UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ADMINISTRATIVE LAW JUDGE

JOSEPH P. CARSON,
Appellant,

v.

MERIT SYSTEMS PROTECTION BOARD,
Agency.

DOCKET NUMBER
AT-1221-14-0637-W-1

DATE: November 6, 2014

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

Mathew Bradley, Esquire, Washington, D.C., for the Agency.

BEFORE
Hon. Bruce Tucker Smith
Administrative Law Judge

INITIAL DECISION

On April 21, 2014, Joseph P. Carson (Appellant) filed the instant Individual Right of Action (IRA) appeal against the Merit Systems Protection Board (Agency)[1] alleging the Agency retaliated against him for whistleblowing or other protected activities.

On May 1, 2014, I received Appellant's IRA appeal from the Board for review and disposition.[2]

[1] The term "Agency" is used when referring to MSPB's role as the Respondent Agency in these proceedings. The term "MSPB" or "Board" is used when referring to the MSPB's general capacity as a governmental adjudicatory organization.

[2] The United States Coast Guard Administrative Law Judge Program provides adjudication services to the MSPB pursuant to a Memorandum of Understanding. As per 5 C.F.R. §1201.4(a), a "judge" is any person authorized by the Board to hold a hearing or decide a case without a hearing, including the Board, or member of the Board, or an

After a complete review and analysis of the record and applicable law, I find the Board does not have jurisdiction under the Whistleblower Protection Act (WPA) (Pub. L. 101-12, as amended) –and as expanded by the Whistleblower Protection Enhancement Act of 2012 (WPEA) (Pub. L. 112-199). Therefore, for the reasons discussed below, Appellant's IRA appeal is **DISMISSED FOR LACK OF JURISDICTION**.

PROCEDURAL BACKGROUND

On December 13, 2013, Appellant, an employee of the Department of Energy, filed a complaint with the Office of Special Counsel (OSC). Appellant argued he made a series of protected disclosures to the President of the United States, OSC, the MSPB, and the Department of Energy, as well as in a succession of federal lawsuits. Specifically, Appellant asserted those protected disclosures involved the Agency's failure to conduct certain "special studies" in accordance with 5 U.S.C. §§1204(a)(3) and (e)(3). In short, Appellant asserted his protected disclosures constituted whistleblowing and, in reprisal for such action, the Agency continued to fail to perform certain studies, thereby causing a significant change in Appellant's duties, responsibilities and/or working conditions.

On March 6, 2014, OSC issued a preliminary determination to Appellant explaining that it analyzed the complaint for potential violations of 5 U.S.C. §§2302(b)(8) and (b)(12). OSC advised Appellant that the complaint did not set forth facts supporting the elements required to prove a violation of either 5 U.S.C. §§2302(b)(8) or (b)(12). Accordingly, OSC advised Appellant that it made a preliminary determination to end its inquiry into his complaint.

By letter dated March 10, 2014, Appellant responded to OSC's March 6, 2014, preliminary determination contesting OSC's decision to close its inquiry. Respondent's letter

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administrative law judge appointed under 5 U.S.C. §3105 or other employee of the Board designated by the Board to hear such matters.

stated "should OSC close out my complaint, I will consider it an act of whistleblower reprisal on OSC's part . . . and I will respond accordingly."

On March 27, 2014, OSC transmitted notice to Appellant advising of its "final determination to close our file in this matter." OSC's correspondence specifically noted, "we cannot conclude you have suffered a 'personnel action' as currently defined in the applicable statute and case law." The "final determination" letter from OSC further noted "you have submitted no facts, other than your personal belief, establishing a causal connection between your whistleblowing and any personnel action that the MSPB has taken against you."[3]

On April 21, 2014, Appellant filed an IRA appeal against the Agency in response to OSC's March 27, 2014, determination to terminate its investigation into Appellant's December 13, 2013, complaint. In his appeal form, Appellant indicated he was appealing MSPB's "failure or refusal to resolve 'protected disclosure.'"

On May 13, 2014, the undersigned issued two orders, to wit: an Acknowledgment Order and an Order on Jurisdiction and Proof. The Order on Jurisdiction and Proof provided Appellant with notice that it was questionable whether his appeal was within the undersigned's jurisdiction. Accordingly, the Order on Jurisdiction and Proof provided Appellant with necessary information concerning the jurisdictional issue and the burdens of proof that he must meet to show that the undersigned should not dismiss the instant matter for lack of jurisdiction. The undersigned directed Appellant to file a statement addressing the jurisdictional issue with supporting evidence, within ten calendar days.

[3] On April 20, 2014, Appellant e-mailed Barbara Wheeler, Complaints Examinations Unit, OSC and "contend[ed]that [OSC] ha[s] engaged in unlawful reprisal against me. . . ." Appellant advised Ms. Wheeler that [i]f I am successful in my efforts to demonstrate that you are engaged in unlawful whistleblower reprisal against me, you should expect me to pursue legal avenues to have your profession of law discipline you professionally."

On May 20, 2014, the undersigned granted Appellant's Request for Extension of Time, and provided until May 27, 2014, for Appellant to file his jurisdictional statement. On May 25, 2014, Appellant filed his jurisdictional statement and the Agency responded on May 29, 2014. On June 24, 2014, following a telephonic pre-hearing conference with the parties, the court requested the parties further brief the jurisdiction issue by July 25, 2014.

On July 18, 2014, Appellant filed his brief; on July 23, 2014, the Agency filed its brief and moved for dismissal of the matter due to lack of jurisdiction.

PRINCIPLES OF LAW

In an IRA appeal, an employee may seek corrective action from the MSPB 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. §1221(a); 5 U.S.C. §2302(b)(8); 5 C.F.R. §1209.2. However, "the Board's jurisdiction is not plenary, but is limited to those matters over which it has been granted jurisdiction by statute or regulation." Weber v. Dep't of the Army, 45 M.S.P.R. 406, 409 (1990). The Board therefore does not have jurisdiction over all actions that are alleged to be incorrect. Weyman v. Dep't of Justice, 58 M.S.P.R. 509, 512 (1993).

As explained in Benton-Flores v. Department of Defense, 121 M.S.P.R. 428 (2014),

> In order to secure corrective action from the Board in an IRA appeal, an appellant must first seek corrective action from OSC. If an appellant has exhausted her administrative remedies before OSC, she can establish Board jurisdiction over an IRA appeal by nonfrivolously alleging that she made a protected disclosure **and** that the disclosure was a contributing factor in the agency's decision to take a personnel action.

Id. at 431-32. (internal citations omitted) (emphasis added). Whether an appellant has presented nonfrivolous allegations is determined on the written record. Yunus v. Dep't of Veterans Affairs, 242 F.3d 1367, 1371-72 (Fed. Cir. 2001).

In any event, as a limited-jurisdiction tribunal, the Board has an obligation to inquire into its own jurisdiction on its own motion. Rogers v. U.S. Postal Service, 59 M.S.P.R. 647, 651 (1993). If jurisdiction is successfully established, then the Board conducts a hearing on the merits. Benton-Flores, 121 M.S.P.R. at 432.[4]

ANALYSIS

As mentioned above, the requirements necessary to establish Board jurisdiction are: (1) exhaustion of administrative remedies; (2) assertion of a nonfrivolous allegation; (3) the allegation is a protected disclosure; and (4) the protected disclosure was a contributing factor in the agency's decision to take a personnel action. Id. at 432-36. As explained below, even assuming the first three jurisdictional elements are met, Appellant failed to demonstrate that the agency took a personnel action against him. Therefore, the board lacks jurisdiction over this case.

Personnel Action Requirement

In an attempt to meet one of the requisite jurisdictional elements, Appellant describes the Agency's purported "personnel action" against him in the following terms:

> MSPB has refused or failed to obtain a timely and objective resolution to Mr. Carson's protected disclosure. He contends this is a personnel action by 5 U.S.C. §2302(a)(2)(A)(xii), "any other significant change in duties, responsibilities or working conditions" because "it might well dissuade a reasonable coworker from making a protected disclosure. . . . "

[4] Notably, "[t]here is a fundamental distinction between the requirements necessary to prevail on the merits of a WPA claim and those sufficient to establish [B]oard jurisdiction. To prevail on the merits, an employee must establish, by a preponderance of the evidence, that a protected disclosure was a contributing factor in an adverse personnel action. At the jurisdictional threshold, however, the employee's burden is significantly lower: for [IRA] appeals 'the Board's jurisdiction is established by nonfrivolous allegations that the [employee] made a protected disclosure that was a contributing factor to the personnel action taken or proposed.'" Johnston v. Merit Sys. Prot. Bd., 518 F.3d 905, 909 (Fed. Cir. 2008) (quoting Stoyanov v. Dep't of the Navy, 474 F.3d 1377, 1382 (Fed. Cir. 2007) (internal citations omitted).

(Appellant's Response to Jurisdictional Order, 05/25/2014) (citations omitted).

Alternatively stated, Appellant claims the Agency retaliated against him by continuing to fail to perform certain studies, thereby causing a significant change in his duties, responsibilities and/or working conditions. A review of relevant authority and the facts in this case belie Appellant's argument.

Under the WPEA, the term "personnel action" is defined as:

> (i) an appointment;
> (ii) a promotion;
> (iii) an action under chapter 75 of this title 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 chapter 43 of this title;
> (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 this subparagraph;
> (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). A review of the record reveals the Agency has not and indeed could not take any of the above-mentioned personnel actions against Appellant. Appellant has shown no evidence that the Department of Energy, or any other agency, has taken any personnel action against him as a result of any of his alleged "whistleblowing activities." Therefore, because there has been no personnel action, Appellant has not shown one of the necessary elements required to establish Board jurisdiction over this case.

Appellant argues that MSPB's failure to obtain a timely resolution to his complaint "might well dissuade a reasonable coworker from making a protected disclosure. . . . " Appellant's argument is unconvincing. "Dissuad[ing] a reasonable coworker from making a

protected disclosure" is not within the definitional ambit of a personnel action as set forth in 5 U.S.C. §2302(a)(2)(A).

Based upon the foregoing, Appellant failed to establish that the Agency took a personnel action against him and therefore failed to establish a valid basis for jurisdiction. Appellant's claim that the Agency's actions, or inactions, constitute a "significant change in duties, responsibilities, or working conditions" does not fall within the ambit of a personnel action as codified at 5 U.S.C. §2302(a)(2)(A)(xii). Accordingly, the MPSB has no jurisdiction. 5 U.S.C. § 2302(b)(8)."

CONCLUSION

Based upon the foregoing analysis, Appellant failed to successfully establish the requisite jurisdictional bases for the Board to adjudicate his claim on the merits. Alternatively stated, Appellant failed to demonstrate that the Agency took a personnel action against him.

DECISION & ORDER

IT IS HEREBY ORDERED, the Agency's Motion to Dismiss, as set forth within its Brief on Jurisdiction, is **GRANTED** and Appellant's IRA appeal is **DISMISSED FOR LACK OF JURISDICTION**.

FOR THE BOARD:

Hon. Bruce Tucker Smith
Administrative Law Judge

NOTICE TO APPELLANT

This initial decision will become final on **December 11, 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.