UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

JOSEPH P. CARSON,
Appellant,

v.

OFFICE OF SPECIAL COUNSEL,
Agency.

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

DATE: July 25, 2014

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

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

BEFORE
Richard W. Vitaris
Administrative Judge

INITIAL DECISION

INTRODUCTION

On or about March 19, 2014, the appellant sought to file an individual right of action (IRA) appeal asserting that, in retaliation for his protected disclosures, the agency denied failed or refused to resolve his allegations of whistleblower retaliation in a timely and objective manner For the reasons set forth below, the appeal is DISMISSED for lack of jurisdiction. The hearing the appellant requested was not held because there was no factual dispute bearing on the issue of jurisdiction. *See Manning v. Merit Systems Protection Board*, 742 F.2d 1424, 1427-28 (Fed. Cir. 1984).

JURISDICTION

The Board has jurisdiction over an IRA appeal if the appellant has exhausted his administrative remedies before OSC and makes non-frivolous allegations that: (1) He engaged in whistleblowing activity by making a protected disclosure and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action. 5 U.S.C. § 1214(a)(3). *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir .2001); *Rusin v. Department of the Treasury*, 92 M.S.P.R. 298, ¶ 12 (2002).

By Order dated July 12, 2014, I ordered the appellant to establish jurisdiction over his IRA appeal. The Order advised the appellant that it did not appear that the Board had jurisdiction over his IRA appeal because he had not nonfrivolously alleged that the agency had taken a personnel action against him. The appellant filed two responses on the jurisdictional issue which I have considered.

In an IRA appeal, an employee may seek corrective action from the Board with respect to 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). In this context, a “personnel action” is defined as follows: (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; and (xi) any other significant change in duties, responsibilities, or working conditions. 5 U.S.C. § 2302(a)(2)(A).

The agency contends that the Board lacks jurisdiction because the appellant was never employed by the agency, nor was he an applicant for employment with

them. Thus, the agency claim that the appellant is not an employee within the meaning of 5 U.S.C. § 2302(b)(8).

It was Congress's intent in drafting 5 U.S.C. § 2302(b)(8) to protect whistleblowers from a broad range of possible retaliatory actions from government agencies. *Weed v. Social Security Administration*, 113 M.S.P.R. 221, ¶ 10 (2010). Thus, the Board has held that an appellant in an IRA appeal is not limited to seeking corrective action for personnel actions taken by his employing agency, but can also raise such claims with respect to personnel actions taken by other Federal agencies, such as, for example a transfer, detail, restoration, or reemployment. *See* 5 C.F.R. § 210.102(18) (defining a transfer as a change of an employee, without a break in service, from a position in one agency to a position in another agency); 5 C.F.R. § 317.903 (defining a detail in the Senior Executive Service to include a temporary assignment to an outside agency); 5 C.F.R. Part 330, subpart G and Part 553 (authorizing a restoration or a reemployment of former employees to include placement in a position in another agency).

In this case, however, the Board lacks jurisdiction because the appellant has failed to nonfrivolously allege that the agency has taken a personnel action concerning him. The appellant contends that the agency — OSC's — failure to resolve or refusal to resolve the appellant's allegations of whistleblower retaliation in a timely and objective manner is itself a "personnel action." I disagree. The claimed "personnel action" clearly does not constitute one of the personnel actions enumerated by 5 U.S.C. § 2302(a)(2)(A). Nor does it meet the definition of the statute's catch all provision, which includes "any other significant change in duties, responsibilities, or working conditions," within the definition of a personnel action. 5 U.S.C. § 2302(a)(2)(A)(xii).

OSC is not the appellant's employing agency nor did the appellant apply to OSC for any type of work, transfer, detail, emolument, restoration or other attribute of employment. Rather, OSC is a Federal investigative and prosecutorial agency. It does not take personnel actions concerning employees other than its

own. While the appellant may be dissatisfied with the quality and timeliness of OSC's investigations and with the merits of OSC's prosecutorial decisions, those investigations and decisions are not personnel actions within the meaning of 5 U.S.C. § 2302(a)(2)(A) even though they may be of keen interest to the appellant and to his career with his own employing agency, the Department of Energy.

Finally, the appellant alleges that the agency is violating certain reporting requirements contained in 5 U.S.C. § 1213(g)(1) and (g)(2). However, the appellant has failed to identify any law, rule, or regulation which would allow the Board to review this claim, and I am aware of none.

DECISION

The appeal is DISMISSED.

FOR THE BOARD: _____/S/_____
Richard W. Vitaris
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **August 29, 2014**, unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals. The paragraphs that follow tell you how and

when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review.

If the other party has already filed a timely petition for review, you may file a cross petition for review. Your petition or cross petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file it with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.
Washington, DC 20419

A petition or cross petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

Criteria for Granting a Petition or Cross Petition for Review

Pursuant to 5 C.F.R. § 1201.115, the Board normally will consider only issues raised in a timely filed petition or cross petition for review. Situations in which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that:

(a) The initial decision contains erroneous findings of material fact. (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific

evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

(b) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The petitioner must explain how the error affected the outcome of the case.

(c) 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.

(d) New and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed.

As stated in 5 C.F.R. § 1201.114(h), a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to

submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

If you file a petition or cross petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. A petition for review must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

A cross petition for review must be filed within 25 days after the date of service of the petition for review.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

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 this initial decision becomes final. *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 this 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 decision only after it becomes final by filing in 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 on which this decision becomes final. *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 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.