UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

JOSEPH P. CARSON,
Appellant,

v.

DEPARTMENT OF ENERGY,
Agency.

DOCKET NUMBER
AT-1221-19-0536-W-2

DATE: January 28, 2020

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

Kristopher D. Muse, Esquire, Oak Ridge, Tennessee, for the agency.

BEFORE
Brian Bohlen
Administrative Judge

INITIAL DECISION

On June 2, 2019, the appellant, Joseph Carson, filed an individual right of actin (IRA) appeal with the Board alleging that he was retaliated against for his protected activity under the Whistleblower Protection Act (WPA).[1] IAF, Tab 1.

[1] The appeal was dismissed without prejudice on July 2, 2019 at the appellant's request. The refiled appeal was timely received by the Board on October 3, 2019. Documents within the initial appeal docket are referred to within this decision as "Initial Appeal File" (IAF), followed by their designated Tab number within that docket. Documents within the Refiled appeal docket are referred to as "Refiled Appeal File" (RAF), followed by their tab number for that docket.

Because the appellant failed to make a nonfrivolous allegation of Board jurisdiction, the hearing he requested was not held. *See Garcia v. Department of Homeland Security*, 437 F.3d 1322, 1344 (Fed. Cir. 2006) (en banc). For the reasons set forth below, the appeal is **DISMISSED** for lack of jurisdiction.

JURISDICTION

Background

The appellant is a GS-0801-14 Facility Representative (Professional Engineer) with the Department of Energy (DOE), in Oak Ridge, Tennessee. *See* Initial Appeal File (IAF), Tab 1. Within this appeal, he contends that he made protected disclosures to his supervisory chain in a letter dated September 11, 2018, which those supervisors inappropriately ignored. He contends that the agency's apathy toward his September 11, 2018 letter itself constitutes a "personnel action" within the meaning of the WPA at 5 U.S.C. § 2302(a)(2)((A) through constituting a significant change in his duties, responsibilities, or working conditions. *Id.*

The appellant's September 11, 2018 letter through his supervisory chain to the Secretary of Energy constitutes his alleged protected activity. This letter starts by arguing broadly that "the 7.5 billion crew members of planet earth" are facing nuclear Armageddon as well as other existential crises due to the Office of Special Counsel (OSC) and the Board – both law-breaking frauds in the appellant's eyes - shirking their responsibilities toward whistleblowers. To drive this point home, he then claimed - without evidence or further explanation - that the Board and OSC were, he believes, "a 'but for' factor or proximate cause for much which has befallen and besets America in (sic) past 40 years, particularly including 9/11, and the illnesses and premature deaths of thousands of 9/11 recovery workers." *Id.*, p. 36.

The appellant next vented his anger at various named and unnamed DOE attorneys for demonstrating "sociopathic legal ethics" through allegedly failing to

properly respond to his discovery requests from the 1999-2003 timeframe, as well as for the content of their later litigation filings. *Id.*, pp. 38-39. The appellant then alleged that the heads of the FBI and other intelligence agencies, the Secretary of the Energy, and the President of the United States were each unwilling or unable to fulfill their statutory duties under 5 U.S.C. § 2301(c) to protect merit system principles. *Id.*, p. 39.

Five pages into the appellant's September 11, 2018 letter, he began to explain how *specifically* he believes OSC and the Board wrought the above-described calamity upon the world. He explained that, in his opinion, OSC is required to investigate whistleblower claims brought by contractors within DOE facilities, and that both OSC and the Board have failed to recognize or honor this duty for several decades.

Analysis

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). *Linder v. Department of Justice*, 122 M.S.P.R. 14, ¶ 6 (2014).

A "non-frivolous allegation" is a claim of facts which, if proven, could establish a prima facie case that the Board has jurisdiction over the appellant's appeal. Mere pro forma allegations are insufficient to satisfy the non-frivolous standard. *Lara v. Department of Homeland Security*, 101 M.S.P.R. 190, ¶ 7 (2006).

A disclosure is protected under the WPA if it meets the reasonable belief test. The Court of Appeal for the Federal Circuit explained the meaning of the

reasonable belief test in *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999). As the Court explained in *Lachance*, the proper test is:

> …could a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee reasonably conclude that the actions of the government evidence gross mismanagement? A purely subjective perspective of an employee is not sufficient even if shared by other employees. The WPA is not a weapon in arguments over policy or a shield for insubordinate conduct. Policymakers and administrators have every right to expect loyal, professional service from subordinates who do not bear the burden of responsibility.

The appellant then meets his ultimate burden of proof on the merits of the appeal if he proves by a preponderance of the evidence (not just a non-frivolous allegation) that he engaged in protected activity, and that such protected activity was a contributing factor in the agency's subsequent decision concerning at least one personnel action defined by 5 U.S.C. § 2302(a). If an appellant meets this burden, corrective action must be ordered by the Board unless the agency proves by clear and convincing evidence that it would have taken the same personnel action(s) in the absence of the protected activity.

An appellant can establish that he exhausted his remedies before the OSC by showing that he filed a request for corrective action there, and either: (1) received written notification that OSC was terminating its investigation into his complaint; or (2) 120 days have passed since the appellant filed his request with OSC, and he has not received written notification from OSC informing him that it was terminating its investigation into his complaints. 5 U.S.C. § 1214(a)(3); *Garrison v. Department of Defense*, 101 M.S.P.R. 229, ¶ 6 (2006); *Mullins v. Department of Justice*, 57 M.S.P.R. 496, 501 (1993).

Further, to satisfy the exhaustion requirement of 5 U.S.C. § 1214(a)(3) in an IRA appeal, an appellant must inform OSC of the precise ground of his charge of whistleblowing, giving OSC a sufficient basis to pursue an investigation which might lead to corrective action. *Ward v. Merit Systems Protection Board*, 981

F.2d 521, 526 (Fed. Cir. 1992). The test of the sufficiency of an employee's charges of whistleblowing to OSC is the statement that he makes in the complaint requesting corrective action, not his characterization of those statements later. *Id*.; *Ellison v. Merit Systems Protection Board*, 7 F.3d 1031, 1036 (Fed. Cir. 1993).

The appellant properly exhausted his remedies with OSC. As an initial matter, it appears undisputed that the appellant properly exhausted his administrative remedies with OSC before filing this appeal with the Board. However, two defects nonetheless warrant dismissal of the appeal: (1) the appeal is precluded by collateral estoppel; and (2) the appellant did not non-frivolously allege that the agency took a covered personnel action against him.

This appeal is precluded by collateral estoppel. The present appeal is not the first time that the appellant has argued that OSC and the Board have violated a law, rule, or regulation by failing to investigate whistleblower claims brought by non-employee contractors. Most notably, in *Carson v. MSPB*, Docket No. AT-1221-14-0637-W-1, the appellant made this precise argument, and the Board squarely rejected it as a policy disagreement outside the scope of the WPA's protection. *See* Final Board Order, dated May 21, 2015, Docket No. AT-1221-14-0520-W-1.

Collateral estoppel bars repeat litigation of an issue when: (1) the issue is identical to that involved in a prior action; (2) the issue was actually litigated in the prior action; (3) the determination on the issue in the prior action was necessary to the resulting judgment; and (4) the party precluded was fully represented in the prior action. *Milligan v. U.S. Postal Service*, 106 M.S.P.R. 414, & ¶ 8 (2007). Further, "unlike *res judicata*, collateral estoppel may bar a party from relitigating an issue in a second action even when the prior appeal was dismissed for lack of subject matter jurisdiction." *Noble v. U.S. Postal Service*, 93 M.S.P.R. 693, 697 (2003). An issue is considered "actually litigated" when it

was "properly raised by the pleadings, was submitted for determination, and was determined." *Id.*, at 698.

The present appeal rests upon the same alleged protected disclosure that was dismissed by the Board for lack of jurisdiction in *Carson v. MSPB*, Docket No. AT-1221-14-0637-W-1. In that earlier appeal, the appellant directly raised – and the Board directly rejected – the issue of whether complaining about OSC declining to investigate contractor claims constituted protected activity under 5 U.S.C. § 2302(b)(8). That issue was plainly central to the Board's final decision, and the appellant represented himself vigorously in that matter. Accordingly, I find that the elements for collateral estoppel are met, and therefore, that this appeal should be dismissed on that basis.

The appellant failed to non-frivolously allege a covered personnel action. Even if the Board were to find collateral estoppel inappropriate here, or if the Board were to find that the appellant raised some other unrelated protected activity within the scope of this appeal, I find that the appeal should nonetheless be dismissed based on another jurisdictional defect. Specifically, as explained below, jurisdiction is lacking because the complained-of retaliation – i.e., that management ignored the appellant's September 11 letter – is not a covered personnel action within the meaning of 5 U.S.C. § 2302(a)(2)(A).

As noted above, the appellant contends that his entire supervisory chain up to the level of the Secretary of Energy ignored his September 11, 2018 letter, and that this act of ignoring the letter was itself a covered "personnel action" within the meaning of the WPA because it significantly changed the appellant's working conditions in light of a recent statutory change codified at 5 U.S.C. § 4302(b). As the appellant further explained, recent changes to 5 U.S.C. § 4302(b) require agencies to rate supervisory performance in part based upon each supervisor's actions in relation to whistleblower protection. The relevant portions of this statute are provided in bold type below:

> (1) The head of each agency, in consultation with the Director of the Office of Personnel Management and the Special Counsel, shall develop criteria that—
>
> (A) the head of the agency shall use as a critical element for establishing the job requirements of a supervisory employee; and
>
> **(B) promote the protection of whistleblowers.**
>
> **(2) The criteria required under paragraph (1) shall include—**
>
> **(A) principles for the protection of whistleblowers, such as the degree to which supervisory employees—**
>
> **(i) respond constructively when employees of the agency make disclosures described in subparagraph (A) or (B) of section 2302(b)(8);**
>
> **(ii) take responsible actions to resolve the disclosures described in clause (i); and**
>
> **(iii) foster an environment in which employees of the agency feel comfortable making disclosures described in clause (i) to supervisory employees or other appropriate authorities; and**
>
> **(B) for each supervisory employee—**
>
> **(i) whether the agency entered into an agreement with an individual who alleged that the supervisory employee committed a prohibited personnel practice; and**
>
> **(ii) if the agency entered into an agreement described in clause (i), the number of instances in which the agency entered into such an agreement with respect to the supervisory employee. (Emphasis added)**

From the appellant's point of view, the above statutory language created an affirmative duty on the part of every supervisor within his chain of command to respond in some fashion to his September 11, 2018 letter. Moreover, he contends that the agency's failure to honor this alleged duty constituted a significant change in his working conditions.

It is easy to see how the above statutory language could form the basis for a protected disclosure under 5 U.S.C. § 2302(b)(8) if an employee showed that he reasonably believed that his agency neglected to update its supervisory performance metrics to capture how its supervisors were handling whistleblower

issues. However, this is not the appellant's argument. Instead, the appellant contends that his agency is culpable of taking a personnel action against him as defined by 5 U.S.C. § 2302(a)(2)(A) in light of the above statutory language simply by not responding affirmatively to his complaint letter. In my view, this argument falls well outside any reasonable interpretation of the cited statutory language from 5 U.S.C. § 4302(b), and also bears no support in case law concerning the scope of what constitutes a significant change in duties, responsibilities, or working conditions under 5 U.S.C. § 2302(a)(2)(A). Accordingly, I find dismissal of the appeal appropriate.

Having found that the appellant is precluded by the doctrine of collateral estoppel from relitigating his concerns about OSC's processing of contractor complaints, and having also found that the appellant failed to non-frivolously allege that the agency took any recognized personnel action against him following his September 11, 2018 letter, the appeal must be dismissed.[2]

[2] Prior to preparing this decision, I reviewed the pending motions filed by both parties to ensure that the resolution of the pending pleadings would not impact a jurisdictional decision. Based on that review, the agency's December 31, 2019 unopposed motion to stay non-jurisdictional discovery is **GRANTED**. All other pending motions from the parties are **DENIED**. The Board also recently received a request dated January 13, 2020, from the National Judicial Conduct and Disability Law Project, Inc. (NJCDLP) to submit an *amicus curiae* brief in support of the appellant's position. The NJCDLP motion contained a proposed brief which explained the NJCDLP's interest in the matter, and which stated the organization's views and legal arguments. The *amicus* motion complies with 5 C.F.R. § 1201.34, and is **GRANTED**. I have therefore considered NJCDLP's brief, and have added both the *amicus* motion and *amicus* brief to the record for this appeal.

DECISION

FOR THE BOARD: /S/
Brian Bohlen
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **March 3, 2020**, 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 one of the authorities discussed in the "Notice of Appeal Rights" section, below. The paragraphs that follow tell you how and when to file with the Board or one of those authorities. 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).

NOTICE OF LACK OF QUORUM

The Merit Systems Protection Board ordinarily is composed of three members, 5 U.S.C. § 1201, but currently there are no members in place. Because a majority vote of the Board is required to decide a case, *see* 5 C.F.R. § 1200.3(a), (e), the Board is unable to issue decisions on petitions for review filed with it at this time. *See* 5 U.S.C. § 1203. Thus, while parties may continue to file petitions for review during this period, no decisions will be issued until at least two members are appointed by the President and confirmed by the Senate. The lack of a quorum does not serve to extend the time limit for filing a petition or cross petition. Any party who files such a petition must comply with the time limits specified herein.

For alternative review options, please consult the section below titled "Notice of Appeal Rights," which sets forth other review options.

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 OF APPEAL RIGHTS

You may obtain review of this initial decision only after it becomes final, as explained in the "Notice to Appellant" section above. 5 U.S.C. § 7703(a)(1). By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. 5 U.S.C. § 7703(b). Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this decision when it becomes final, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

Please read carefully each of the three main possible choices of review below to decide which one applies to your particular case. If you have questions about whether a particular forum is the appropriate one to review your case, you should contact that forum for more information.

(1) Judicial review in general. As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court within **60 calendar days** of the date this decision becomes final. 5 U.S.C. § 7703(b)(1)(A).

If you submit a petition for review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. 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, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. 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 Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

(2) Judicial or EEOC review of cases involving a claim of discrimination. This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days** after this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. ____ , 137 S. Ct. 1975 (2017). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and

to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

Contact information for U.S. district courts can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. 5 U.S.C. § 7702(b)(1). You must file any such request with the EEOC's Office of Federal Operations within **30 calendar days** after this decision becomes final as explained above. 5 U.S.C. § 7702(b)(1).

If you submit a request for review to the EEOC by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit a request for review to the EEOC via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, N.E.
Suite 5SW12G
Washington, D.C. 20507

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012. This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and you wish to challenge the Board's rulings on your whistleblower claims only, excluding all other issues, then you may file a petition for judicial review with the U.S. 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** of the date this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(1)(B).

If you submit a petition for judicial review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. 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, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. 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 Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

Contact information for the courts of appeals can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx