2015-3135, -3211

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JOSEPH P. CARSON,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

Petitions for Review of the Merit Systems Protection Board
in Nos. AT-1221-14-0620-W-1 and AT-1221-15-0092-W-1

BRIEF OF PETITIONER JOSEPH P. CARSON

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April 19, 2016

FORM 9. Certificate of Interest

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Joseph P. Carson v. Merit Systems Protection Board

No. 2015-3135, -3211

CERTIFICATE OF INTEREST

Counsel for the (petitioner) (appellant) (respondent) (appellee) (amicus) (name of party)
Petitioner certifies the following (use "None" if applicable; use extra sheets if necessary):

1. The full name of every party or amicus represented by me is:
Joseph P. Carson

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:
Joseph P. Carson

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:
None

4. ☑ There is no such corporation as listed in paragraph 3.

5. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:
Loring E. Justice, Loring Justice, PLLC

April 19, 2016
Date

/s/ B. Chadwick Rickman, Esq.
Signature of counsel

B. Chadwick Rickman, Esq.
Printed name of counsel

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to 5 U.S.C. §§ 1221(h), (i), and 7703(b)(1).

The MSPB decision appealed from has become final. *See e.g.*, *Conforto v. Merit Systems Protection Bd.*, 713 F. 3d 1111 (Fed. Cir. 2013).The Notice of Appeal in No. 2015-3135 was filed on April 24, 2015, less than 60 days from the issuance of the Board's final decision on March 25, 2015 in *Carson v. Office of Special Counsel*, AT-1221-14-0620-W-1. (*Carson I*)(Appx001-011). The Notice of Appeal in No. 2015-3211 was filed on August 19, 2015, less than 60 days from the issuance of the Board's final decision on August 17, 2015 in *Carson v. Office of Special Counsel*, AT-1221-15-0092-W-1 (*Carson II*)(Appx012-023). On October 19, 2015, the Court granted Mr. Carson's unopposed motion to consolidate the two appeals: *Carson v. MSPB*, 2015-3135 and *Carson v. MSPB*, 2015-3211.

STATEMENT OF THE ISSUES

(a) Is the Office of Special Counsel's (OSC) refusal to review or address Mr. Carson's protected disclosures and/or comply with a number of

its nondiscretionary duties in his whistleblower reprisal complaints a "personnel action" aggrieving Mr. Carson?

(b) Does OSC's intentional refusal to review Mr. Carson's admittedly nonfrivolous protected whistleblower disclosures and/or comply with a number of its nondiscretionary duties in his whistleblower reprisal complaints in retaliation for his protected activity represent "any other significant change in working conditions" for Mr. Carson?

STATEMENT OF THE CASE

Joseph Carson ("Carson," "Joe Carson"), an employee of the Department of Energy (DOE), has filed IRA appeals, because agencies, including DOE, the Office of Special Counsel (OSC), and the Merit Systems Protection Board (MSPB or "Board") took personnel actions against him in retaliation for protected disclosures/protected activity.[1] In reprisal for protected activity and protected disclosures, OSC failed or refused to comply with statutory duties to investigate Mr. Carson's

[1] *Carson v. Department of Energy*, MSPB Docket No. AT-1221-14-0520-W-1, Final Order at 2 (May 21, 2015); *Carson v. Office of Special Counsel*, MSPB Docket No. AT-1221-14-0620-W-1 (*Carson I*), Final Order at 2 (Mar. 25, 2015); *Carson v. Merit Systems Protection Board*, MSPB Docket No. AT-1221-14-0637- W-1, Initial Decision at 2 (Nov. 6, 2014).

whistleblower reprisal complaints regarding DOE and the Board.[2] Below, OSC did not meaningfully dispute Mr. Carson's allegations were "nonfrivolous," rather the sole material dispute was whether Mr. Carson alleged a personnel action. The question is: Has Mr. Carson suffered a "personnel action" because the agency ignored and failed to process, in any way, his admittedly nonfrivolous allegations?

This question arises in a consolidated appeal arising from two individual right of action (IRA) proceedings before the Merit Systems Protection Board ("the Board"):

a. ***Carson v. Office of Special Counsel***, AT-1221-14-0620-W-1 (***Carson I***)

In this whistleblower reprisal appeal (a violation of 5 U.S.C. §2302(b)(8)), Mr. Carson alleged the OSC engaged in reprisal against him when it ignored his whistleblower disclosures to it about its own violations of law. Mr. Carson filed his IRA appeal on March 19, 2014. MSPB issued a "Show Cause Order" for jurisdiction on July 10, 2014. Mr. Carson timely responded. OSC did not respond to the Show Cause

[2] *See, e.g.*, No. 15-3211, MSPB Docket No. AT-1221-15-0092-W-1, Appx157.

Order. On July 25, 2014, MSPB issued its initial decision, and although there was no dispute that Mr. Carson's allegations were "nonfrivolous" MSPB nonetheless dismissed the appeal for lack of jurisdiction based on a determination OSC took no "personnel action" against him (Appx120-128). Mr. Carson timely submitted a PFR of the initial decision. The Board's final decision of March 25, 2015 upheld the initial decision (Appx001-011).

b. ***Carson v. Office of Special Counsel*, AT-1221-15-0092-W-1 (*Carson II*)**

This is a federal reprisal appeal, alleging a violation of 5 U.S.C. §2302(b)(9)(A)(i). OSC engaged in reprisal against Mr. Carson when it failed or refused to comply with several of its non-discretionary statutory duties after he filed two whistleblower reprisal complaints with it.[3] Mr. Carson filed the IRA appeal on October 22, 2014 (Appx154-

[3] 5 U.S.C. § 1212 provides

(a)The Office of Special Counsel shall—
(1) in accordance with section 1214(a) and other applicable provisions of this subchapter, protect employees, former employees, and applicants for employment from prohibited personnel practices;

171). MSPB issued a "show cause Order" for jurisdiction on October 28, 2014 (Appx189-195) to which Mr. Carson responded on November 17, 2014 (Appx196-350). OSC responded on December 17, 2014 (Appx351-360). Again, OSC did not meaningfully dispute Mr. Carson's allegations were "nonfrivolous," but focused upon whether a "personnel action" had taken place. In an initial decision on January 13, 2015, the MSPB determined Mr. Carson failed to allege a personnel action (Appx361-370). Mr. Carson timely filed a PFR of the initial decision. In a final decision of August 17, 2015, the Board dismissed the appeal on

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(2)receive and investigate allegations of prohibited personnel practices, and, where appropriate—
(A) bring petitions for stays, and petitions for corrective action, under section 1214; and
(B) file a complaint or make recommendations for disciplinary action under section 1215;
(3) receive, review, and, where appropriate, forward to the Attorney General or an agency head under section 1213, disclosures of violations of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;
(4) review rules and regulations issued by the Director of the Office of Personnel Management in carrying out functions under section 1103 and, where the Special Counsel finds that any such rule or regulation would, on its face or as implemented, require the commission of a prohibited personnel practice, file a written complaint with the Board;
…

adjudicatory efficiency, based on the pending appeal at this Court, *Carson v. MSPB*, 2015-3135 (*Carson I*) (Appx012-023). The Board rejected the application of collateral estoppel, as advocated by OSC, but nonetheless found the appeal should be dismissed on the related but more amorphous doctrine of "adjudicatory efficiency." Given OSC did not meaningfully dispute Mr. Carson's allegations were "nonfrivolous," the Board apparently found no factual inquiry was necessary on this prong of the jurisdictional test, making *Carson I* and *II* legally identical in that both would turn on the issue of whether OSC's ignoring or failure to process in any way an admittedly nonfrivolous whistleblower disclosure and whistleblower reprisal complaint is a "personnel action."

STATEMENT OF THE FACTS

Joseph Carson is a licensed professional engineer who has been a nuclear professional for 40 years. He served as a submarine officer in the nuclear Navy from 1976 to 1982. He worked as a start-up and test engineer at three commercial nuclear plants from 1982-1989 and became a licensed professional engineer in 1984. He started his employment at the U.S. Department of Energy (DOE) in a position with

extensive responsibilities for public (including workplace) health and safety in January 1990. Mr. Carson first "blew whistles" about serious workplace and public health and safety issues in the Department of Energy in 1992, after his professional safety related findings were suppressed by his management. As one result of his whistleblowing, the DOE Inspector General issued a March 1996 report on DOE's Accident Investigation Program, IG-0386, that resulted in the program's overhaul.[4]

Between 1994 and 2001, Mr. Carson was repeatedly subjected to retaliation and prevailed in IRA appeals and Petitions for Enforcement against DOE's unlawful reprisal under the Whistleblower Protection Act. He "prevailed" in at least eight separate whistleblower or whistleblower-related decisions at the Board including three published Board decisions, *Carson v. Department of Energy*, 77 MSPR 453 (1998); 85 MSPR 171 (2000); and 88 MSPR 260 (2001). Some of the history of retaliation is cited in *Carson v. Department of Energy*, 398 F.3d 1369,

[4] Report on the Scope of the Accident Investigation of the Tristan Fire at the DOE Brookhaven National Laboratory <www.ig.energy.gov/documents/CalendarYear1996/IG-0386.txt>.

1372-73, 1378-79 (Fed. Cir. 2005).

SUMMARY OF THE ARGUMENT

The Board has jurisdiction over an IRA appeal if the appellant exhausts his administrative remedies before OSC and makes nonfrivolous allegations: (1) he made a disclosure described under 5 U.S.C. § 2302(b)(8), or engaged in protected activity described under 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D); and (2) the disclosure or protected activity was a contributing factor in the agency's decision to take or fail to take a personnel action as defined by 5 U.S.C. § 2302(a), 5 U.S.C. §§ 1214(a)(3), 1221(e)(1); *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001). An employee may seek corrective action from the Board regarding any "personnel action" taken, or proposed to be taken, against him as the result of a prohibited personnel practice described in 5 U.S.C. § 2302(b)(8). 5 U.S.C. § 1221(a). A "personnel action" is defined as: (i) an appointment; (ii) a promotion; (iii) an action under 5 U.S.C. chapter 75 or other disciplinary or corrective action; (iv) a detail, transfer, or reassignment; (v) a reinstatement; (vi) a restoration; (vii) a reemployment; (viii) a

performance evaluation under 5 U.S.C., chapter 43; (ix) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other personnel action; (x) a decision to order psychiatric testing or examination; (xi) the implementation or enforcement of any nondisclosure policy, form, or agreement; and (xii) ***any other significant change in duties, responsibilities, or working conditions***. 5 U.S.C. § 2302(a)(2)(A). (emphasis added). The key issue at the heart of this appeal is did Mr. Carson validly claim he suffered a personnel action in *Carson I* and/or *Carson II* (particularly given the agency did not dispute below Mr. Carson nonfrivolously alleged a whistleblower disclosure described under 5 U.S.C. § 2302(b)(8) in *Carson I* and engaged in protected activity described under 5 U.S.C. § 2302(b)(9)(A)(ii) in *Carson II*. Nor did the agency meaningfully dispute Mr. Carson's claims that his whistleblower disclosures in *Carson I* and protected activities in *Carson II* were a contributing factor to the personnel actions he claimed in

Carson I and *II*. The agency only contested Mr. Carson claims that it committed a personnel action against him.[5]

In reprisal for his whistleblowing activities, the Office of Special Counsel (OSC) refused to review or address Mr. Carson's protected disclosures regarding violations of law by OSC in *Carson I*.[6] This is a personnel action aggrieving Mr. Carson as it represents "any other significant change in working conditions."[7]

In reprisal for his protected activities, the Office of Special Counsel (OSC) failed or refused to comply with a number of its nondiscretionary

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[5] Certainly, the agency should not be allowed to argue on appeal what it has not argued below. However, in the unlikely event the agency is allowed to argue Mr. Carson's disclosures were frivolous, the dismissal of *Carson II* on the basis of adjudicatory efficiency would be in error. If the nonfrivolousness of Mr. Carson's disclosures or protected activity is at issue, the nature of the disclosures and activity in *Carson II* is wholly different than those in *Carson I*, making the use of "adjudicatory efficiency" to dismiss *Carson II*, pending this appeal improper. To determine nonfrivolousness, the facts undergirding the protected disclosure and/or protected activity must be analyzed and that was not done below. But because the subject matter of the claims in *Carson I* and *Carson II* are different unless the nonfrivolous inquiry is undisputed as it was below, there is no identity of issues and adjudicatory efficiency cannot be invoked.

[6] No. 15-3211, MSPB Docket No. AT-1221-15-0092-W-1, Appx168-169, Appx172.

[7] No. 15-3211, MSPB Docket No. AT-1221-15-0092-W-1, Appx157.

statutory duties as an investigatory agency in two of his whistleblower reprisal complaints in *Carson II*.[8] This is also personnel action aggrieving Mr. Carson as it represents "any other significant change in working conditions."

In both *Carson I* and *Carson II*, the Board found it lacked jurisdiction because OSC's failure to respond to Mr. Carson's admittedly nonfrivolous claims of OSC's violations of law was not a "personnel action" (*Carson I*) and because OSC's undisputed failure to comply with a number of its nondiscretionary duties as an investigatory agency for two of Carson's whistleblower reprisal complaints (*Carson II*) was not a "personnel action" under 5 U.S.C. § 2302(a)(2)(A)(xii).[9]

[8] Including failure to make and report the required determination "whether are reasonable grounds to believe" Carson experienced reprisal, failure to state whether Carson has "reasonable belief" in his whistleblower disclosures, failure to respond to Carson's comments and requests for information, failure to state the facts and law determined in its investigation. *See* No. 15-3211, MSPB Docket No. AT-1221-15-0092-W-1, Appx199-208.

[9] The administrative judge and Board rejected OSC's argument because Carson was not employed by OSC, the agency he alleged took the personnel action against him, the Board lacked jurisdiction.

The Board below held it lacks jurisdiction in both *Carson I* and *Carson II* because no personnel action occurred. This is an error. The agency — OSC's — choice to deliberately ignore appellant's allegations of whistleblower retaliation is a "personnel action." OSC's choice to ignore Mr. Carson's allegations represents a significant change in his "working conditions." 5 U.S.C. § 2302(a)(2)(A)(xii). Congress chose the exceptionally broad language of "working conditions" when it wrote 5 U.S.C. § 2302(a)(2)(A)(xii). It is not the province of the Board below, nor any other Court, to re-write this deliberately broad language. Carson is entitled to "working conditions" free of whistleblower retaliation. OSC's investigations of reprisal and other types of prohibited personnel practices complaints and their related reports are reported to the complainant. (5 U.S.C. § 1214(a)(1)(C) and (D)). If OSC ignores Mr. Carson's admittedly nonfrivolous complaints and/or disclosures, his "working conditions" change, as he no longer has a meaningful opportunity to report to and be protected by OSC, as the law so entitles him.

ARGUMENT

The "standard of review" for MSPB cases is found at 5 U.S.C. §7703(c).[10] The Federal Circuit reviews the Board's jurisdictional findings *de novo*. *Stoyanov v. Department of the Navy*, 474 F.3d 1377, 1379 (Fed. Cir. 2007). The Court reviews the Board's legal determinations *de novo*. *Welshans v. U.S. Postal Serv.*, 550 F.3d 1100, 1102 (Fed. Cir. 2008).

LEGAL AND HISTORICAL BACKGROUND: CSRA AND WPA

The Civil Service Reform Act of 1978 ("CSRA" or "the Act" or "Act") codified merit principles and provided employees who commit prohibited personnel practices (PPPs) receive disciplinary action and it protects employees who disclose improper government conduct. The Act

[10] Section 7703 provides in pertinent part:
(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be -
(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(2) obtained without procedures required by law, rule, or regulation having been followed; or
(3) unsupported by substantial evidence; except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

defines what constitutes a "protected disclosure" and what actions are "prohibited personnel practices."[11] The Act was passed in an environment of serious concern about the integrity of the merit system in federal employment[12] and significant evidence of disturbingly aggressive retaliation against whistleblowers.[13] The Whistleblower Protection Act ("WPA") was passed in 1989 to strengthen the Office of Special Counsel, created under the CSRA. OSC exists in critical part to protect whistleblowers from retaliation.[14] The WPA instructed the strengthened OSC its mission is to "protect employees, especially whistleblowers, from prohibited personnel practices."[15] Of paramount

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[11] *See*, 5 USC § 2302.

[12] *See, e.g.*, Violations and Abuses of Merit Principles in Federal Employment Part 1; Hearings Before the Subcommittee on Manpower and Civil Service, Serial no. 94-19, 94th Cong., 1st Sess. (1975); Violations and Abuses of Merit Principles in Federal Employment Part II. Hearings Before the Subcommittee on Manpower and Civil Service, Serial no. 94-20, 94th Cong., 1st Sess. (1975).

[13] Select Committee on Presidential Campaign Activities, Executive Session Hearings, *Watergate and Related Activities: Use of Incumbency -- Responsiveness Program*, 93rd Cong., 2nd Sess. (1974). *See also Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

[14] *See* S. REP. No. 103-358, at 2 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3549, 3550.

[15] Whistleblower Protection Act of 1989, Pub. L. No. 101-12, § 2(b)(2)(A), 103 Stat. 16.

significance is the mandate OSC is to "act in the interests of employees"[16] who petition for its protection and assistance. It cannot be overstated the WPA obligated OSC to assist whistleblowers.[17] OSC is intended to be a whistleblower advocate office. As every learned observer who has addressed the question has concluded, Congress desired OSC "act aggressively on behalf of whistleblowers."[18] Due to its uniquely strong commission to assist and protect whistleblowers, OSC's role as a whistleblower advocate is essential to the federal merit system.[19]

OSC must "receive" any allegation of a prohibited personnel practice and must investigate complaints, "to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken."[20] OSC was

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[16] *Id.* § 2(b)(2)(B).
[17] S. REP. No. 103-358, at 2 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3550. The WPA specifically requires "that the Office . . . shall act in the interests of employees who seek assistance" from it.
[18] S. REP. No. 103-358, at 2 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3550.
[19] *See e.g., Dunlop v. Bachowski, 421 U.S. 560 (1975).*
[20] 5 U.S.C. § 1213(a)(1)(A).

originally the investigatory and prosecutorial arm of the MSPB.[21] It gained independence from MSPB via the Whistleblower Protection Act of 1989. There is no doubt OSC was meant to be a powerful and important agency as an employee may disclose to it evidence or data classified or confidential according to law.[22] Please note the language OSC "must receive" any allegation. This phraseology strongly implies OSC lacks the ability to self-limit its role through constrained interpretation of its own jurisdiction.

The CSRA's objectives include creating a federal agency workplace where:[23]

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[21] MSPB is charged to ensure that the federal civil service is based on merit. MSPB has jurisdiction over the personnel practices of the federal government and is tasked with conducting special studies related to the integrity of the merit system. On a practical level, it decides allegations of wrongdoing often related to adverse agency actions and may provide relief when appropriate. *See,* 5 U.S.C. §§ 1201–1206 (1978).

[22] 5 U.S.C. § 2302(b)(8)(B).

[23] The Civil Service Reform Act of 1978 (CSRA) established statutory protections for federal employees to encourage disclosure of government illegality, waste, fraud, and abuse.

1) Employees can effectively bring forward concerns (i.e. make whistleblower disclosures) – and their disclosures receive a timely and objective resolution, [24]

2) Employees are adequately protected from reprisal and all other types of prohibited personnel practices (PPPs), and [25]

3) There is an objective basis for employees to know conditions 1 and 2 exist.[26]

Unfortunately, in 1984, the MSPB reported that the Act had no effect on the number of whistleblowers and federal employees continue to fear

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[24] Federal agency employees have a positive legal obligation to make such whistleblower disclosures by 5 CFR § 2635.101(b)(11), "Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities."

[25] OSC is charged to "protect" federal agency employees from reprisal and other types of PPPs, see 5 U.S.C. §§1212(a)(1) and 1214(a)(1)(A). Only OSC has the statutory duty "to protect" agency employees from PPPs. Agency heads do not have this responsibility or authority, their duty is to work with OSC to "prevent" PPPs, per §2302(c).

[26] By 5 U.S.C. §1204(a)(3), it is the responsibility of the Merit Systems Protection Board to conduct the requisite "special studies" of to make such a determination - and the responsibility of the President to "take any action necessary" to correct any deficiencies, per §2301(c).

reprisal.[27] In response, Congress in 1989 unanimously passed the Whistleblower Protection Act, which forbids retaliation against federal employees who disclose what they reasonably believe to be evidence of illegal or other seriously improper government activity.[28] Congress substantially amended the WPA in 1994 as part of legislation to reauthorize the OSC and MSPB. The amendments were designed, in part, to address a series of actions by the OSC and decisions by the MSPB and some Courts that Congress deemed inconsistent with the intent of the 1989 Act.[29]

As part of the 1994 amendments to the WPA, a "catch-all" personnel action, "any other significant change to duties, responsibilities, or working conditions" was added to the list of "personnel actions" in §2302(a)(2)(A). The purpose was described in the accompanying S. Rep. No. 103-358, "To Authorize Appropriations for the United States Office

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[27] *See*, Merit Systems Protection Board, "Blowing the Whistle in the Federal Government: A Comparative Analysis of 1980 and 1983 Survey Findings" (October 1984).
[28] Federal Whistleblower Protection Act of 1989 (WPA), P.L. 101-12.
[29] U.S. Office of Special Counsel Reauthorization Act of 1994, P.L. 103-424.

of Special Counsel, Merit Systems Protection Board, and for Other Purposes," August 23, 1994, starting at page 9 and continuing to page 10:

> Section 5(d) addresses narrow construction of the Whistleblower Protection Act with regard to the types of retaliatory action for which remedies are available. Under section 2302(b)(8), retaliation against the whistleblower constitutes a prohibited personal practice only if it takes the form of a "personnel action." Unfortunately, there are many retaliatory actions that do not fall into the definition of personnel actions . . .
>
> The intent of the Whistleblower Protection Act was to create a clear remedy for all cases of retaliation or discrimination against whistleblowers. The Committee believes that such retaliation must be prohibited regardless of form it may take. For this reason, section 5(d) would amend the Act to cover any action taken to discriminate or retaliate against the whistleblower because of his/our protected conduct, regardless of the form that discrimination or retaliation may take.

WPEA OF 2012

In 2012, the Whistleblower Protection Act was again strengthened due the inadequate protection being afforded federal employees.

Senate Report 112-155 is instructive, "Whistleblower Protection Enhancement Act of 2012," April 19, 2012. It accompanies S. 743. From the Report:

> The Whistleblower Protection Enhancement Act of 2012 will strengthen the rights and protections for federal whistleblowers so that they may more effectively help root out waste, fraud, and abuse in federal government. Whistleblowers play a critical role in keeping our government honest and efficient. Moreover, in a post-9/11 world, we must do our utmost to ensure that those with knowledge of problems at our nation's airports, borders, law enforcement agencies, and nuclear facilities are able to reveal those problems without fear of retaliation or harassment. Unfortunately, federal whistleblowers have seen their protections diminish in recent years, largely as a result of a series of decisions by the United States Court of Appeals for the Federal Circuit, which has exclusive jurisdiction over many cases brought under the Whistleblower Protection Act (WPA).[30] Specifically, the Federal Circuit has wrongly accorded a narrow definition to the type of disclosure that qualifies for whistleblower protection.

THE INSTANT CONTROVERSY

Mr. Carson and the Agency struggle over the meaning of "any other significant change in duties, responsibilities or working conditions." The history of the provision, its previous interpretation by the Board, and the pronouncements of the Supreme Court favor Mr. Carson. As quoted above, Congress explicitly instructed the language should be interpreted broadly, wholly inconsistent with the position the Board espoused below. Even though there appears to be no Federal Circuit

[30] Whistleblower Protection Act of 1989, Public Law No. 101-12, 103 Stat. 16 (1989).

precedent for determining what can create "any other significant change in duties, responsibilities or working conditions," such precedent exists at MSPB. The formulations of *Shivaee v. Dept. of Navy*, 74 M.S.P.R. 383, 388 (1997), are that if the agency/employer actions would deter other similarly situated employees from engaging in protected activities or making protected disclosures, they qualify.

In *Shivaee*, the Board found:

> ... the provision adding, "any other significant change in duties, responsibilities, or working conditions" to listed personnel actions should be interpreted broadly. This personnel action is intended to include any harassment or discrimination that could have a chilling effect on whistleblowing or otherwise undermine the merit system, and should be determined on a case-by-case basis.[31]

If an employee's whistleblower disclosures go unheeded, would that tend to deter a reasonable colleague from making a whistleblower disclosure? Yes, and this is not conjecture, as is evident from the finding of the Merit Systems Protection Board in a 2011 Special Study, that the number one reason concerned federal agency employees do not make

[31] *Shivaee,* at 388.

whistleblower disclosures is fear they will be ignored. [32]

An analysis of the text demonstrates Mr. Carson's interpretation is correct and the Board erred. "Personnel actions," under the Whistleblower Protection Enhancement Act (WPEA), include 11 specific personnel actions and a deliberately broad 12th category, Congress included: "(xii) any other significant change in duties, responsibilities, or working conditions." 5 U.S.C. § 2302(a)(2)(A). OSC's failed or refused to comply with statutory duties to consider and resolve Mr. Carson's admittedly nonfrivolous protected disclosures, despite its duty to do so is a personnel action because it is a "significant change" to his "working conditions" and would dissuade a reasonable co-worker from making protected disclosures to OSC, reporting prohibited personnel practices to OSC, or assisting in an OSC investigation - OSC's failures are a "significant change" in "working conditions" for all federal employees.[33] The Agency has not argued and cannot argue Mr. Carson made irrational or absurd disclosures to it. The Agency never found Mr.

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[32] *See* "Blowing the Whistle: Barriers to Federal Employees Making Disclosure," MSPB Special Study, November 2011.

[33] *See* No. 15-3135, MSPB Docket No. AT-1221-14-0620-W-1, Appx138; *see also* Appx098 (the appellant's argument below).

Carson acted in less than good faith in making protected disclosures. The Agency must review protected disclosures in good-faith. It could reject them, but it cannot ignore them. The Agency is neglecting its statutory function and basic duties in ensuring the integrity of the federal civil service; it has imposed an adverse "significant change" in Mr. Carson's "working conditions."

The Board below found he had not alleged OSC's actions or inactions resulted in any specific changes in his own job duties, responsibilities, or working conditions.[34] No. 15-3135, MSPB Docket No. AT-1221-14-0620-W-1, Appx001-011, Appx120-145, Appx146-153, Appx120-128, Appx092-093, Appx098, Appx099-019. . And it reasoned absent such

[34] The Board below found Mr. Carson contended OSC's refusal to address his disclosures is a personnel action because it contributes to "corruption and dysfunction" in the federal workplace, and such is not sufficiently specific to constitute a personnel action under 5 U.S.C. § 2302(a)(2)(A). The Board cited, for this proposition, *King v. Department of Health & Human Services*, 133 F.3d 1450, 1452-53 (Fed. Cir. 1998). The alleged personnel action in *King* occurred in February 1994 and it strongly appears the Court treated the "catch all" category enacted as part of the 1994 WPA amendments as inapplicable. The *King* Court also found the law was not intended to create an independent right of action for normal workplace supervision. This case does not involve a supervisory issue or normal workplace management concerns. It is likely *King* would be decided differently if the 1994 "catch all" category amendment were applied to it.

specific allegations, Carson cannot claim OSC took a personnel action against him and cited, *Godfrey v. Department of the Air Force*, 45 M.S.P.R. 298, 303 (1990). The problem with this argument is it relies on *Godfrey*, decided well before the 1994 catch-all category and fails to acknowledge or appreciate the enhanced protections afforded to whistleblowers in the 2012 WPEA.

The Board below misunderstood Mr. Carson's argument and found because Mr. Carson's theory is the agency is deliberately ignoring his protected disclosures, his complaint cannot succeed because the statute authorizes no employee "to appeal alleged personnel actions taken against his coworkers." *See* No. 15-3135, MSPB Docket No. AT-1221-14-0620-W-1, Appx006; *citing, Stoyanov v. Department of the Navy*, 474 F.3d 1377, 1380-81 (Fed. Cir. 2007). However, this is a distortion of Mr. Carson's position: first, Mr. Carson has explicitly complained the Agency is deliberately ignoring ***his*** whistleblower complaints. This is unquestionably an action against him personally. So, on this account, *Stoyanov* is inapposite. In *Stoyanov*, the appellant alleged a family member was subjected to retaliation because of Stoyanov's own

protected activity. Nothing was done to Mr. Stoyanov, personally. Second, to the extent Mr. Carson suggests the Agency is failing or refusing to comply with statutory duties to investigate whistleblower reprisal complaints as a matter of practice, he has filed whistleblower complaints subjected to that practice so this is an action personal to him. It cannot be if an Agency takes improper actions or omissions against a single employee, there is jurisdiction but if the Agency imposes those improper actions or omissions in mass, there is no jurisdiction, even if the complaining employee is a member of the mass of employees subjected to the improper actions or omissions. Mr. Carson has it either way: (1) the Agency specifically ignored ***his***, good-faith complaints and (2) even if the Agency is ignoring whistleblower complaints in the aggregate, Mr. Carson's complaints are among those ignored. This is a personnel action under 5 U.S.C. § 2302(a)(2)(A). And, it has "practical consequences" under the language of *King*, as Mr. Carson lacks the OSC protection to which he is entitled.

CONCLUSION AND STATEMENT OF RELIEF SOUGHT

Joe Carson has standing and the dismal state of OSC significantly affects the "working conditions" of himself and all other federal employees.

OSC has unique nondiscretionary statutory duties to protect Mr. Carson and other federal agency employees from reprisal (and other types of PPPs). Given that, OSC undisputed failure or refusal to consider Mr. Carson reasonably evidenced, non-frivolous, good-faith whistleblower disclosures in *Carson I* and OSC's undisputed failure or refusal to comply with its nondiscretionary statutory duties to Mr. Carson alone in two whistleblower reprisal complaints, are personnel actions from which Mr. Carson is entitled to relief. The Court should either reverse MSPB's jurisdictional determinations in *Carson I* and *Carson II* or vacate them and remand the cases to MSPB for a proper adjudication.

STATEMENT ABOUT ORAL ARGUMENT

Under FRAP 34(a)(1), Mr. Carson respectfully requests oral argument. This matter involves the agency's deliberate decision to not

follow the law, to ignore whistleblower retaliation complaints, to choose not to uphold the integrity of the federal civil service system meant to be insured by its statutory reporting duties, and to construe its governing statute in contravention of Congress, resulting in significant detriment to the working conditions of Joe Carson and every federal employee. Mr. Carson's appeal is not frivolous, and the dispositive issues have not been authoritatively decided. Mr. Carson respectfully asserts the decisional process would be aided by oral argument, and given the significance of the issues and the gravity of the agency's actions, justice requires he be allowed a hearing to voice his claims.

Respectfully submitted,

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ADDENDUM

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOSEPH P. CARSON,
Appellant,

v.

OFFICE OF SPECIAL COUNSEL,
Agency.

DOCKET NUMBER
AT-1221-14-0620-W-1

DATE: March 25, 2015

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

Joseph P. Carson, Knoxville, Tennessee, pro se.

Jason Weidenfeld, Esquire, and Pamela Gault, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Mark A. Robbins, Member

FINAL ORDER

¶1 The appellant has filed a petition for review of the initial decision, which dismissed his individual right of action (IRA) appeal for lack of jurisdiction. Generally, we grant petitions such as this one only when: the initial decision contains erroneous findings of material fact; the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of

[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. *See* 5 C.F.R. § 1201.117(c).

the law to the facts of the case; the judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. *See* Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115). After fully considering the filings in this appeal, and based on the following points and authorities, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review. Except as expressly MODIFIED by this Final Order to address the appellant's new claims raised in the first instance on review, we AFFIRM the initial decision.

BACKGROUND

¶2 The appellant, an employee of the Department of Energy, filed an IRA appeal alleging that, in reprisal for his whistleblowing activities, the Office of Special Counsel (OSC) failed or refused to take steps to resolve his protected disclosures regarding violations of law by OSC. Initial Appeal File (IAF), Tab 1 at 1, 15-16, Tab 2 at 1. On the section of the appeal form requiring the appellant to indicate the personnel action or decision that he was appealing, he wrote, "any other significant change in working conditions." IAF, Tab 1 at 4. OSC responded, alleging that the appellant was never employed by OSC, the matters raised in his appeal were not personnel actions, and the Board lacked jurisdiction to review the merits of OSC's investigative decisions. IAF, Tab 6 at 6. Subsequently, the administrative judge issued an order to show cause, which set forth the requirements for establishing jurisdiction over an IRA appeal. IAF, Tab 10 at 1-2.

¶3 After the appellant submitted two responses to the order to show cause, the administrative judge dismissed the appeal for lack of jurisdiction without holding

the hearing requested by the appellant. *See* IAF, Tab 1 at 2, Tab 13, Initial Decision (ID) at 1, 4; *see also* IAF, Tabs 11-12 (the appellant's responses to the show cause order). He found that the Board lacked jurisdiction over the appeal because OSC's failure to resolve the appellant's claims of whistleblower retaliation was not a "personnel action" under 5 U.S.C. § 2302(a)(2)(A).[2] ID at 3. In addition, the administrative judge found that the Board lacked authority to review the appellant's allegations that OSC violated 5 U.S.C. § 1213(g), a statutory provision addressing referral of certain protected disclosures received by OSC to agency heads. ID at 4; IAF, Tab 12 at 4-6.

¶4 The appellant has filed a timely petition for review. Petition for Review (PFR) File, Tab 3. The agency has filed a response to the petition for review, and the appellant has filed a reply. PFR File, Tabs 5-6.

DISCUSSION OF ARGUMENTS ON REVIEW

¶5 The Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule, or regulation. *Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985). The Board has jurisdiction over an IRA appeal if the appellant exhausts his administrative remedies before OSC and makes nonfrivolous allegations that: (1) he made a disclosure described under 5 U.S.C. § 2302(b)(8), or engaged in protected activity described under 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D); and (2) the disclosure or protected activity was a contributing factor in the agency's decision to take or fail to take a personnel action as defined by 5 U.S.C. § 2302(a). 5 U.S.C. §§ 1214(a)(3), 1221(e)(1); *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001). We agree with the administrative

[2] The administrative judge found that, standing alone, the fact that the appellant was not employed by OSC, the agency that he alleged took the personnel action against him, did not necessarily preclude Board jurisdiction over his appeal. *See* ID at 3; *see also Weed v. Social Security Administration*, 113 M.S.P.R. 221, ¶¶ 9-10 (2010) (finding that the Whistleblower Protection Act (WPA) did not restrict the definition of an "employee" to employees of the agency alleged to have taken the personnel action at issue).

judge that the dispositive issue in this appeal is whether the appellant raised a nonfrivolous allegation that OSC took or failed to take a personnel action against him. *See* ID at 3.

The administrative judge correctly found that the appellant failed to raise a nonfrivolous allegation that OSC took or failed to take a personnel action against him.

¶6 "Personnel actions," for purposes of the Whistleblower Protection Enhancement Act (WPEA), are defined as the following 12 actions: (i) an appointment; (ii) a promotion; (iii) an action under 5 U.S.C. chapter 75 or other disciplinary or corrective action; (iv) a detail, transfer, or reassignment; (v) a reinstatement; (vi) a restoration; (vii) a reemployment; (viii) a performance evaluation under 5 U.S.C. chapter 43; (ix) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in 5 U.S.C. § 2302(a)(2)(A); (x) a decision to order psychiatric testing or examination; (xi) the implementation or enforcement of any nondisclosure policy, form, or agreement; and (xii) any other significant change in duties, responsibilities, or working conditions. 5 U.S.C. § 2302(a)(2)(A).

¶7 The appellant has not alleged, either below or on review, that OSC's actions constitute any of the 11 personnel actions enumerated in 5 U.S.C. § 2302(a)(2)(A)(i)-(xi). *See* PFR File, Tabs 3, 6; *see also* IAF, Tabs 1-2, 11-12. Instead, the appellant relies upon 5 U.S.C. § 2302(a)(2)(A)(xii), arguing that OSC's failure or refusal to resolve his alleged protected disclosures and refusal to seek a legal opinion from the Office of Legal Counsel of the Department of Justice regarding his allegations that OSC violated the law constitute a "significant change in working conditions." PFR File, Tab 3 at 10, 12, Tab 6 at 5; IAF, Tab 1 at 4, Tab 2 at 1 (the appellant's argument below). We agree with the administrative judge that, although OSC's investigations and prosecutorial

decisions may be of keen interest to the appellant, they do not constitute personnel actions within the meaning of 5 U.S.C. § 2302(a)(2)(A). *See* ID at 3-4.

¶8 The appellant has not challenged the administrative judge's findings that OSC is not his employing agency and that he has not applied to OSC for any work, transfer, detail, restoration, or other attribute of employment. ID at 3; PFR File, Tabs 3, 6. The appellant continues to allege on review that OSC's failure or refusal to resolve his alleged protected disclosures was a personnel action because it "would dissuade a[]reasonable co-worker from making protected disclosures to OSC," reporting prohibited personnel practices to OSC, or assisting in an OSC investigation. *See* PFR File, Tab 3 at 10; *see also* IAF, Tab 2 at 1 (the appellant's argument below). However, he has not alleged that OSC's actions or inactions resulted in any specific changes in his own job duties, responsibilities, or working conditions.[3] *See* 5 U.S.C. § 2302(a)(2)(A)(xii); *see also* PFR File, Tabs 3, 6; IAF, Tab 1 at 15-16, Tab 2 at 1, Tabs 11-12. In the absence of such allegations, the appellant's generalized assertion that he experienced a significant change in duties, responsibilities or working conditions is insufficient to raise a nonfrivolous allegation that OSC took a personnel action against him. *See Godfrey v. Department of the Air Force*, 45 M.S.P.R. 298, 303 (1990) (jurisdiction over an IRA appeal requires more than generalized assertions unsupported by reference to any specific matter).

[3] Although not clearly articulated by the appellant on review, to the extent that he alleges that OSC's failure or refusal to resolve his disclosures is a personnel action because it contributes to "corruption and dysfunction" in the federal workplace, we find that such a general allegation is not sufficiently concrete or specific to constitute a personnel action under 5 U.S.C. § 2302(a)(2)(A). *See* PFR File, Tab 3 at 6 (the appellant's argument that OSC's alleged abandonment of its statutory responsibilities results in corruption and dysfunction in federal agencies); *see also King v. Department of Health & Human Services*, 133 F.3d 1450, 1452-53 (Fed. Cir. 1998) (an action must have "practical consequences" for an employee to constitute a "personnel action" under 5 U.S.C. § 2302(a)(2)(A)); *Zimmerman v. Department of Housing & Urban Development*, 61 M.S.P.R. 75, 80 (1994) (allegations of "continuing reprisal" and "threats" were too vague to constitute personnel actions).

¶9 The statute authorizing Board jurisdiction over IRA appeals authorizes an employee to seek corrective action from the Board with respect to a personnel action taken "against such employee." 5 U.S.C. § 1221(a). It does not authorize an employee to appeal alleged personnel actions taken against his coworkers. *See id.*; *see also Stoyanov v. Department of the Navy*, 474 F.3d 1377, 1380-81 (Fed. Cir. 2007) (finding that the alleged personnel action must be taken or proposed to be taken against the person bringing the IRA appeal). We find that the alleged deterrent effect upon the appellant's coworkers is not a personnel action under 5 U.S.C. § 2302(a)(2)(A).[4]

The administrative judge did not misinterpret the nature of the alleged "personnel action."

¶10 On review, the appellant argues that the administrative judge misinterpreted the nature of the personnel action that he alleged that OSC took against him. PFR File, Tab 3 at 4, 10-13. He contends that the administrative judge misconstrued his appeal as alleging that the personnel action was OSC's failure to protect him from reprisal by his employing agency, the Department of Energy. *Id.* at 4, 12-13. We find that the appellant's argument is not supported by the initial decision or any other evidence in the record below. The administrative judge did not state that the appellant alleged that OSC had failed to protect him from reprisal by the Department of Energy. *See* ID. Instead, he found that the appellant alleged that OSC's "failure to resolve or refusal to resolve [his] allegations of whistleblower reprisal in a timely and objective manner" was a

[4] The appellant argues that Supreme Court precedent in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), a case arising under Title VII of the Civil Rights Act, requires the Board to consider whether OSC's actions would dissuade a reasonable coworker from making protected disclosures to OSC. PFR File, Tab 3 at 10. However, in *Stoyanov*, which was decided after *Burlington Northern*, the U.S. Court of Appeals for the Federal Circuit held that, in an IRA appeal, the personnel action must be taken against the person bringing the appeal. *Stoyanov*, 474 F.3d at 1380-81. It is well settled that decisions of the Federal Circuit constitute precedent that is binding on the Board. *Spain v. Department of Homeland Security*, 99 M.S.P.R. 529, ¶ 9 (2005), *aff'd*, 177 F. App'x 88 (Fed. Cir. 2006).

personnel action. ID at 3. We find the administrative judge's interpretation to be consistent with the appellant's allegations below that OSC retaliated against him by failing or refusing to resolve his claims regarding OSC's own violations of law.[5] *See* IAF, Tab 2 at 1 (the appellant's allegations below), Tab 11 at 2 (same). Absent a personnel action, the Board lacks jurisdiction to review the appellant's claims that OSC violated the law.

¶11 On review, the appellant contends that the administrative judge erred in failing to address whether he made a protected disclosure.[6] PFR File, Tab 3 at 12. However, absent a "personnel action," the Board lacks jurisdiction over the appellant's IRA appeal. *See Shivaee v. Department of the Navy*, 74 M.S.P.R. 383, 387 (1997) (in order for a right of appeal to accrue under the WPA, the predecessor to the WPEA, the appellant must establish that he was subject to a threatened personnel action); *see also Yunus*, 242 F.3d at 1371 (in order to establish Board jurisdiction over an IRA appeal, an appellant must establish both that he made a protected disclosure and that the disclosure was a contributing factor in the decision to take or fail to take a personnel action). Therefore, once

[5] Even assuming for the sake of argument, however, that the administrative judge misconstrued the appellant's arguments, the appellant has not demonstrated that this error would be prejudicial to his substantive rights. *See Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984) (an adjudicatory error that is not prejudicial to a party's substantive rights provides no basis for reversal of an initial decision). We find that the appellant failed to raise a nonfrivolous allegation that either OSC's failure to resolve his allegations that OSC violated the law or OSC's failure to protect him from unspecified reprisal by the Department of Energy was a personnel action, as that term is defined in 5 U.S.C. § 2302(a)(2)(A).

[6] After the close of the record on review, the appellant filed two motions seeking leave to file additional evidence and argument. PFR File, Tabs 9, 12. The appellant alleges that this new evidence would support his claims of "having a 'reasonable belief' in his whistleblower disclosures about OSC law breaking . . . ." *See* PFR File, Tab 9 at 4, *see also* PFR File, Tab 12 at 4-5. However, the appellant has not demonstrated the relevance of this evidence to the dispositive issue in this appeal, which is whether he raised a nonfrivolous allegation that OSC took or failed to take a personnel action against him. Accordingly, the appellant's motions are denied. *See* 5 C.F.R. § 1201.114(k) (once the record closes, no additional evidence or argument will be accepted unless it is new and material).

the administrative judge found that the appellant had failed to raise a nonfrivolous allegation that OSC took or failed to take a personnel action against him, he was not required to address whether the appellant had a reasonable belief that OSC was violating the law. *See Shivaee*, 74 M.S.P.R. at 387-89 (dismissing an IRA appeal on the ground that the appellant failed to raise a nonfrivolous allegation of a personnel action, without addressing whether he had a reasonable belief that the agency violated the law).

¶12 On review, the appellant also repeatedly asserts that OSC violated the law when it failed to resolve his whistleblower disclosures. PFR File, Tab 3 at 4-6, 10, 12, Tab 6 at 5. However, the Board has no authority to adjudicate the appellant's claims that OSC violated the law in failing to investigate his claims. *See Wren v. Merit Systems Protection Board*, 681 F.2d 867, 871-72 (D.C. Cir. 1982) (finding that the Board had no authority to enforce the statutory requirement that OSC investigate allegations of whistleblower reprisal).

The Board will not address the issue of whether the Board took a personnel action against him by failing to conduct special studies, including studies of OSC.

¶13 On review, the appellant continues to argue that the Board enables OSC's violations of law by failing to conduct "special studies" pursuant to 5 U.S.C. § 1204(a)(3).[7] *See* PFR File, Tab 3 at 6-7, 9, 12, Tab 6 at 5; *see also* IAF, Tab 11 at 6 (the appellant's assertion below that the Board violated the law by failing to conduct special studies). For the first time on review, he additionally contends that the Board's failure to conduct special studies was itself a "significant change in working conditions." PFR File, Tab 6 at 5.

¶14 The appellant previously raised the issue of whether the Board took a personnel action against him by failing to conduct special studies, including studies of OSC, in another appeal against the Board, *Carson v. Merit Systems Protection Board*, MSPB Docket No. AT-1221-14-0637-W-1. The administrative

[7] Because the administrative judge did not address this claim, we MODIFY the initial decision to do so.

law judge dismissed the appeal for lack of jurisdiction, finding that the appellant failed to raise a nonfrivolous allegation that the Board's failure to conduct special studies constituted a personnel action.[8] *See Carson v. Merit Systems Protection Board*, MSPB Docket No. AT-1221-14-0637-W-1, Initial Decision at 2, 5-7 (Nov. 6, 2014). The initial decision became the Board's final decision after all three Board members recused themselves from considering the appellant's petition for review. *Carson v. Merit Systems Protection Board*, MSPB Docket No. AT-1221-14-0637-W-1, Order (Dec. 23, 2014); *see* 5 C.F.R. § 1200.3(b). Because the Board's members previously recused themselves from considering this issue, the Board will not address it further.[9]

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

The initial decision, as supplemented by this Final Order, constitutes the Board's final decision in this matter. 5 C.F.R. § 1201.113. You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision.

The court must receive your request for review no later than 60 calendar days after the date of this order. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has

[8] For the first time on review, the appellant also argues that because he raised claims against the Board, his appeal should have been assigned to an administrative law judge under 5 C.F.R. § 1201.13, as though it were an appeal by a Board employee, or alternatively, that the administrative judge should have been disqualified under 5 C.F.R. § 1201.42. PFR File, Tab 3 at 9, 12. As noted above, the appellant's appeal against the Board was assigned to an administrative law judge. *See Carson v. Merit Systems Protection Board*, MSPB Docket No. AT-1221-14-0637-W-1, Initial Decision at 1 n.2 (Nov. 6, 2014).

[9] On December 31, 2014, the appellant appealed the Board's final decision to the U.S. Court of Appeals for the District of Columbia Circuit, where his appeal remains pending. The court will review the issue of the Board's jurisdiction over the appeal de novo. *See Stoyanov*, 474 F.3d at 1379 (whether the Board has jurisdiction to adjudicate an appeal is a question of law that is reviewed de novo).

held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you want to request review of the Board's decision concerning your claims of prohibited personnel practices under 5 U.S.C. § 2302(b)(8), (b)(9)(A)(i), (b)(9)(B), (b)(9)(C), or (b)(9)(D), but you do not want to challenge the Board's disposition of any other claims of prohibited personnel practices, you may request review of this final decision by the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. The court of appeals must receive your petition for review within 60 days after the date of this order. *See* 5 U.S.C. § 7703(b)(1)(B) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. You may choose to request review of the Board's decision in the United States Court of Appeals for the Federal Circuit or any other court of appeals of competent jurisdiction, but not both. Once you choose to seek review in one court of appeals, you may be precluded from seeking review in any other court.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website. Additional information about the United States Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11. Additional information about other courts of appeals can be found at their respective websites, which can be accessed through http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

If you are interested in securing pro bono representation for an appeal to the United States Court of Appeals for the Federal Circuit, you may visit our website

at http://www.mspb.gov/probono for a list of attorneys who have expressed interest in providing pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Merit Systems Protection Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board

Washington, D.C.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOSEPH P. CARSON,
Appellant,

v.

OFFICE OF SPECIAL COUNSEL,
Agency.

DOCKET NUMBER
AT-1221-15-0092-W-1

DATE: August 17, 2015

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

Joseph P. Carson, Knoxville, Tennessee, pro se.

Pamela Gault, Esquire, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Mark A. Robbins, Member

FINAL ORDER

¶1 The appellant has filed a petition for review of the initial decision, which dismissed his individual right of action (IRA) appeal for lack of jurisdiction. Generally, we grant petitions such as this one only when: the initial decision contains erroneous findings of material fact; the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of

[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. *See* 5 C.F.R. § 1201.117(c).

the law to the facts of the case; the judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. *See* Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115). After fully considering the filings in this appeal, and based on the following points and authorities, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review. Except as expressly MODIFIED by this Final Order to dismiss the appeal based on adjudicatory efficiency, and to acknowledge and decline to address the appellant's claims against the Board, we AFFIRM the initial decision.

BACKGROUND

¶2 The appellant, an employee of the Department of Energy (DOE), has filed a number of IRA appeals, alleging that various agencies, including DOE, the Office of Special Counsel (OSC), and the Board, took personnel actions against him in retaliation for protected disclosures. Initial Appeal File (IAF), Tab 1 at 5; *see, e.g.*, *Carson v. Department of Energy*, MSPB Docket No. AT-1221-14-0520-W-1, Final Order at 2 (May 21, 2015); *Carson v. Office of Special Counsel*, MSPB Docket No. AT-1221-14-0620-W-1 (*Carson I*), Final Order at 2 (Mar. 25, 2015); *Carson v. Merit Systems Protection Board*, MSPB Docket No. AT-1221-14-0637-W-1, Initial Decision at 2 (Nov. 6, 2014).

¶3 In the present IRA appeal, the appellant alleged that, in reprisal for his whistleblowing activities, OSC failed or refused to properly investigate, process, and resolve his whistleblower complaints regarding DOE and the Board. IAF, Tab 1 at 4, 8, Tab 17 at 8-13. OSC moved to dismiss the appeal based on adjudicatory efficiency or collateral estoppel due to an initial decision in one of

the appellant's prior IRA appeals, *Carson I*. IAF, Tab 20 at 3-5; *see Carson I*, Initial Decision (July 25, 2014).

¶4 After issuing orders setting forth the requirements for establishing jurisdiction over an IRA appeal, and then considering the appellant's responses, the administrative judge dismissed the appeal for lack of jurisdiction without holding the requested hearing. IAF, Tab 25, Initial Decision (ID); *see* IAF, Tab 1 at 2, Tab 3 at 1-4, Tab 6 at 4, Tab 8 at 2-4, Tab 17. The administrative judge denied the agency's request to dismiss the appeal based on collateral estoppel because a petition for review was pending in *Carson I* and he did not address the agency's alternative argument that the appeal should be dismissed based on adjudicatory efficiency. ID at 2-3; *see* IAF, Tab 20 at 3-5. Instead, the administrative judge dismissed the appeal on the ground that the appellant failed to raise a nonfrivolous allegation that OSC took or failed to take a personnel action against him.[2] ID at 3-4.

¶5 The appellant has filed a timely petition for review. Petition for Review (PFR) File, Tab 3. The agency has filed a response, and the appellant has filed a reply.[3] PFR File, Tabs 10, 21. In addition, the appellant has filed motions seeking leave to submit additional evidence and argument on review. PFR File, Tabs 7, 11, 17, 20.

DISCUSSION OF ARGUMENTS ON REVIEW

¶6 The Board's jurisdiction is limited to those matters over which it has been given jurisdiction by law, rule, or regulation. *Maddox v. Merit Systems*

[2] On review, the appellant claims that the administrative judge found that he raised a nonfrivolous allegation that he engaged in protected activity by filing whistleblower complaints with OSC. Petition for Review (PFR) File, Tab 21 at 4-5. The administrative judge did not make any such finding. *See* ID. Regardless, because we resolve this appeal on other grounds, we do not reach this issue.

[3] On April 1, 2015, the Clerk of the Board granted the appellant an extension of time to file a reply and ordered him to file an amended reply to replace an unauthorized pleading filed in the interim. PFR File, Tab 18 at 1-2; *see* PFR File, Tabs 16, 21.

Protection Board, 759 F.2d 9, 10 (Fed. Cir. 1985). The Board has jurisdiction over an IRA appeal if the appellant exhausts his administrative remedies before OSC and makes nonfrivolous allegations that: (1) he made a disclosure described under 5 U.S.C. § 2302(b)(8), or engaged in protected activity described under 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D); and (2) the disclosure or protected activity was a contributing factor in the agency's decision to take or fail to take a personnel action as defined by 5 U.S.C. § 2302(a). 5 U.S.C. §§ 1214(a)(3), 1221(e)(1); *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001).

The Board will not address the appellant's allegations against it.

¶7 On review, as he did below, the appellant argues that the Board violates the law and enables OSC's violations of law by failing to conduct "special studies" pursuant to 5 U.S.C. § 1204(a)(3). PFR File, Tab 3 at 4-13; *see* IAF, Tab 5 at 4-5, 7, Tab 9 at 5. For the first time on review, he additionally contends that the Board's failure to conduct special studies was itself a personnel action, and that the Board took a personnel action against him through its "failure or refusal to address" his whistleblower disclosures regarding OSC. PFR File, Tab 3 at 10-11, 13-14.

¶8 The appellant previously raised the issue of whether the Board took a personnel action against him by failing to conduct special studies, including studies of OSC, in another appeal against the Board, *Carson v. Merit Systems Protection Board*, MSPB Docket No. AT-1221-14-0637-W-1. The appeal was assigned to an administrative law judge, who dismissed it for lack of jurisdiction. *See Carson v. Merit Systems Protection Board*, MSPB Docket No. AT-1221-14-0637-W-1, Initial Decision at 2, 5-7 (Nov. 6, 2014). The initial decision became the Board's final decision after all three Board members recused themselves from considering the appellant's petition for review. *Carson v. Merit Systems Protection Board*, MSPB Docket No. AT-1221-14-0637-W-1, Order (Dec. 23, 2014); *see* 5 C.F.R. § 1200.3(b). Because the Board's members previously

recused themselves from considering this issue, the Board will not address it further. The current two Board members similarly recuse themselves from addressing the appellant's new allegation that the Board took a personnel action against him by failing or refusing to address his whistleblower disclosures regarding OSC. *See* PFR File, Tab 3 at 13-14.

¶9 The Board does not, however, recuse itself from the appellant's claims against OSC. On review, he argues that the Board members cannot adjudicate these claims due to a conflict of interest.[4] PFR File, Tab 3 at 4-5.

¶10 We find that the appellant's generalized assertion that the Board enables violations of law by OSC, a separate and distinct agency, is insufficient to warrant the Board's recusal from adjudicating his claims against OSC based upon allegations of bias. *See generally Oliver v. Department of Transportation*, 1 M.S.P.R. 382, 386 (1980) (in making a claim of bias or prejudice against an administrative judge, a party must overcome the presumption of honesty and integrity that accompanies administrative adjudicators). Similarly, we find that the appellant has failed to establish that recusal is warranted based upon the appearance of a conflict of interest. *See generally Shoaf v. Department of Agriculture*, 97 M.S.P.R. 68, ¶¶ 7-12 (2004) (an administrative judge did not abuse his discretion in denying a recusal motion where the appellant failed to allege facts that would reasonably cause an objective observer to question the administrative judge's impartiality), *aff'd*, 158 F. App'x 267 (Fed. Cir. 2005).

The appellant's claims against OSC are dismissed based on adjudicatory efficiency.

¶11 In response to the appellant's petition for review, OSC reiterates its argument, raised below, that the appeal should be dismissed based on adjudicatory efficiency or collateral estoppel. PFR File, Tab 10 at 5; *see* IAF,

[4] Below, the appellant raised similar arguments in moving to recuse the administrative judge. IAF, Tab 5 at 4-5, 7. The administrative judge denied the request and also denied the appellant's motion to certify the issue for an interlocutory appeal. IAF, Tab 8 at 2, Tab 9 at 4-6; ID at 4 n.1.

Tab 20 at 3-5. We agree that the instant appeal should be dismissed based on adjudicatory efficiency.[5]

¶12 When an appellant files an appeal that raises the same claims raised in an earlier appeal before the decision in the earlier appeal has become final, the Board may dismiss the subsequent claims based upon adjudicatory efficiency. *Bean v. U.S. Postal Service*, 120 M.S.P.R. 447, ¶ 5 (2013); *Zgonc v. Department of Defense*, 103 M.S.P.R. 666, ¶ 6 (2006) (same), *aff'd*, 230 F. App'x 967 (Fed. Cir. 2007). Appeals may be dismissed in the interest of adjudicatory efficiency where an identity of issues exists and the controlling issues in the appeal will be determined in a prior appeal. *Kinler v. General Services Administration*, 44 M.S.P.R. 262, 263 (1990).

¶13 In *Carson I*, an administrative judge found that the appellant failed to raise a nonfrivolous allegation that OSC's failure or refusal to resolve his alleged protected disclosures constituted a personnel action. *Carson I*, ID at 3-4. The appellant filed a petition for review of the initial decision in *Carson I*, which the Board denied approximately 2 months after the initial decision in the instant appeal was issued. *Carson I*, Final Order at 1-2. We found that he failed to raise a nonfrivolous allegation that OSC's investigations and prosecutorial decisions constitute personnel actions within the meaning of 5 U.S.C. § 2302(a)(2)(A). *Id.* at 4-6. Subsequently, he appealed our decision in *Carson I* to the United States Court of Appeals for the Federal Circuit (Federal Circuit), where his appeal remains pending.[6]

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[5] On review, the appellant contends that the administrative judge did not provide him with notice of the elements of proof for collateral estoppel and adjudicatory efficiency. PFR File, Tab 21 at 5-6. However, this oversight was cured by the agency's pleading below, which provided this information. *See* IAF, Tab 20 at 3-5; *Mapstone v. Department of the Interior*, 106 M.S.P.R. 691, ¶ 9 (2007) (an administrative judge's failure to provide an appellant with proper jurisdictional notice can be cured if the agency's pleadings contain the notice that was otherwise lacking).

[6] Collateral estoppel may only be applied when there is a final judgment in the previous litigation. *Zgonc*, 103 M.S.P.R. 666, ¶ 6. Because the Federal Circuit will review the

¶14 We find that the determinative jurisdictional issue in the present appeal—whether the appellant raised a nonfrivolous allegation that OSC's investigations and prosecutorial decisions constitute personnel actions within the meaning of 5 U.S.C. § 2302(a)(2)(A)—is identical to the determinative jurisdictional issue in *Carson I*.[7] *See* IAF, Tab 25; ID at 3-4; *Carson I*, Final Order at 4-6. Because the controlling jurisdictional issue regarding the appellant's claims against OSC in the instant appeal will be determined by the Federal Circuit in *Carson I*, we find that his claims against OSC should be dismissed based upon adjudicatory efficiency.[8]

The appellant has not shown that the new evidence that he submits and desires to submit on review is material.

¶15 With his petition for review, the appellant submits two documents that he contends constitute new and material evidence: (1) a January 22, 2015 notice of proposed rulemaking regarding a proposal to amend OSC's regulations; and (2) what he characterizes as a "whistleblower disclosure" regarding the notice of

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issue of the Board's jurisdiction over *Carson I* de novo, we find that the present appeal should not be dismissed based on collateral estoppel. *See Cataulin v. U.S. Postal* Service, 41 M.S.P.R. 681, 683 (1989) (a judgment pending on appeal may be given collateral estoppel effect, unless the appeal removes the entire case to the appellate court and constitutes a proceeding de novo); *Lively v. Department of the Navy*, 31 M.S.P.R. 318, 321 (1986) (same); *see also Stoyanov v. Department of the Navy*, 474 F.3d 1377, 1379 (Fed. Cir. 2007) (the Federal Circuit reviews the Board's jurisdictional findings de novo).

[7] We have considered the appellant's argument on review that his claims in the present appeal differ from his claims in *Carson I* because here he alleged that OSC failed to protect him from reprisal. PFR File, Tab 21 at 7-8. However, the sole basis for his allegation that OSC failed to protect him from reprisal is that it did not properly investigate, process, and resolve his whistleblower complaints, which are the same claims he raised in *Carson I*. *See* IAF, Tab 1 at 4, 8, Tab 17 at 8-13. Therefore, the argument does not alter our conclusion that the determinative jurisdictional issues in the two appeals are identical.

[8] However, although we find that the appeal should be dismissed based on adjudicatory efficiency, the administrative judge did not err in declining to dismiss the appeal on that basis. *See, e.g., Kroeger v. U.S. Postal Service*, 865 F.2d 235, 239 (Fed. Cir. 1988) ("where the requirements are met, it would not be error (though it may waste judicial resources) to decline to apply collateral estoppel").

proposed rulemaking. PFR File, Tab 1. In addition, on March 2, 2015, he filed a motion seeking leave to submit additional evidence in support of his appeal, including letters: (1) from OSC in response to the "whistleblower disclosure"; and (2) from the appellant to the Tennessee Board of Architectural and Engineering Examiners concerning a professional misconduct complaint, both dated February 23, 2015.[9] PFR File, Tab 7.

¶16 The Board generally will not consider evidence submitted for the first time on review absent a showing that: (1) the documents and the information contained therein were unavailable before the record closed despite due diligence; and (2) the evidence is of sufficient weight to warrant an outcome different from that of the initial decision. *Carson v. Department of Energy*, 109 M.S.P.R. 213, ¶ 21 (2008), *aff'd*, 357 F. App'x 293 (Fed. Cir. 2009); *see* 5 C.F.R. § 1201.115(d). The appellant has failed to demonstrate that the evidence at issue is relevant to the Board's dismissal on the grounds of adjudicatory efficiency, and accordingly, the evidence is not material to the outcome of his case. *See Russo v. Veterans Administration*, 3 M.S.P.R. 345, 349 (1980) (the Board will not grant a petition for review based on new evidence absent a showing that it is of sufficient weight to warrant an outcome different from that of the initial decision). Accordingly, we will not consider the new evidence submitted on review and DENY the appellant's March 2, 2015 motion for leave to file additional evidence. *See* 5 C.F.R. § 1201.114(a)(5) (providing that nonstandard pleadings are only accepted on review based on a showing of the nature and need for the pleading).

[9] On March 27, March 31, and April 8, the appellant also filed motions for leave to submit the Board's final order in *Carson I* on review, and to submit new argument in his reply regarding the order in *Carson I*. PFR File, Tabs 11, 17, 20. We have taken official notice of our order in *Carson I*, and it is unnecessary for the appellant to submit it on review. *See* 5 C.F.R. § 1201.64 (allowing the Board to take official notice of matters that can be verified). Further, we find that his three motions for leave are moot because he submitted, and we have reviewed, his arguments regarding the effect of *Carson I* on the instant appeal. PFR File, Tab 1 at 6-8, 10. However, having considered these arguments, we find that they do not alter our conclusion that his claims against OSC should be dismissed based on adjudicatory efficiency. *Id*.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

The initial decision, as supplemented by this Final Order, constitutes the Board's final decision in this matter. 5 C.F.R. § 1201.113. You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit.

The court must receive your request for review no later than 60 calendar days after the date of this order. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you want to request review of the Board's decision concerning your claims of prohibited personnel practices under 5 U.S.C. § 2302(b)(8), (b)(9)(A)(i), (b)(9)(B), (b)(9)(C), or (b)(9)(D), but you do not want to challenge the Board's disposition of any other claims of prohibited personnel practices, you may request review of this final decision by the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. The court of appeals must receive your petition for review within 60 days after the date of this order. *See* 5 U.S.C. § 7703(b)(1)(B) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. You may choose to request review of the Board's decision in the United States Court of Appeals for the Federal Circuit or any other court of appeals of competent jurisdiction, but not both. Once you choose to seek review in one court of appeals, you may be precluded from seeking review in any other court.

If you need further information about your right to appeal this decision to court, you should refer to the Federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United

States Code, at our website, http://www.mspb.gov/appeals/uscode.htm. Additional information about the United States Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11. Additional information about other courts of appeals can be found at their respective websites, which can be accessed through http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

If you are interested in securing pro bono representation for an appeal to the United States Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Merit Systems Protection Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

FOR THE BOARD: _____

William D. Spencer
Clerk of the Board

Washington, D.C.

CERTIFICATE OF SERVICE

I certify the foregoing has been filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. This 19th day of April, 2016.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Federal Rule of Civil Procedure 32(a)(7)(B). The brief contains 3743 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Federal Circuit Rule 32(b).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in a 14 point Century font.

s/ B. Chadwick Rickman
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Attorney for Petitioner

April 19, 2016
Date