MSPB nor the Federal Circuit would have jurisdiction over this type of claim. As such, *res judicata* does not apply to this claim.

Because Petitioner did not respond to the Agency's notification in 1996 of the opportunity to decline FERS coverage (as conclusively found by the MSPB and the Federal Circuit), Petitioner "is deemed to have elected FERS coverage effective the earliest date he . . . could have elected FERS coverage." OPM, Elections of FERS Coverage, Deemed Elections of FERS Coverage, Section 11A6.1-1D ("Documentation Requirement") (www.opm.gov/fers_election/ch_11/c_deem.htm). In Petitioner's case, as an employee who was rehired and erroneously placed in FERS after June 30, 1987, "the effective date of the deemed FERS election [is his] entry-on-duty date." *Id.*, Section 11A6.1-1H ("Effective Date of Deemed FERS Election"). Thus, Petitioner correctly asserts that his deemed FERS election was effective upon his entry-on-duty date, namely, January 14, 1990.

That date also has significance for TSP purposes, as explained by OPM: In situations where an employee is deemed to have elected FERS coverage, the first eligibility date for Thrift Savings Plan (TSP) participation will also change. Agencies should be aware of TSP eligibility rules and refer to Part 1605 of title 5, Code of Federal Regulations, for additional information on correcting TSP errors.

Id., Section 11A6.1-1I (“Correction of Records”).

The regulations in 5 C.F.R. Part 1605 (“Correction of Administrative Errors”) are promulgated by the Federal Retirement Thrift Investment Board, which administers the TSP. As relevant here, they provide procedures for correction of employing agency errors regarding TSP payments. More specifically, 5 C.F.R. §1605.16(d) (“Agency Procedures”) requires that agencies establish procedures for employees to submit claims in this regard, and that final agency decisions on such claims are appealable in accordance with 5 U.S.C. §8477 (that is, to U.S. District Courts).¹⁴ In addition, OPM’s website provides a detailed explanation concerning retirement contribution error correction, including specifics about makeup of missed employee and agency contributions. See www.opm.gov/ASD/htm/2002/02-103.htm (Retirement and Insurance Service Benefits Administration Letter, “Retirement Coverage Error Correction: Erroneous FERS Coverage in Effect for Less than 3 Years” (May 7, 2002), Attach. 4).

Claims regarding alleged agency errors as to TSP payments are governed by the regulations of the Federal Retirement Thrift Investment Board. As such, they do not come within the jurisdiction of the PAB. In this regard, Petitioner’s attempt to bring this claim within the jurisdiction of the PAB as a prohibited personnel practice fails for the same reasons set forth above with respect to his claims regarding 5 U.S.C. §8402 and the Fifth Amendment to the Constitution.¹⁵

Finally, it is noted that the record in this case contains no indication that Petitioner has filed a claim with the Agency regarding alleged Agency errors as to TSP payments. Moreover, I find that Petitioner’s raising of this claim before the PAB does not constitute the filing of a claim with the Agency. I note that the Agency did not specifically address Petitioner’s assertion in this regard, other than to state generally in its Answer to the Petition that GAO has properly followed applicable laws and regulations with regard to the award of Petitioner’s retirement benefits. Response, Ex. 12 at 3.¹⁶ The Agency clearly has an obligation to comply with applicable regulations of the Federal Retirement Thrift Investment Board and OPM regarding correction of TSP contribution errors. Petitioner’s assertion and supporting evidence raise a significant question as to whether GAO has corrected his TSP records to conform to applicable regulations

¹⁴ The provisions of Title 5 United States Code, subpart G, and implementing regulations for the Executive Branch covering retirement, among other matters, apply to GAO employees. 4 C.F.R. §8.1.

¹⁵ In light of this conclusion, there is no need to address Petitioner’s request that a determination be made regarding the Agency’s fiduciary status under 5 U.S.C. §8477(a)(3)(C).

¹⁶ During the status conference in this case, the Agency requested leave to file a reply to Petitioner’s response to its anticipated dispositive motion. This request was deferred, and the Agency was allowed to renew its request after the scheduled pleadings had been filed. The Agency did not renew its request to file a reply to Petitioner’s Response.

for employees who, like Petitioner, are deemed to have elected FERS coverage. Nonetheless, Petitioner's allegation is not a matter over which the PAB has jurisdiction.

CONCLUSION

The Petition is dismissed for lack of subject matter jurisdiction.

SO ORDERED.