No. _____

In The
Supreme Court of the United States

JOSEPH P. CARSON,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court's precedent in *Burlington North. & Santa Fe Ry. Co. v. White*, 126 S.Ct. 2405 (2006) applies to determining whether a personnel action, defined at 5 U.S.C. §2302(a)(2)(A)(xi) as, "any other significant change in duties, responsibilities or working conditions," has occurred to a federal employee alleging whistleblower reprisal.

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The Court of Appeals for the Federal Circuit, in *Carson v. Merit Systems Protection Board*, Docket No. 2007-3134, issued a judgment of affirmance without opinion, per Fed. Cir. R. 36, of the unpublished final decision of the Merit Systems Protection Board, Docket No. AT-1221-06-1125-W-1. The Federal Circuit decision is reported at 257 Fed. Appx. 268, 2007 WL 3333475 (C.A.Fed.).

JURISDICTION

The Federal Circuit filed its decision on November 7, 2007, and entered an order denying petitioner's motion for rehearing on November 17, 2009. On January 7, 2010, The Chief Justice granted petitioner's request for an extension of time and directed it be filed on or before April 1, 2010. This Court has jurisdiction under 28 U.S.C. §1254(1) to review the circuit court's decision on a writ of certiorari.

STATUTORY PROVISION INVOLVED

5 U.S.C. §2302(a)(2)(A)(xi)

> For the purpose of this section a "personnel action" means any other significant change in duties, responsibilities, or working conditions.

STATEMENT OF THE FACTS

Petitioner Joseph Carson is a licensed professional engineer (PE) who has been a nuclear professional for over 30 years. He served as a submarine officer in Admiral Rickover's nuclear navy from 1976-1982. He worked as a start-up and test engineer at three different commercial nuclear plants from 1982-1989 and became a PE in 1984. He started his employment at the U.S. Department of Energy (DOE) as a nuclear safety engineer in January 1990.

As a PE, Mr. Carson has a positive legal and professional duty to "blow whistles," when necessary in his professional duties, to protect public and workplace health and safety, regardless of possible employer or client retribution.[1] [2] [3] DOE knew Mr. Carson was a PE when it hired him; the vacancy announcement for the position stated its educational requirements could be satisfied with a PE license. Additionally,

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[1] Because the "paramount" objective of engineering ethics is protection of public health, safety and welfare, situations requiring "whistleblowing" can occur. For PE's, this duty is codified in the "rules of professional conduct" of State Engineering Boards, see <http://en.wikipedia.org/wiki/Engineering_ethics>.

[2] Mr. Carson has twice submitted the winning essay for the annual Milton Lunch Engineering Ethics Contest of the National Society of Professional Engineers (NSPE) <www.nspe.org/Ethics/EthicsResources/MiltonLunch/miltonlunch_pastwinners.html>.

[3] Mr. Carson also served on the American Nuclear Society (ANS) Special Committee on Ethics, which drafted the current ANS Code of Ethics <www.ans.org/about/coe/>. ANS is the largest nuclear professional society in world.

Mr. Carson's duty as a PE to "blow whistles," when necessary, is underscored by several of the "merit systems principles" – the core values of the federal civil service, codified at 5 U.S.C. §2301(b) – specifically §2301(b)(4) and (b)(9).

Mr. Carson first "blew whistles" about serious workplace and public health and safety issues in the Department of Energy in 1992, after his 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 entire program being revamped.[4] His disclosures also played a role in the Secretary of Energy unilaterally terminating, on May 1, 1997, Associated Universities, Inc. (AUI) as the 50 year-long contractor of Brookhaven National Laboratory on Long Island, because of its significantly deficient environment, safety and health programs.[5] [6]

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[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>

[5] The link to DOE's Press Release is broken, the related May 1, 1997 statement of Lyle Schwartz, BNL's Interim Director is available at <www.bnl.gov/bnlweb/pubaf/pr/1997/bnlpr0501a97.html>.

[6] U.S. Office of Special Counsel Press Release of November 4, 1998 "OSC Announces Report To The President Of Safety Concerns At The U.S. Department Of Energy's Brookhaven National Laboratory" <www.osc.gov/documents/press/1998/pr98_10.htm>

Mr. Carson's disclosures and his "prevailing" in several whistleblower reprisal appeals in the 1990's also played a role, perhaps a significant role, in the passage of the landmark 2000 law, the Energy Employees Occupational Illness Compensation Program Act (EEOICPA), the first medical entitlement law since the 1970 "Black Lung" law. By it, about 50,000 workers in DOE's Cold War facilities (or their survivors), who were placed in harm's way in those workplaces without their knowledge of the hazards they faced or proper protection from them, have received about 5 billion dollars in compensation.[7] [8]

Between 1994 and 2001, Mr. Carson repeatedly prevailed in IRA appeals and Petitions for Enforcement against DOE unlawful reprisal under the Whistleblower Protection Act, 5 U.S.C. §§1221, 2302. He "prevailed" in no fewer than eight separate whistleblower or whistleblower-related decisions at the Board during this time, 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 same agency wrongdoing is cited in the Federal Circuit's divided decision in *Carson v. Department of Energy*, 398 F.3d 1369, 1372-73, 1378-79 (Fed. Cir. 2005). To his knowledge,

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[7] 42 U.S.C. §7384(a), which cites the "FINDINGS" section of P.L. 106-398, EEOICPA of 2000, elaborates on these hazards and that the workers were neither informed nor protected from them.

[8] Based on Department of Labor statistics, available at <www.dol.gov/owcp/energy/regs/compliance/weeklystats.htm>.

no federal employee, from the creation of the Civil Service in 1883 by the Pendleton Act, has "prevailed" in more whistleblower related litigation.

In contrast, even though he has also filed over 25 prohibited personnel practices (PPP) complaints with the U.S. Office of Special Counsel (OSC) since 1992, OSC has not once determined and/or reported to the Secretary of Energy, per 5 U.S.C. §1214(e) and/or §1214(b)(2)(B), "there is reasonable cause to believe" a PPP occurred. Such a §1214(e) report, together with the agency-head certified response, stating the corrective actions and their schedule, are permanent, publicly available records, per 5 U.S.C. §1219(a)(3).

In several PPP complaints Mr. Carson filed with OSC around 2004, he alleged a 5 U.S.C. §2302(b)(9) type PPP – reprisal for engaging in protected activity – occurred in which the involved agency action constituted a "personnel action" for creating "any other significant change in . . . working conditions," per 5 U.S.C. §2302(a)(2)(A)(xi). The three agency actions cited by Mr. Carson in these PPP complaints were:

> 1) the agency's material breach of a 1994 MSPB enforceable settlement agreement of a whistleblower appeal,
>
> 2) the false, unfounded, and highly irresponsible statements of his supervisors to any number of Department of Energy employees in Oak Ridge, in Washington, DC, as well as to DOE contractor employees in Oak Ridge that he was "a threat of workplace violence," and

> 3) the failure of responsible agency officials to process three of his formal agency grievances he presented in 1999 and 2000, per the agency's grievance procedure.

In terminating its investigation of these PPP complaints, OSC stated that, absent specific MSPB determinations to the contrary, OSC would presume MSPB would make a negative determination – that no personnel action occurred.[9]

Mr. Carson sought a review of OSC's presumptive negative jurisdictional determinations at Federal District Court for the District of Columbia, via a petition for writ of mandamus. The Court determined that such OSC determinations were beyond the jurisdiction of the district court, in *Carson v. Office of Special Counsel*, Docket No. 04-0315, Not Reported in F.Supp.2d, 2006 WL 785292 (D.D.C. March 27, 2006), *5.

Mr. Carson is not an attorney, he engages in litigation because he wants to be able to do his duty as a PE and federal employee to protect others and not experience unlawful reprisal for it. He does not want others to experience what he has either. That is what 18 years of this matter boil down to. In retrospect, he would have appealed the district court decision because it conflicts with *Weber v. United States*, 209 F.3d 756, 759 (D.C. Cir. 2000) which finds district courts do have subject matter jurisdiction over OSC's

[9] See Joint Appendix A082-83

negative jurisdictional determinations. OSC has not accepted the ruling in *Weber* and still claims its negative jurisdictional determinations are beyond Court review, as indicated in its briefs in the pending case *Carson v. Office of Special Counsel*, Docket No. 09-5645, Sixth Circuit Court of Appeals.

At any rate, following the District Court decision, Mr. Carson ascertained if he re-filed the PPP complaints, citing the 5 U.S.C. §2302(b)(8) type PPP – whistleblower reprisal – and if OSC again closed the PPP investigation on presumptive jurisdictional grounds, he could then file an IRA appeal per 5 U.S.C. §1221 to obtain an MSPB jurisdictional determination and, if necessary, a review by the Federal Circuit of MSPB's jurisdictional rulings.

Also about this time, this Court created new case law possibly relevant to determining whether an agency action constituted a "personnel action" for being "any other significant change in duties, responsibilities, or working conditions" in *Burlington Northern & Santa Fe Railway Co. v. White,* 126 S.Ct. 2405 (2006).

So Mr. Carson filed a new, consolidated, PPP complaint with OSC, file no. MA-06-2118, alleging the whistleblower reprisal type PPP, citing the three agency actions described above along with the new Supreme Court precedent in *Burlington*. OSC closed

its investigation for the same presumptive jurisdictional reason as the previous PPP complaints.[10] Mr. Carson then filed an IRA appeal per 5 U.S.C. §1221 with MSPB, Docket No. AT-1221-06-1125-W-1.

On December 29, 2006, MSPB issued an initial decision which dismissed his appeal on jurisdictional grounds, based on the Administrative Judge's determination that Mr. Carson failed to nonfrivolously claim the challenged agency actions constituted personnel actions for creating "any other significant change in . . . working conditions," per 5 U.S.C. §2302(a)(2)(A)(xi). The decision did not address whether *Burlington* was relevant. App. 3-20.

Mr. Carson decided against filing a petition for review of this initial decision with the Full MSPB so he could obtain a review by the Federal Circuit more quickly (in retrospect, he would have filed a PFR with the Full MSPB). The MSPB initial decision automatically became final on February 2, 2007 and Mr. Carson then filed a petition for review with the U.S. Court of Appeals for the Federal Circuit, per 5 U.S.C. §7703(b)(1).

MSPB became the respondent, per 5 U.S.C. §7703(a)(2), because the MSPB decision addressed only jurisdictional issues. An amicus curiae brief was filed on behalf of Mr. Carson. This resulted in the Department of Energy filing an intervenor brief. Even

[10] See Joint Appendix A079-81

though Mr. Carson was pro se, formal briefs were filed. No oral argument occurred. The Federal Circuit affirmed the MSPB decision without issuance of written opinion on November 9, 2007, per Fed. Cir. R. 36. App. 1-2.

Mr. Carson filed a timely petition for rehearing and rehearing en banc on January 25, 2008, which was not accepted by the Court because it had extra material in its addendum. Mr. Carson then timely filed an unopposed motion to allow the extra material in the addendum. Eighteen months later, on July 24, 2009, the Court, without ruling either on the unopposed motion to allow the extra material in the addendum or on the petition for rehearing, issued its decision as a mandate.

On September 25, 2009, Mr. Carson applied to The Chief Justice for an extension of time to file a petition for writ of certiorari. The Clerk of the Supreme Court notified him, in a letter dated October 1, 2009, that his application was out-of-time. Mr. Carson then contacted the Clerk of the Court for the Federal Circuit and, for the first time, realized that the Federal Circuit had not ruled on his unopposed motion to allow the extra material in the addendum or on the petition for rehearing/rehearing en banc before issuing the mandate. After discussing the situation with the Clerk and the representatives of MSPB and DOE, he filed an unopposed out-of-time motion for leave to file a petition for rehearing/ rehearing en banc which was granted on October 9, 2009. On November 17, 2009, the Federal Circuit

denied his petition for rehearing/rehearing en banc. App. 21-22

On January 7, 2010, The Chief Justice approved Mr. Carson's application for an extension of time to file a petition for writ of certiorari on or before April 1, 2010.

However, just as too many other concerned federal employees, Mr. Carson, together with his family, has paid a high cost for doing his duty as a PE employed by DOE as a nuclear safety engineer and for defending, upholding, and advancing his profession of engineering, its code of ethics, and the public health and safety, together with the merit system principles of the federal civil service. His testimony to the concerned federal employees – who regularly reach out to him – is dismal, "Look the other way if you can live with yourself." However, Mr. Carson cannot "live with himself" having to give such dismal advice, so he keeps trudging along, hoping to contribute to positive change in a broken system – which has left America much diminished and more threatened.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD VACATE AND REMAND THE JUDGMENT TO THE FEDERAL CIRCUIT WITH INSTRUCTIONS TO DEVELOP PRECEDENT FOR WHEN A PERSONNEL ACTION OCCURS AS A RESULT OF "ANY OTHER SIGNIFICANT CHANGE IN DUTIES, RESPONSIBILITIES, OR WORKING CONDITIONS," IN LIGHT OF *BURLINGTON*.

BACKGROUND

The background and current state of federal whistleblower protection is summarized in the first few pages of Senate Report 111-101, "Whistleblower Protection Enhancement Act of 2009," December 3, 2009. It accompanies S.372, which has the backing of the Administration. As of the date of this petition, S.372 is awaiting action by the Full Senate.

From the S. Rep. No. 111-101:

> Whistleblowers have long played a clear goal role in keeping our government honest and efficient, and the events of September 11, 2001 make even clear the fact that our citizens' safety depends on our ensuring 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. (pages 1-2) . . .

* * *

The Civil Service Reform Act of 1978 (CSRA) established statutory protections for federal employees to encourage disclosure of government illegality, waste, fraud, and abuse.[11] As explained in the accompanying Senate report:

> Often, the whistleblower's reward for dedication to the highest moral principles is harassment and abuse. Whistleblowers frequently encounter severe damage to their careers and substantial economic loss. Protecting employees who disclose government illegality, waste, and corruption is a major step toward a more effective civil service. . . . [T]hese conscientious civil servants deserve statutory protection rather than bureaucratic harassment and intimidation (pages 2-3).[12]

. . . However, in 1984, the MSPB reported that the Act had no effect on the number of whistleblowers and that federal employees continue to fear reprisal (page 3).[13] . . .

In response, Congress in 1989 unanimously passed the (Whistleblower Protection Act) WPA, which forbids retaliation against federal employees who disclose what they reasonably

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[11] Civil Service Reform Act of 1978 (CSRA), P.L. 95-454

[12] S. Rep. No. 95-969, at 8

[13] See Merit Systems Protection Board, "Blowing the Whistle in the Federal Government: A Comparative Analysis of 1980 and 1983 Survey Findings" (October 1984)

> believe to be evidence of illegal or other seriously improper government activity (page 3).[14]
>
> . . . 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 the Federal Circuit Congress deemed inconsistent with the intent of the 1989 Act (page 3).[15]

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 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) address[es] the 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 personnel

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[14] Federal Whistleblower Protection Act of 1989 (WPA), P.L. 101-12

[15] U.S. Office of Special Counsel Reauthorization Act of 1994, P.L. 103-424

> 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 what 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/her protected conduct, regardless of the form that discrimination or retaliation may take.

The primary reason this Court should grant the petition, vacate the decision and remand it to the Federal Circuit is to create precedent about this 1994 addition to the WPA, in light of *Burlington*.

At this point, almost 16 years after this "catch-all" personnel action was added to strengthen protection for federal whistleblowers, the Federal Circuit has yet to review it.[16] [17] Additionally, there is no precedent at MSPB about what, if any, impact, *Burlington*

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[16] See *Holderfield v. MSPB*, 326 F.3d 1207, 1209 (Fed. Cir. 2003).

[17] The Intervenor's brief, page 13, makes the same point, that *Shivaee v. Dept. of Navy*, 74 MSPR 383 (1997) has not been endorsed by the Federal Circuit.

has on this section of law. Arguably, this Federal Circuit judgment conflicts with *Burlington*, and, therefore, warrants this Court's action by Rule 10(c) of the Rules of the Supreme Court.

Additionally, as one result of the lack of relevant precedent at the Federal Circuit, OSC uses that lack as grounds to close PPP complaints that allege this type of "personnel action," as the PPP complaints associated with this case demonstrate. (If OSC wanted to establish case law for this catch-all personnel action at MSPB, it could have done so years ago, which would have led to the creation of relevant Federal Circuit precedent).[18]

Additionally, S.372 (as the corresponding House Bill, H.R. 1507), does not amend the current list "personnel actions" at §2302(a)(2)(A), so unless this Court remands the case back to the Federal Circuit, it may be many years more before relevant case law is created – that OSC can finally apply in performing its primary statutory duty of protecting concerned federal employees from reprisal, so they do not need to hock their homes and savings to pursue year after

[18] OSC can seek corrective action on behalf of an employee affected by a PPP at MSPB per §1214(b)(2)(C) and (b)(3) and 5 C.F.R. §1201.128. OSC does not have independent litigating authority, but if MSPB rules against OSC in a corrective action petition, the involved employee can seek a judicial review at the Federal Circuit, per §1214(c) and 5 C.F.R. §1201.133. If MSPB rules for OSC, then OPM can seek a judicial review, per §7703(d).

year of redress via litigation – frequently at the cost of their marriages, if not health and career.

How the underlying MSPB decision conflicts with relevant MSPB precedent and *Burlington*.

Even though there is no Federal Circuit precedent for determining what can create "any other significant change in duties, responsibilities or working conditions," such precedent exists at MSPB, *Shivaee v. Dept. of Navy*, 74 MSPR 383, 388 (1997), which is quite close to that given in *Burlington* at p. 1215 – that if the agency/employer actions would tend to deter other similarly situated employees from engaging in protected activities or making protected disclosures, they qualify.

From *Shivaee*, at 388:

> . . . 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.

From *Burlington*, at 2415:

> In our view, a plaintiff must show that a reasonable employee would have found the

> challenged action materially adverse, "which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Rochon*, 438 F.3d, at 1219 (quoting *Washington*, 420 F.3d, at 662).

In the MSPB decision, the Administrative Judge did not apply this criteria, even though he correctly quoted it from *Shivaee* at App. 10-11. However, he then improperly required a showing that the agency actions against Mr. Carson actually deterred other employees from making protected disclosures, a much higher burden, see App. 11-12 (emphasis added):

> For the following reasons, I find the appellant's aforementioned allegations do not constitute nonfrivolous allegations that the agency took personnel actions against him within the meaning of 5 U.S.C. §2302(a)(2)(A)(xi) . . .
>
> . . . the appellant essentially alleges that the agency's failure to comply with a 1994 settlement agreement in one of his previous appeals has created an environment within the workplace **wherein employees are "deterred" from engaging in protected activity** such as making protected disclosures of agency wrongdoing. Appellant's claims in this regard are generalized and unspecified in that he has failed to describe any specific instance wherein the agency's alleged noncompliance with its 1994 settlement agreement in his case **resulted in any other employees' failure to engage in**

> **protected activity**. Likewise, I note appellant's claim in this regard relates to the circumstances of his fellow employees and not himself. Thus, I find that the appellant has failed to nonfrivolously allege that the agency's **alleged failure** to comply with its 1994 settlement agreement resulted in a significant change in *his* duties, responsibilities, and/or working conditions, as mandated by the statute.

The MSPB decision mentioned *Burlington* only in passing, by quoting an OSC letter mentioning it, see App. 9, footnote 1. The MSPB decision neither addressed the relevancy of *Burlington* nor applied it.

The MSPB decision also incorrectly describes the agency activities Mr. Carson appealed, see App. 7-8. Mr. Carson, per MSPB regulation at 5 C.F.R. §1201.24, described the three involved agency actions in his MSPB appeal.[19] The agency, in its response to his appeal, made per 5 C.F.R. §1201.25, agreed that two had happened and asked for additional information about the third, which he later provided.[20]

In responding to the Board's Jurisdictional Order,[21] Mr. Carson did not repeat this previously provided information, instead, he applied the criteria of *Burlington* and *Shivaee* to the agency actions in

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[19] See Joint Appendix A135-137

[20] See Joint Appendix A112-115

[21] See Joint Appendix A069-70

question. From Mr. Carson's response to the jurisdictional order, described in the MSPB decision at App. 7-8.[22]

The agency actions involved are personnel actions

In June 2006, the Supreme Court, in *Burlington Northern and Santa Fe Railway Co. v. White*, 126 S.Ct. 2405, 2415 (2006) created a specific criteria relevant to existing Board precedent that whether an agency action created "any significant change in working conditions" should be "interpreted broadly." Specifically, the Supreme Court ruled,

> In the present context that means that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.

This Supreme Court ruling is consistent with the legislative history for the 1994 amendments to the WPA, cited by the Board in *Shivaee*.

Applying the repeatedly cited Board precedent to "broadly interpret," informed by the recent Supreme Court precedent in *Burlington*, to the three agency actions involved in this appeal is straightforward:

> 1. An agency employee makes protected disclosures and alleges reprisal in a formal

[22] See Joint Appendix A077

appeal. He settles the case, but the agency fails to comply with the settlement agreement. Would that agency action tend to deter other agency employees from making protected disclosures or engaging in protected activities? Clearly, yes, therefore it creates "any other significant change in working conditions," and is a personnel action.

2. An agency employee makes protected disclosures and alleges reprisal in a formal appeal. He settles the case, but agency employees then start a rumor campaign that he is a "threat of workplace violence." Would that agency action tend to deter other agency employees from making protected disclosures or engaging in protected activities? Clearly, yes, therefore it creates "any other significant change in working conditions," and is a personnel action.

3. An agency employee makes protected disclosures and alleges reprisal in a formal appeal. He also files related grievances, per the agency grievance procedure. The agency fails to comply with its agency grievance procedure by failing to process his grievances or inform the employee why. Would that agency action tend to deter other agency employees from making protected disclosures or engaging in protected activities? Clearly, yes, therefore it creates "any other significant change in working conditions," and is a personnel action.

Mr. Carson, in his response to the jurisdictional order, applied the *Shivaee* and *Burlington* criteria to the involved agency actions; however, the MSPB decision incorrectly describes and treats his analysis of the alleged agency actions as "his list of alleged personnel actions," see App. 7.

II. REASONS WHY THE SOLICITOR GENERAL MAY DECIDE TO FILE AN "ACQUIESCENCE" IN RESPONSE TO THIS PETITION

As Mr. Carson understands the Court's statistics, this petition has about a 1 in 500 chance of being granted, unless the Solicitor General files an "acquiescence" supporting it. He understands the Solicitor General files a response to about 10% of the petitions for writ of certiorari it receives. He also understands that Supreme Court Rule 12.6 gives the Solicitor General only 20 days, with no possibility of a time extension, to file an acquiescence to this petition for writ of certiorari.

The reasons why the Solicitor General may decide to file a brief supporting Mr. Carson's petition include:

1. Improving protection of concerned federal employees is also a stated objective of the

Obama Administration[23] and the Administration's support of S.372 has been publicized.

2. The position of Special Counsel, head of OSC, has been vacant for 18 months. Mr. Carson is a leader in efforts to have the President nominate, and the Senate confirm, a Special Counsel who will adopt a platform of hope and reform at OSC, as articulated by David Nolan, Esq., an overt candidate for the position, at <www.NolanforOSC.com>.

3. Creating precedent at the Federal Circuit for "any other significant change in duties, responsibilities, or working conditions," particularly in light of *Burlington*, will allow OSC to apply that criteria – not only prospectively, but retrospectively back to 1994.

4. OSC has enormous powers (largely untested in Court) to protect federal employees from PPP's. It can re-open a closed investigation at any time, it can initiate a new investigation without a specific complaint – and there is no statute of limitations for a PPP. Even if the federal employee has pursued remedy for the PPP at the MSPB without success, OSC is not precluded from doing so on behalf of that employee – res judicata would not apply, OSC is a different party,

[23] Then-Senator Obama responded to a survey on improving whistleblower protection on May 8, 2007 <http://whsknox.blogs.com/nolan_osc/obama.survey.scanned.pdf>

seeking remedy via a different section of law.[24] By the WPA of 1989, OSC has a positive duty, as a federal law enforcement agency, to "act in the interests" of federal employees seeking its protection from PPP's, so OSC's taking such action is warranted by its reasons for existence.[25]

5. The Attorney General, as other agency heads, has a positive statutory duty to "prevent PPP's," per § 2302(c), and is apparently unable to demonstrate compliance with this vital duty to Department of Justice employees.[26] Four widely publicized joint reports of the Department of Justice Inspector General and Office of Professional Responsibility in the past 2 years found widespread PPP's in hiring practices in the Department of Justice, and, apparently, in the firing of at least one of the nine US Attorneys, during the Bush Administration.[27] These reports indicated a failure of Department of Justice

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[24] The doctrine of res judicata is summarized in *Carson v. Department of Energy*, 398 F.3d 1369, 1375, n. 8 (Fed. Cir. 2005).

[25] The appendix of 5 U.S.C. §1201 contains section 2 of P.L. 101-12, the WPA of 1989, which gives OSC this mandate at section 2(b)(2)(B).

[26] As of the date of this filing, the Department of Justice has failed to provide any responsive records to Mr. Carson's Freedom of Information Act request, made in November 2009, for such records, see *Carson v. Department of Justice*, docket no. 10-0056, Eastern District of Tennessee at Knoxville.

[27] The four reports are available at <www.justice.gov/opr/inv-rpts.htm>.

employees to "blow whistles" to appropriate authorities about PPP's they witnessed. Based on what he has experienced, Mr. Carson cannot blame Department of Justice employees for "looking the other way" at such lawbreaking, even though it harms rule of law.

6. If the Solicitor General files an acquiescence and/or if this Court grants this petition in its absence, vacates the judgment and remands the case with instructions for the Federal Circuit to issue a published decision that establishes precedent for "any other significant change in duties, responsibilities, or working conditions," in light of *Burlington*, and applies it to the facts of this case, then Congressional intent, as repeatedly expressed in legislation and its legislative history, in protecting concerned federal employees from reprisal, could be significantly advanced.

III. OTHER REASONS TO GRANT THIS PETITION

Rule 10(a) of the Rules of the Supreme Court states this Court may grant a petition for certiorari because a United States court of appeals has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power. The following detail reasons why this Court may find it appropriate to grant this petition on this basis.

The Federal Circuit misapplied Fed. Cir. R. 36 in issuing a judgment of affirmance without opinion.

The panel of the Court entered a judgment of affirmance without opinion, even though the criteria for issuing a judgment of affirmance without opinion, per Fed. Cir. R. 36, are not met in this case. By Fed. Cir. R. 36 at least one of five listed criteria must be met AND an opinion would have no precedential value.

Contrary to this, an opinion in this case would have clear precedential value, because there is no precedent at the Federal Circuit for when a personnel action occurs as a result of "any other significant change in duties, responsibilities or working conditions." See *Holderfield v. MSPB*, 326 F.3d 1207, 1210 (Fed. Cir. 2003), *Shivaee v. Dept. of Navy*, 74 MSPR 383, 388 (1997), and *Burlington* p. 2415.

Of the five criteria for issuing a Judgment of Affirmance Without Opinion in Fed. Cir. R. 36, only the last two are relevant to an MSPB decision. Criteria (d) states, "the decision of an administrative agency warrants affirmance under the standard of review in the statute authorizing the petition for review." MSPB is the respondent in this petition for review because the case involves MSPB's jurisdiction, see 5 U.S.C. §7703(a)(2). By *Campion v. MSPB*, 326 F.3d 1210, 1213 (Fed. Cir. 2003), the Court reviews issues of law, including the jurisdiction of the Board, without deference to the Board's opinion. In other

words, the Court performs *de novo* reviews of issues of law contained in MSPB decisions and petitioner respectfully states that a *de novo* review of the involved issues of law, including a previously untested issue of law, is not adequately documented in a judgment of affirmance without opinion.

The "standard of review" for MSPB cases at the Federal Circuit is found at §7703(c); by §7703(c)(1) the Court must set aside any MSPB decision found "otherwise not in accordance with law." Because this case involves a novel question of law at the Federal Circuit, it cannot be affirmed by this criteria. The MSPB decision relies on an MSPB precedent, *Shivaee*, which has not been adopted as lawful at the Federal Circuit.

Criteria (e) of Fed. Cir. R. 36, "a judgment or decision has been entered without an error of law," requires a determination that the Federal Circuit could not make in this case, because there is no precedent at the Federal Circuit for the central issue of law – when do agency actions become a "personnel action" for creating "any other significant change in duties, responsibilities, or working conditions?"

Additionally, according to case records available on Westlaw on the date of this filing, MSPB has been a party at the Federal Circuit in 1889 cases. In only 65 of those cases was the decision issued per Fed. Cir. R. 36. Of those 65 cases, only 9 involved an intervenor and in only one case – this one – was there both an intervenor and and amicus curiae. In only one case –

this one – was a petition for panel rehearing filed subsequent to a Fed. Cir. R. 36 disposition.

Both MSPB's and the Intervenor's Briefs contain much improper argument

The only agency that can file a petition for review of an MSPB decision at the Federal Circuit is the Office of Personnel Management (OPM) and it can only do so in the limited circumstances described at §7703(d). Agencies such as MSPB and DOE cannot file petitions for review or cross petitions for review at the Federal Circuit.

Employees can file petitions for review (PFR), but the review standard used by the Federal Circuit for their PFR's is limited, as specified at §7703(c). Agency responses to employee PFR's cannot make new argument, not found in the MSPB decision or argue against the findings of the MSPB decision.

The MSPB decision made no ruling on whether *Burlington* was relevant, it mentioned *Burlington* only once, in quoting an OSC letter to Mr. Carson. Despite that, both the MSPB and DOE briefs to the Federal Circuit argued that Burlington was not relevant.[28]

The MSPB decision found, consistent with DOE's response to Mr. Carson's appeal, that they had occurred

[28] See MSPB's brief at 11-12 and DOE's brief at 11-13

to Mr. Carson. The agency's response to his IRA appeal, made per 5 C.F.R. §1201.25, does not dispute that they happened to him (although it requests additional information about one because the agency could not locate the relevant records). An excerpt from it follows:[29]

> . . . Appellant makes three statements listing alleged actions he considers to be prohibited personnel practices. . . . Appellant's third allegation, that the agency "failed to process several of the appellant's formal grievances," lacks the specificity required by 5 C.F.R. §1201.24(a). Without more specificity the agency cannot formulate a cogent response. The agency requests the Board require Appellant to provide information substantiating this allegation.

Consistent with the undisputed case record established by these documents, the MSPB determined that they happened to Mr. Carson, see App. 7-8. In describing each agency action, the Administrative Judge makes clear it happened to Mr. Carson by using phrases as "the terms of his settlement agreement," "they alleged that the appellant posed a 'threat of workplace violence,'" and "failing to process his grievances or inform him why" Despite this, the Intervenor, as the Respondent, improperly sought the

[29] See Joint Appendix A116-118

Federal Circuit to overturn these MSPB determinations of fact.[30]

It is improper and/or unlawful, by 5 U.S.C. §7703(a) and (d); 5 C.F.R. §§1201.119 and 120; and FRAP 28.1, for either the respondent or the intervenor to seek this Court's review of these factual determinations by the MSPB. The Federal Circuit does not have the power to review such claims. Mr. Carson brought these concerns to the Court's attention, they were not acted upon.[31]

The MSPB Administrative Judge, contrary to MSPB regulation, failed to fully develop the case record on the significant issue of law regarding the relevance and/or application of *Shivaee* and *Burlington* to the involved agency actions

Contrary to 5 C.F.R. §1201.41(b)(5)(ii), the AJ failed to fully develop the case record on the relevancy and/or application of *Shivaee* and *Burlington* to the involved agency actions. He did not allow the intervenor to reply to Mr. Carson's response to his jurisdictional order, even though both Mr. Carson's IRA appeal and his response to the jurisdictional order described these cases and the underlying question of law as essential to his claims.

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[30] See MSPB's brief at 5, 12 and 13. See DOE's brief at 2, 3 and 6-10

[31] See Mr. Carson's reply brief to the intervenor's brief at 7-10

This also appears contrary to 5 C.F.R. §1201.41(b)(9), which requires the AJ take specific actions to ensure the case record for questions of law to be fully developed. However, the intervenor did not object, during the MSPB adjudication, to its lack of opportunity to fully develop the case record for this essential question of law, nor did it seek leave to file a related memorandum of law.

CONCLUSION

For the above reasons, the Court should grant this petition, vacate the decision of the Federal Circuit, and remand the case to the Federal Circuit with instructions for it to address, in light of *Burlington*, when agency actions create "any other significant change in duties, responsibilities or working conditions" and apply its reasoning to the involved agency actions.

Respectfully submitted,

JOSEPH P. CARSON, PE
10953 Twin Harbour Drive
Knoxville, TN 37934
865-300-5831

Pro Se

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

2007-3134

JOSEPH P. CARSON,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

and

DEPARTMENT OF ENERGY,

Intervenor.

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

Jeffrey A. Gauger, Acting Associate General Counsel, Office of the General Counsel, United States Merit Systems Protection Board, of Washington, DC, for respondent. With him on the brief were *B. Chad Bungard,* General Counsel, and *Rosa M. Koppel,* Deputy General Counsel.

Roger A. Hipp, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, for intervenor. With him on the brief were *Peter D. Keisler,* Acting Attorney General, *Jeanne E. Davidson,* Director, and *Todd M. Hughes,* Deputy Director.

David B. Nolan, of Alexandria, Virginia, for amici curiae, P. Jeffrey Black, et al.

Appealed from: United States Merit Systems Protection Board

Judgment

ON APPEAL from the United States Merit Systems Protection Board

In CASE NO(S). AT1221061125-W-1

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

Per Curiam (RADER, *Circuit Judge,* PLAGER, *Senior Circuit Judge* and MOORE, *Circuit Judge*).

AFFIRMED. *See* Fed. Cir. R. 36.

ENTERED BY ORDER
OF THE COURT

DATED: November 9, 2007 /s/ Jan Horbaly
Jan Horbaly, Clerk

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

JOSEPH P. CARSON, Appellant, v.	DOCKET NUMBER AT-1221-06-1125-W-1
DEPARTMENT OF ENERGY, Agency.	DATE: December 29, 2006

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

Mary D. Copeland, Esquire, Oak Ridge, Tennessee, for the agency.

BEFORE
Anthony W. Cummings
Administrative Judge

INITIAL DECISION

INTRODUCTION

On September 2, 2006, Joseph P. Carson filed an individual right of action (IRA) appeal with the Board's Atlanta Regional Office in which he alleged that the Office of Special Counsel (OSC) failed to protect him from prohibited personnel practices by his employing agency, the Department of Energy. Based on the following analysis and findings, the appeal is DISMISSED for lack of jurisdiction.

ANALYSIS AND FINDINGS

Jurisdictional Requirements

Under the provisions of the Whistleblower Protection Act (WPA), an employee who believes that he was retaliated against because he made a protected whistleblowing disclosure may file an IRA appeal with the Board. *See* 5 U.S.C. § 1221(a); 5 C.F.R. § 1209.2 (2006). Before filing an IRA appeal with the Board of an action that is not an "otherwise appealable action," the individual must first seek corrective action from the OSC. 5 U.S.C. § 1214(a)(3); 5 C.F.R. § 1209.2(b)(a) (2006). The Board may only review those disclosures and personnel actions that an appellant raised before the OSC. *Ellison v. Merit Systems Protection Board,* 7 F.3d 1031, 1037 (Fed. Cir. 1993); *Lewis v. Department of the Army,* 58 M.S.P.R. 325, 332 (1993).

The Board has jurisdiction over an IRA appeal if the appellant has exhausted his administrative remedies before OSC and makes nonfrivolous 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. *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). The question of whether the appellant has made a nonfrivolous allegation is determined based on the written record, without holding a jurisdictional hearing. *See Spencer v.*

Department of the Navy, 327 F.3d 1354, 1356 (Fed. Cir. 2003); *Iyer v. Department of the Treasury*, 95 M.S.P.R. 239, ¶ 4 (2003), *aff'd,* 104 F. App'x. 159 (Fed. Cir. 2004).

For an appellant to establish that he has exhausted his administrative remedies before OSC, except in situations where the underlying personnel action is otherwise appealable to the Board, the appellant must show that either: (a) OSC has notified him "that an investigation concerning [him] . . . has been terminated," and "no more than 60 days have elapsed since notification was provided" to him; or (b) 120 days have elapsed since the appellant sought corrective action from OSC, and he "has not been notified by [OSC] that [it] shall seek corrective action on [his] behalf." 5 U.S.C. § 1214(a)(3). In the instant appeal, it is undisputed that the appellant filed a complaint with OSC and that OSC subsequently notified him that it had terminated its investigation. Accordingly, I find that the appellant has exhausted his administrative remedies before OSC.

Regarding whether the appellant has made a nonfrivolous allegation that he engaged in whistleblowing activity by making a protected disclosure, the appellant is not required to *prove* that he made protected disclosures but, rather, is required merely to make a nonfrivolous allegation that at least one of his disclosures was protected under 5 U.S.C. § 2302(b)(8). *Grubb v. Department of the Interior*, 96 M.S.P.R. 377, ¶ 11 (2004); *Greenspan v. Department of Veterans Affairs,* 94 M.S.P.R. 247, ¶¶ 9-10 (2003).

Protected whistleblowing takes place where an appellant made a disclosure that he reasonably believed evidences a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. *Grubb*, 96 M.S.P.R. 377, ¶ 11; *see also DiGiorgio v. Department of the Navy,* 84 M.S.P.R. 6, ¶ 14 (1999).

In an IRA appeal, a 'personnel action' is defined as: (1) an appointment; (2) a promotion; (3) an adverse action under 5 U.S.C. chapter 75 or other disciplinary or corrective action; (4) a detail, transfer, or reassignment; (5) a reinstatement; (6) a restoration; (7) a reemployment; (8) a performance evaluation under 5 U.S.C. chapter 43; (9) 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; (10) a decision to order psychiatric testing or examination; or (11) any other significant change in duties, responsibilities, or working conditions. *See* 5 C.F.R. § 1209.4.

The appellant failed to make allegations of fact, which if proven, would show that the Board has jurisdiction over this appeal.

By Order dated October 20, 2006, the appellant was apprised of the jurisdictional issue this case presents. Appeal File (AF), Tab 6. Specifically, the

appellant was informed that he had to file a statement of factual evidence, *i.e.*, he had to assert non-frivolous allegations of jurisdiction supported by affidavits or other evidence, responding to the requirements noted above. *Id.* He was informed that the written record would determine whether his allegations were non-frivolous. *Id.* He was also informed that if he made nonfrivolous allegations of fact to establish jurisdiction, he would be entitled to a hearing on the merits of his claim, and if he did not his appeal would be dismissed based on lack of Board jurisdiction. *Id.*

In response to the Board's October 20, 2006 Order on the jurisdictional issue, the appellant submitted the following information as his list of alleged personnel actions:

1. In prior appeals to the Board, it was found that the appellant was a whistleblower and one of his cases settled. The appellant contends that, "any other significant change in working conditions" occurred and resulted in a personnel action when other agency employees were allegedly deterred "from making protected disclosures or engaging in protected activities" due to the agency's alleged failure to comply with the terms of his settlement agreement.

2. Appellant contends that "any other significant change in working conditions" occurred and resulted in a personnel action when agency employees started "a

> rumor campaign" in which they alleged that appellant posed "a threat of workplace violence" which, according to appellant, was due to the agency's alleged failure to comply with the terms of the settlement agreement reached in his prior whistleblower appeals.

3. Appellant contends that "any other significant change in working conditions" occurred and resulted in a personnel action when the agency allegedly deterred other employees from "making protected disclosures or engaging in protected activities" by allegedly failing to process his grievances or inform him why it failed to do so after he blew the whistle as indicated in his prior whistleblower appeals to the Board.

AF, Tab 8, p. 7.

For the following reasons, I find that the appellant has failed to make nonfrivolous allegations of whistleblowing. First, in his response to the jurisdictional issue, appellant does not allege any new set of facts other than those he has previously raised in his numerous prior IRA appeals filed over the years between 1992 and 2005. Indeed, in his response, the appellant specifically acknowledges this fact as follows:

> "So while the appellant did not cite make (sic) make new allegations or provide additional evidence in his PPP complaint MA-06-2118. . . ."

See AF, Tab 8, p. 5. This comports with OSC's assessment of appellant's current PPP complaint as stated in its August 29, 2006 letter in which it terminated its investigation into appellant's current PPP complaint.[1] *See* AF, Tab 1. Thus, appellant is relying upon

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[1] In its August 29, 2006 letter closing its inquiry into the appellant's complaint, OSC stated that the appellant's current complaint "concerns prior reprisal for whistleblowing complaints that you (the appellant) had filed with OSC (closed by OSC between 1992 and 2005)" and that "you have offered no new factual allegations. . . ." *See* AF, Tab 1. Furthermore, OSC repeated the claims appellant raised in both his "current complaint form" as well as in his written response to OSC's letter announcing its intention to close its inquiry into his current prohibited personnel practice complaint. Those claims included, in pertinent part, appellant's contention that:

a) OSC's previous interpretations of "any other significant change in working conditions" are incorrect in light of the Board's ruling in *Roach v. Department of the Army,* 82 M.S.P.R. 464 (1999); and

b) the Supreme Court's decision in Burlington Northern and Santa Fe Railway Co., v. White, 126 S.Ct. 2405 (2006), (a) established new law relevant to the jurisdictional issue, (b) by the Court's analysis, "any other significant change in working conditions" cannot have a threshold higher than "employer's action that could well dissuade a reasonable worker from making or supporting a charge of discrimination; (c) given the Court's holding, "it is now 'open and shut' that he [appellant] experienced" personnel actions in his prior PPP complaints; and (d) based on this decision, OSC should reverse its earlier jurisdictional determinations in his prior complaints;

AF, Tab 1.

disclosures already ruled as protected under 5 U.S.C. § 2302(b)(8). However, in the instant appeal, appellant now claims that the agency's alleged failure to comply with a settlement agreement reached with the agency in his prior IRA appeal in 1994 has resulted in new personnel actions based upon it's [sic] allegedly creating significant changes in his working conditions within the meaning of 5 U.S.C. § 2302(a)(2)(A)(xi).

Prior to October 29, 1994, the definition of "personnel action" included "any other significant change in duties or responsibilities which is inconsistent with the employee's salary or grade level." 5 U.S.C. § 2302(a)(2)(A)(x). Effective October 29, 1994, this definition was amended to state: "[a]ny other significant change in duties, responsibilities, or working conditions." Pub.L.No. 103-424 § 59(a)(1), (2), 108 Stat. 4363 (codified as amended at 5 U.S.C.A. § 2302(a)(2)(A)(xi)). The 1994 amendment's deletion of the qualifying language "which is inconsistent with the employee's salary or grade level" enlarged the category of actions encompassed in the definition of "personnel action." *See Shivaee v. Department of the Navy,* 74 M.S.P.R. 383, 388 (1997), *citing Briley v. National Archives and Records Administration,* 71 M.S.P.R. 211, 223 (1996). The legislative history shows that this provision for "personnel action" is to be interpreted broadly and 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. *See* 140 Cong. Rec. H11, 421

(daily ed. Oct. 7, 1994) (statement of Rep. McCloskey).

For the following reasons, I find the appellant's aforementioned allegations do not constitute nonfrivolous allegations that the agency took personnel actions against him within the meaning of 5 U.S.C. § 2302(a)(2)(A)(xi). Since appellant's allegations highlighted in his jurisdictional response paragraphs (1) and (3) are essentially identical, I will address them first.

In paragraphs (1) and (3) of his response to the jurisdictional issue as highlighted above, the appellant essentially alleges that the agency's failure to comply with a 1994 settlement agreement in one of his previous appeals has created an environment within the workplace wherein employees are "deterred" from engaging in protected activity such as making protected disclosures of agency wrongdoing. Appellant's claims in this regard are generalized and unspecified in that he has failed to describe any specific instance wherein the agency's alleged noncompliance with its 1994 settlement agreement in his case resulted in any other employees' failure to engage in protected activity. Likewise, I note appellant's claim in this regard relates to the circumstances of his fellow employees and not himself. Thus, I find that the appellant has failed to nonfrivolously allege that the agency's alleged failure to comply with its 1994 settlement agreement resulted in a significant change in *his* duties, responsibilities, and/or working conditions, as mandated by the statute.

Accordingly, I find that this allegation is not a personnel action within the meaning of the WPA.

Additionally, I find appellant's allegation that the agency's alleged noncompliance with a 1994 settlement agreement resulted in a "rumor campaign" is similarly vague and generalized. For instance, to the extent appellant is claiming that the agency's alleged noncompliance with the 1994 settlement agreement constitutes the "personnel action" resulting in the "rumor campaign," I find such is not the case since the appellant has not sufficiently shown how the agency's alleged act of noncompliance with his settlement agreement was responsible for significantly changing his working conditions.

Likewise, to the extent appellant is claiming the "rumor campaign" itself constitutes a personnel action, I find that the rumors of appellant posing a threat of workplace violence do not constitute actions that were taken by, or on behalf of the agency, or in which the agency could be deemed complicit. *Cf. Arauz v. Department of Justice,* 89 M.S.P.R. 529, 533 (2001). Rather, if indeed true, they describe actions initiated by appellant's co-workers and, therefore, cannot constitute covered 'personnel actions' for WPA purposes; *i.e.*, the actions of an employee representing agency management. *See* 5 U.S.C. § 2302(b) ('Any employee' in authority prohibited from taking various actions, including those listed in section 2302(b)(8).)

Thus, I find that appellant's allegations in this regard do not constitute personnel actions within the

meaning of 5 U.S.C. § 2302(a)(2)(A)(xi), in that appellant has failed to sufficiently show how management is responsible for creating an environment wherein such rumors would fester. Employees talk, and appellant has failed to show, other than via bare allegations, how any affirmative action or lack of action by the agency has resulted in this talk among agency employees. Consequently, I find that the appellant has failed to allege personnel actions with respect to his generalized complaints about his working conditions.

Finally, assuming *arguendo* that appellant's allegations of a "rumor campaign" or that agency noncompliance with a settlement agreement resulted in deterring employees from engaging in protected activity constituted personnel actions, I find that the appellant failed to nonfrivolously allege that the protected disclosures of his prior IRA appeals were a contributing factor to the agency taking these personnel actions. As previously noted, to establish Board jurisdiction over the IRA appeal, the appellant also must nonfrivolously allege that his whistleblowing activity was a contributing factor in the agency's decision to take or fail to take a personnel action. Thus, to satisfy the contributing factor jurisdictional criterion, the appellant must raise a nonfrivolous allegation that the fact of, or content of, the protected disclosure was one factor that tended to affect the personnel action in any way. *Perkins v. Department of Veterans Affairs,* 98 M.S.P.R. 250, ¶ 19 (2005). The appellant may demonstrate that a disclosure was a

contributing factor in a personnel action through circumstantial evidence, including, but not limited to, evidence that the official taking the personnel action knew of a disclosure and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. 5 U.S.C. § 1221(e)(1); *Easterbrook v. Department of Justice,* 85 M.S.P.R. 60, ¶ 7 (2000).

With regard to the knowledge prong of the knowledge/timing test, the appellant may establish, for jurisdictional purposes, that a disclosure was a contributing factor in a personnel action by nonfrivolously alleging that the official taking the personnel action had constructive knowledge of the disclosure; constructive knowledge may be established by demonstrating that an individual with actual knowledge of the disclosure influenced the official(s) accused of taking the retaliatory action. *See Marchese v. Department of the Navy,* 65 M.S.P.R. 104, 108 (1994). Regarding the timing prong of the knowledge/timing test, the relevant inquiry is the time between when the agency official taking the action had actual or constructive knowledge of the disclosure – not necessarily the date of the disclosure itself – and the time that the action was taken. *Caddell v. Department of Justice,* 57 M.S.P.R. 508, 514 (1993).

In the instant appeal, based upon the transcript of appellant's prior appeal before Judge Stuart Miller,

a Mr. Cooper[2] testified that he first believed appellant might pose a threat of workplace violence as early as 1992, and that he discussed this belief with other employees at that time. *See* AF, Tab 8, sub-tab 6. In his response to the Board's jurisdictional order, appellant states that the disclosures previously found to be protected by the Board are found in the Board's initial decision in *Carson v. Department of Energy,* AT-1221-98-0623-W-1 (Init. Dec., April 29, 1999). In that decision, Judge Miller found that the appellant testified to only six of at least twenty disclosures he made between 1991 and 1998. *See Carson v. Department of Energy,* AT-1221-98-0623-W-1 (Init. Dec., April 29, 1999), p. 3. Judge Miller found that the first of appellant's six disclosures occurred in "early 1993" and appellant testified that:

> "he did a review of programs in the Oak Ridge Operations in which he found a program "that was broken." He testified that there were no records of accidents, investigations or corrective measures that were recommended or implemented. This was important because it was essential to have a history in order to identify root causes to prevent the same problems from reoccurring both at Oak Ridge and across the agency (DOE). *See* Appellant's Exhibit K, pp. 8-10. He wrote a draft report of his findings and attached it to a "larger" report which was

[2] William Cooper, appellant's supervisor in 1992. *See Carson v. Department of Energy,* 85 M.S.P.R. 171, 174 (2000).

> furnished to his management chain (Senior Residents Cooper and Hillman)."

See id. at p. 3. The next four disclosures identified in Judge Miller's decision all occurred after 1993, most notably in 1996 and 1997. *See id.* Indeed, the evidence suggested that the agency's failure to heed appellant's disclosure of a "lack of reporting and documentation of safety occurrences/accidents and corrective measures," which appellant initially identified in 1993 and again in 1996, may have indirectly contributed to the death of a welder who burned to death in February 1997. *See id.*

With respect to these disclosures identified by appellant between 1993 and 1997, I find that they obviously could not have been a contributing factor to the rumors circulating around appellant's workplace as early as 1992 of appellant posing a threat of workplace violence since the evidence shows these alleged rumors occurred prior to the disclosures.

In terms of the final disclosure, appellant testified before Judge Miller that he reported the final disclosure in 1991 and 1992 to the Inspector General that the use of support services contractors/consultants "was excessive and wasteful." *See Carson v. Department of Energy,* AT-1221-98-0623-W-1 (Init. Dec., April 29, 1999), p. 6. However, appellant has not shown how "the fact of, or content of," that disclosure was one factor that tended to affect the personnel action in any way. *See Perkins,* 98 M.S.P.R., ¶ 19. Indeed, since I have previously found that appellant's

allegation of "a rumor campaign" and that the agency's noncompliance with the 1994 settlement agreement served to "deter" other employees from engaging in protected activity do not constitute personnel actions, this point is moot.

Accordingly, for all of the foregoing reasons, I find that the appellant's allegations do not constitute non-frivolous allegations of whistleblowing.[3]

DECISION

The appeal is DISMISSED.

FOR THE BOARD:

Anthony W. Cummings
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on ***February 2, 2007,*** unless a petition for review is filed by that date or the Board reopens the case on its own motion. 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

[3] Because the appellant's submissions on the jurisdictional issue failed to raise nonfrivolous allegations of fact that he made a protected disclosure that was a contributing factor in the agency's decision to take or fail to take a personnel action, no hearing was held in this appeal. *See Spencer,* 327 F.3d at 1356; *Yunus,* 242 F.3d at 1371.

after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. You must establish the date on which you 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 for the Federal Circuit. 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. Your petition, with supporting evidence and argument, must be filed with:

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

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review 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).

If you file a 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. Your petition 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 more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you claim that you received this decision more than 5 days after its issuance, you have the burden to prove to the Board the date 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 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).

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be *received* by the court no later than 60 calendar days after the date this initial decision becomes final.

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). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, http://fedcir.gov/contents.html. 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.*

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.

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ORDER

(Filed Nov. 17, 2009)

A combined petition for panel rehearing and for rehearing en banc having been filed by the Petitioner, and the petition for rehearing, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED. The mandate has already issued.

FOR THE COURT,

/s/ Jan Horbaly
Jan Horbaly
Clerk

Dated: 11/17/2009

cc: Joseph P. Carson
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