No. _____

In The
Supreme Court of the United States

JOSEPH P. CARSON,

PETITIONER,

v.

UNITED STATES MERIT SYSTEMS PROTECTION BOARD,

RESPONDENT.

On Petition for 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)(xii) as, "any other significant change in duties, responsibilities or working conditions," has occurred to a federal agency employee alleging reprisal for making whistleblower disclosures or filing whistleblower reprisal complaints.

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OPINION BELOW

On March 17, 2017, the Court of Appeals for the Federal Circuit issued a nonprecedential disposition affirming two unpublished final decisions of the Merit Systems Protection Board, Appeal numbers AT-1221-14-0620-W-1 and AT-1221-15-0092-W-1, respectively. The Federal Circuit decision is reported at 257 Fed. Appx. 268, 2007 WL 3333475 (C.A.Fed.). (see Appendix)

JURISDICTION

The Federal Circuit filed its nonprecedential decision on March 17, 2017. On August 11, 2017 it denied Petitioner's Motion to Issue a Precedential decision. On November 13, 2017, it issued its denial of Petitioner's Motion to Reconsider the denial of the previous Motion. The Chief Justice granted petitioner's request for an extension of time and directed it be filed on or before April 12, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court's decision on a writ of certiorari. (see Appendix)

STATUTORY PROVISION INVOLVED

5 U.S.C. § 2302(a)(2)(A)(xii)

For the *purpose of this section* - a "personnel action" means – "any other significant change in duties,

responsibilities, or working conditions."

STATEMENT OF THE CASE

Joseph Carson ("Carson," "Joe Carson"), an employee of the Department of Energy (DOE), filed Individual Right of Action appeals alleging that several agencies, including DOE, the U.S. Office of Special Counsel (OSC), and the Merit Systems Protection Board (MSPB or "Board") took personnel actions against him in retaliation for protected disclosures/protected activity. [1] Specific to the two individual right of action (IRA) appeals considered by the CAFC, Mr. Carson claims in one (AT-1221-14-0620) that OSC failed or refused to review his whistleblower disclosures to it about his claims of its violations of law as required its non-discretionary statutory duties to federal agency employees who make whistleblower disclosures to it, thereby creating "any other significant change in…(his) working conditions." In the other (AT-1221-15-0092-W-1), Mr. Carson claims that OSC failed or refused to comply with a number of its nondiscretionary statutory duties to protect him from reprisal in investigating and reporting the results of its investigations in two whistleblower reprisal complaints he filed with it (these became IRA appeals against DOE and MSPB), thereby creating

[1] *Carson v. Office of Special Counsel*, MSPB Docket No. AT-1221-14-0620-W-1; *Carson v. Office of Special Counsel*, MSPB Docket No. AT-1221-15-0092-W-1; *Carson v. Merit Systems Protection Board*, MSPB Docket No. AT-1221-14-0637- W-1.

"any other significant change in …(his) working conditions." In the appeals to the Board below, OSC did not meaningfully dispute Mr. Carson's allegations were "nonfrivolous," rather the sole jurisdictional dispute was whether Mr. Carson's claimed OSC violations, even if true, could possibly create "any other significant change in …(his) working conditions."

The jurisdictional question posed in both underlying IRA appeals was: Could Mr. Carson experience "any other significant change in …working conditions," as the result of OSC's violations of law against him? The question was posed in a consolidated appeal arising from the two individual right of action (IRA) proceedings before the Merit Systems Protection Board below.

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

In this whistleblower reprisal appeal (a violation of 5 U.S.C. § (b)(8)), Mr. Carson alleged the OSC engaged in reprisal against him when it ignored his whistleblower disclosures to it about its own violations of law. Mr. Carson filed his IRA appeal on March 19, 2014. MSPB issued a "Show Cause Order" for jurisdiction on July 10, 2014. Mr. Carson timely responded. OSC did not respond to the Show Cause Order. On July 25, 2014, MSPB issued its initial decision. Although there was no dispute that Mr. Carson's allegations were "nonfrivolous" the MSPB AJ nonetheless dismissed

the appeal for lack of jurisdiction based on the determination that it would be impossible for OSC to "create any other significant change in .. (his) working conditions," in any circumstance whatsoever, solely because OSC is not his employing agency. The relevant Board precedent in *Shivaee v. Department Navy*, 74 M.S.P.R. 383, 388 (1997) was not cited or applied to support this summary determination. Mr. Carson timely submitted a PFR of the initial decision. The Board's unpublished final decision of March 25, 2015 upheld the initial decision and provided no additional reasoning for its summary determination. Mr. Carson filed a timely PFR with the US Court of Appeals for the Federal Circuit. Its summary unpublished opinion upheld the Board's summary determination and also cited no supporting precedent.

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

This is a federal IRA appeal, alleging reprisal in violation of 5 U.S.C. § 2302(b)(9)(A)(i). Mr. Carson alleged OSC engaged in reprisal against him when it failed or refused to comply with several of its non-discretionary statutory duties to protect him after he filed two whistleblower reprisal complaints with it. Mr. Carson filed the IRA appeal on October 22, 2014. Again, OSC did not meaningfully dispute Mr. Carson's allegations were "nonfrivolous," but focused upon whether, it could not, in any possible circumstance, create "any other significant change in …(his) working conditions." As in the other IRA, the MSPB AJ dismissed the appeal for lack of

jurisdiction based on the determination that it would be impossible for OSC to "create any other significant change in .. (his) working conditions," in any circumstance whatsoever, solely because OSC is not his employing agency. No Board precedent was cited or applied to support this summary determination. Mr. Carson timely submitted a PFR of the initial decision. The Board's unpublished final decision of August 17, 2015 upheld the initial decision and provided no additional reasoning for its summary determination (although it did cite "judicial efficiency" as a possible explanation for not providing any). Mr. Carson filed a timely PFR with the US Court of Appeals for the Federal Circuit. Its summary unpublished opinion upheld the Board's summary determination and also cited no precedent to support it.

These Board decisions were appealed to the Court of Appeal for the Federal Circuit, which has jurisdiction over Board decisions pursuant to 5 U.S.C. §§ 1221(h), (i), and 7703(b)(1). The nonprecedential decision it issued (the subject of this petition for writ) contained no analysis of the lower decisions by the board, other than to cite agreement with the conclusion. It contained no analysis of *Burlington,* or it holdings as they apply to the statutory definition, "other significant change in duties, responsibilities, or working conditions." 5 U.S.C. § 2302(a)(2)(A)(xii)

REASONS FOR GRANTING THE PETITION

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

a. 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. 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 all nations Ports, borders, law enforcement agencies, and nuclear facilities are able to reveal those problems without fear of retaliation or harassment. (Page 1-2)

With this statement the Senate reaffirmed the

vital policy and legislative goal of protecting whistleblowers first codified in the Civil Service Reform Act of 1978 (CSRA). That Act established statutory protections for federal employees to encourage disclosure of government illegality, waste, fraud, and abuse.[2] As explained in the Senate Report accompanying that legislation:

> Often, the whistleblowers's reward for dedication to the highest more principles is harassment and abuse. Whistleblowers frequent 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..... these conscientious civil service deserve statutory protection rather than bureaucratic harassment and intimidation (page 2-3).[3]

However, in 1984, the MSPB reported that the Act had had no effect on the number of whistleblowers and that federal employees continue to fear reprisal.[4] In response, Congress in 1989 unanimously passed the (Whistleblower Protection Act) WPA, which forbids retaliation against federal

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

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

[4] See Merit Systems Protection Board, "Blowing the Whistle in the Federal Government: A Comparative Analysis of 1980 and 1983 Survey Findings" (October 1984), at page 3.

employees who disclose what they reasonably believe to be evidence of illegal or other seriously improper government activity.[5] It also made OSC an independent executive branch agency with an exclusive statutory mandate to protect the federal agency employees who sought its protection from agency reprisal and to "act in their interests" in doing so. 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.[6]

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 narrow construction of the Whistleblower Protection Act with regard to the types retaliatory action for which remedies

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

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

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

b. RELEVANT PRECEDENT FROM THIS COURT REGARDING PERSONNEL ACTION

In June 2006 the Supreme Court, in *Burlington Northern and Santa Fe Railway Co. v. White*, 126 S.Ct. 2405 (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 v. Dept. of Navy*, 74 M.S.P.R. 383, 388 (1997). Applying the relevant (even if uncited and unapplied) Board precedent in *Shivaee* to "broadly interpret," informed by the recent Supreme Court precedent *Burlington*, to the OSC's undisputed actions involved in this appeal is straightforward:

1. An agency employee makes whistleblower disclosures to OSC about OSC and MSPB violations of law in not protecting federal agency whistleblowers. (Neither OSC nor MSPB have Inspector Generals). OSC fails or refuses to comply with its statutory duties to review the whistleblower disclosures to make a "substantial likelihood" determination or request the Department of Justice review how it is interpreting and applying the involved civil service laws, relevant to all federal agencies. Would its actions tend to deter other agency employees from making whistleblower disclosures to it, if not at all? Clearly, yes, therefore it creates "any other

significant change in working conditions," and is a personnel action.

2. An agency employee files whistleblower reprisal complaints with OSC, a protected activity. OSC fails or refuses to protect the employee as required by law. Would OSC's violations of law tend to deter other agency employees from seeking its protection from reprisal? Clearly, yes, therefore it creates "any other significant change in working conditions," and is a personnel action.

c. MSPB DECISION CONFLICTS WITH 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," some such precedent exists at MSPB. In reasoning quite similar to that in *Burlington*, the Board held that if the agency/employer's actions would tend to deter other similarly situated employees from engaging in protected activities or making protected disclosures, they qualify as prohibited. *Shivaee v. Dept. of Navy*, 74 M.S.P.R. 383, 388 (1997).

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.

Compared to that in *Burlington*, at 1215:

> 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).

The MSPB decisions in question did not apply *Shivaee* "case by case analysis" before making their summary determinations that OSC could violate each and every of its nondiscretionary statutory duties to a federal agency employee who made a whistleblower disclosure to it or sought its protection from whistleblower reprisal without, in any possible circumstance, deterring any reasonable federal agency employee from doing likewise. Nor did they consider or apply *Burlington*. The Federal Circuit also failed to consider or apply *Burlington* in its nonpublished, summary decision that cited no

precedent, in affirming the Board's non-published decisions. At this point, 24 years after this "catch-all" personnel action was added to strengthen protection for federal whistleblowers, the Federal Circuit has yet to review it.[7] Additionally, there is no precedent at MSPB about what, if any, impact, *Burlington* 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.

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.

Without explicit acknowledgment, federal circuit issued a judgement of affirmance without opinion per Fed. Cir. R. 36. However, its doing so, even if implicit, is contrary to both the criteria of Fed. Cir. R. 36 and its Internal Operating Procedure (IOP) 10 for determining whether to publish a

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

decision. By Fed. Cir. R. 36 at least one of five listed criteria must be met AND an opinion would have no precedential value to be issued as in this case.

An opinion in this case would have clear precedential value, because there is no precedent at the Federal Circuit – or any other appellate court - 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 M.S.P.R. 383, 387 (1997), and *Burlington* p. 1215) ,

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 USC 7703(a)(2). Under *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. Petitioner respectfully posits that a *de novo* review of the issues of law involved here, including a previously untested question, cannot be adequately documented in a judgment of affirmance without opinion.

Criteria (e) from the Rule, "a judgment or decision has been entered without an error of law." The "standard of review" for MSPB cases at the Federal Circuit is found at 5. U.S.C. § 7703(c). As per § 7703(c)(1) the Court must set aside any MSPB decision found "otherwise not in accordance with law." There is currently 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?" Because this case involves a novel question of law at the Federal Circuit, it cannot be affirmed by nonprecedential disposition. This is even more the case where, as here, the MSPB decision mentions (but does not apply) an MSPB precedent, *Shivaee*, which has not been adopted as lawful at the Federal Circuit.

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,

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APPENDIX A

NOTE: This order is nonprecedential.

United States Court of Appeals
for the Federal Circuit

JOSEPH P. CARSON,
Petitioner

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent

2015-3135, 2015-3211

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

ON MOTION

PER CURIAM.

O R D E R

Petitioner Joseph P. Carson moves to reissue the court's nonprecedential opinion, dated March 17, 2017, as precedential.

Upon consideration thereof,

IT IS ORDERED THAT:

The motion is denied.

FOR THE COURT

August 11, 2017
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

APPENDIX B

NOTE: This order is nonprecedential.

United States Court of Appeals
for the Federal Circuit

JOSEPH P. CARSON,
Petitioner

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent

2015-3135, 2015-3211

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

Decided: March 17, 2017

JOSEPH P. CARSON, Knoxville, TN, pro se after argument. LORING EDWIN JUSTICE, Loring Justice, PLLC, Knoxville, TN, argued for petitioner. Also formerly represented by BRIAN CHADWICK RICKMAN.

JEFFREY GAUGER, Office of the General Counsel, Merit Systems Protection Board, Washington, DC, argued for respondent. Also represented by BRYAN G. POLISUK.

ZENA DENISE CRENSHAW-LOGAL, Crown Point, IN, pro se, as amicus curiae.

ANDREW DUDLEY JACKSON, Crown Point, IN, pro se, as amicus curiae.

BRENDA MCCRACKEN, Joliet, IL, pro se, as amicus curiae.

Before NEWMAN, MOORE, and O'MALLEY, *Circuit Judges.*

PER CURIAM.

Joseph P. Carson seeks review of the March 25, 2015 and August 17, 2015 decisions of the Merit Systems Protection Board ("the Board") dismissing his whistleblower claims against the Office of Special Counsel ("OSC") for lack of jurisdiction and adjudicatory efficiency, respectively. *Carson v. Office of Special Counsel*, 2015 WL 1353650 (M.S.P.B. Mar. 25, 2015); *Carson v. Office of Special Counsel*, 2015 WL 4884874 (M.S.P.B. Aug. 17, 2015).

In the first case, the Board determined that Carson's allegations against the OSC—in brief, that the OSC failed to investigate or resolve his other whistleblower allegations against his employer, the Department of Energy— did not themselves describe a "personnel action" within the meaning of the Whistleblower Protection Enhancement Act. *Carson*, 2015 WL 1353650, at ¶¶ 11–12 (quoting 5 U.S.C. § 2302(a)(2)(A) (2012)). Accordingly, the Board dismissed

Carson's claim for lack of jurisdiction. *Id.* at ¶ 1. Carson timely appealed that decision to this court. In the second case, the Board determined that a subsequent claim filed by Carson essentially "raise[d] the same claims" and, because the first case was still pending on appeal and not yet final, "dismiss[ed] . . . based upon adjudicatory efficiency." *Carson*, 2015 WL 4884874, at ¶ 12 (citing *Bean v. U.S. Postal Serv.*, 120 M.S.P.R. 447 (2013); *Zgonc v. Dep't of Def.*, 103 M.S.P.R. 666 (2006)). Carson timely appealed that decision as well, and the two cases were consolidated before this court.

After full review of the record, oral argument, and Carson's proposed corrections to statements made at oral argument, we find no error in the Board's analysis. Specifically, we find that Carson failed to allege that a cognizable personnel action was taken against him and that, in the absence of such allegations, the Board lacked jurisdiction to review Carson's claims. We also find that the Board did not err in dismissing Carson's duplicate claim on administrative efficiency grounds. And, we do not find Carson's proposed corrections to the record material to these findings. Accordingly, the Board's decisions are affirmed and Carson's motion to correct is denied as moot.[1]

AFFIRMED

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[1]To the extent that Carson, in that same motion, requests that we administer "disciplinary action" to one or more of the attorneys involved in this appeal, that request is denied. Such complaints should be addressed, instead, to the relevant disciplinary tribunals, not to this court.

APPENDIX C

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOSEPH P. CARSON,
Appellant,

v.

OFFICE OF SPECIAL COUNSEL,
Agency.

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

DATE: August 17, 2015

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

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

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

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

BEFORE

Susan Tsui Grundmann, Chairman
Mark A. Robbins, Member

FINAL ORDER

¶1 The appellant has filed a petition for review of the initial decision, which dismissed his individual right of action (IRA) appeal for lack of jurisdiction. Generally, we grant petitions such as this one only when: the initial decision contains erroneous findings of material fact; the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. *See* Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115). After fully considering the filings in this appeal, and based on the following points and authorities, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review. Except as expressly MODIFIED by this Final Order to dismiss the appeal based on adjudicatory efficiency, and to acknowledge and decline to address the appellant's claims against the Board, we AFFIRM the initial decision.

BACKGROUND

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

¶3 In the present IRA appeal, the appellant alleged that, in reprisal for his whistleblowing activities, OSC failed or refused to properly investigate, process, and resolve his whistleblower complaints regarding DOE and the Board. IAF, Tab 1 at 4, 8, Tab 17 at 8-13. OSC moved to dismiss the appeal based on adjudicatory efficiency or collateral estoppel due to an initial decision in one of the appellant's prior IRA appeals, *Carson I*. IAF, Tab 20 at 3-5; *see Carson I*, Initial Decision (July 25, 2014).

¶4 After issuing orders setting forth the requirements for establishing jurisdiction over an IRA appeal, and then considering the appellant's responses, the administrative judge dismissed the appeal for lack of jurisdiction without holding the requested hearing. IAF, Tab 25, Initial Decision (ID);

see IAF, Tab 1 at 2, Tab 3 at 1-4, Tab 6 at 4, Tab 8 at 2-4, Tab 17. The administrative judge denied the agency's request to dismiss the appeal based on collateral estoppel because a petition for review was pending in *Carson I* and he did not address the agency's alternative argument that the appeal should be dismissed based on adjudicatory efficiency. ID at 2-3; *see* IAF, Tab 20 at 3-5. Instead, the administrative judge dismissed the appeal on the ground that the appellant failed to raise a nonfrivolous allegation that OSC took or failed to take a personnel action against him.[2] ID at 3-4.

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

DISCUSSION OF ARGUMENTS ON REVIEW

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

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

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

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

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

¶8 The appellant previously raised the issue of

whether the Board took a personnel action against him by failing to conduct special studies, including studies of OSC, in another appeal against the Board, *Carson v. Merit Systems Protection Board*, MSPB Docket No. AT-1221-14-0637-W-1. The appeal was assigned to an administrative law judge, who dismissed it for lack of jurisdiction. *See Carson v. Merit Systems Protection Board*, MSPB Docket No. AT-1221-14- 0637-W-1, Initial Decision at 2, 5-7 (Nov. 6, 2014). The initial decision became the Board's final decision after all three Board members recused themselves from considering the appellant's petition for review. *Carson v. Merit Systems Protection Board*, MSPB Docket No. AT-1221-14-0637-W-1, Order (Dec. 23, 2014); *see* 5 C.F.R. § 1200.3(b). Because the Board's members previously recused themselves from considering this issue, the Board will not address it further. The current two Board members similarly recuse themselves from addressing the appellant's new allegation that the Board took a personnel action against him by failing or refusing to address his whistleblower disclosures regarding OSC. *See* PFR File, Tab 3 at 13-14.

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

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

Tab 3 at 4-5.

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

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

¶11 In response to the appellant's petition for review, OSC reiterates its argument, raised below, that the appeal should be dismissed based on adjudicatory efficiency or collateral estoppel. PFR File, Tab 10 at 5; *see* IAF, Tab 20 at 3-5. We agree that the

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IAF, Tab 8 at 2, Tab 9 at 4-6; ID at 4 n.1.

instant appeal should be dismissed based on adjudicatory efficiency.[5]

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

¶13 In *Carson I*, an administrative judge found that the appellant failed to raise a nonfrivolous allegation that OSC's failure or refusal to resolve his alleged protected disclosures constituted a personnel action. *Carson I*, ID at 3-4. The appellant filed a petition for review of the initial decision in *Carson I*, which the Board denied approximately 2 months after the initial

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

decision in the instant appeal was issued. *Carson I*, Final Order at 1-2. We found that he failed to raise a nonfrivolous allegation that OSC's investigations and prosecutorial decisions constitute personnel actions within the meaning of 5 U.S.C. § 2302(a)(2)(A). *Id.* at 4-6. Subsequently, he appealed our decision in *Carson I* to the United States Court of Appeals for the Federal Circuit (Federal Circuit), where his appeal remains pending.[6]

¶14 We find that the determinative jurisdictional issue in the present appeal— whether the appellant raised a nonfrivolous allegation that OSC's investigations and prosecutorial decisions constitute personnel actions within the meaning of 5 U.S.C. § 2302(a)(2)(A)—is identical to the determinative jurisdictional issue in *Carson I*.[7] *See* IAF, Tab 25; ID at

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[6]Collateral estoppel may only be applied when there is a final judgment in the previous litigation. *Zgonc*, 103 M.S.P.R. 666, ¶ 6. Because the Federal Circuit will review the issue of the Board's jurisdiction over *Carson I* de novo, we find that the present appeal should not be dismissed based on collateral estoppel. *See Cataulin v. U.S. Postal* Service, 41 M.S.P.R. 681, 683 (1989) (a judgment pending on appeal may be given collateral estoppel effect, unless the appeal removes the entire case to the appellate court and constitutes a proceeding de novo); *Lively v. Department of the Navy*, 31 M.S.P.R. 318, 321 (1986) (same); *see also Stoyanov v. Department of the Navy*, 474 F.3d 1377, 1379 (Fed. Cir. 2007) (the Federal Circuit reviews the Board's jurisdictional findings de novo).

[7]We have considered the appellant's argument on review that his claims in the present appeal differ from his claims in *Carson I* because here he alleged that OSC failed to protect him from

3-4; *Carson I*, Final Order at 4-6. Because the controlling jurisdictional issue regarding the appellant's claims against OSC in the instant appeal will be determined by the Federal Circuit in *Carson I*, we find that his claims against OSC should be dismissed based upon adjudicatory efficiency.[8]

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

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

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

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

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

¶16 The Board generally will not consider evidence submitted for the first time on review absent a showing that: (1) the documents and the information contained therein were unavailable before the record closed despite due diligence; and (2) the evidence is of sufficient weight to warrant an outcome different from that of the initial decision. *Carson v. Department of Energy*, 109 M.S.P.R. 213, ¶ 21 (2008), *aff'd*, 357 F. App'x 293 (Fed. Cir. 2009); *see* 5 C.F.R. § 1201.115(d). The appellant has failed to demonstrate that the evidence at issue is relevant to the Board's dismissal on the grounds of adjudicatory efficiency, and accordingly, the evidence is not material to the

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

outcome of his case. *See Russo v. Veterans Administration*, 3 M.S.P.R. 345, 349 (1980) (the Board will not grant a petition for review based on new evidence absent a showing that it is of sufficient weight to warrant an outcome different from that of the initial decision). Accordingly, we will not consider the new evidence submitted on review and DENY the appellant's March 2, 2015 motion for leave to file additional evidence. *See* 5 C.F.R. § 1201.114(a)(5) (providing that nonstandard pleadings are only accepted on review based on a showing of the nature and need for the pleading).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

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

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

If you want to request review of the Board's

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

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

other courts of appeals can be found at their respective websites, which can be accessed through http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

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

FOR THE BOARD:

William D. Spencer
Clerk of the Board

Washington, D.C.

APPENDIX D

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOSEPH P. CARSON,
Appellant,

v.

OFFICE OF SPECIAL COUNSEL,
Agency.

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

DATE: March 25, 2015

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

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

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

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

BEFORE

Susan Tsui Grundmann, Chairman
Mark A. Robbins, Member

FINAL ORDER

¶1 The appellant has filed a petition for review of the initial decision, which dismissed his individual right of action (IRA) appeal for lack of jurisdiction. Generally, we grant petitions such as this one only when: the initial decision contains erroneous findings of material fact; the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. *See* Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115). After fully considering the filings in this appeal, and based on the following points and authorities, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review. Except as expressly MODIFIED by this Final Order to address the appellant's new claims raised in the first instance on review, we AFFIRM the initial decision.

BACKGROUND

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

¶3 After the appellant submitted two responses to the order to show cause, the administrative judge dismissed the appeal for lack of jurisdiction without holding the hearing requested by the appellant. *See* IAF, Tab 1 at 2, Tab 13, Initial Decision (ID) at 1, 4; *see also* IAF, Tabs 11-12 (the appellant's responses to the show cause order). He found that the Board lacked jurisdiction over the appeal because OSC's failure to resolve the appellant's claims of whistleblower retaliation was not a "personnel action" under 5 U.S.C.

§ 2302(a)(2)(A).[2] ID at 3. In addition, the administrative judge found that the Board lacked authority to review the appellant's allegations that OSC violated 5 U.S.C. § 1213(g), a statutory provision addressing referral of certain protected disclosures received by OSC to agency heads. ID at 4; IAF, Tab 12 at 4-6.

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

DISCUSSION OF ARGUMENTS ON REVIEW

¶5 The Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule, or regulation. *Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985). The Board has jurisdiction over an IRA appeal if the appellant exhausts his administrative remedies before OSC and makes nonfrivolous allegations that: (1) he made a disclosure described under 5 U.S.C. § 2302(b)(8), or engaged in protected activity described under 5 U.S.C. § 2302(b)(9)(A)(I),

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

(B), (C), or (D); and (2) the disclosure or protected activity was a contributing factor in the agency's decision to take or fail to take a personnel action as defined by 5 U.S.C. § 2302(a). 5 U.S.C. §§ 1214(a)(3), 1221(e)(1); *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001). We agree with the administrative judge that the dispositive issue in this appeal is whether the appellant raised a nonfrivolous allegation that OSC took or failed to take a personnel action against him. *See* ID at 3.

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

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

working conditions. 5 U.S.C. § 2302(a)(2)(A).

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

¶8 The appellant has not challenged the administrative judge's findings that OSC is not his employing agency and that he has not applied to OSC for any work, transfer, detail, restoration, or other attribute of employment. ID at 3; PFR File, Tabs 3, 6. The appellant continues to allege on review that OSC's failure or refusal to resolve his alleged protected disclosures was a personnel action because it "would dissuade a[]reasonable co-worker from making protected disclosures to OSC," reporting prohibited personnel practices to OSC, or assisting in an OSC investigation. *See* PFR File, Tab 3 at 10; *see also* IAF,

Tab 2 at 1 (the appellant's argument below). However, he has not alleged that OSC's actions or inactions resulted in any specific changes in his own job duties, responsibilities, or working conditions.[3] *See* 5 U.S.C. § 2302(a)(2)(A)(xii); *see also* PFR File, Tabs 3, 6; IAF, Tab 1 at 15-16, Tab 2 at 1, Tabs 11-12. In the absence of such allegations, the appellant's generalized assertion that he experienced a significant change in duties, responsibilities or working conditions is insufficient to raise a nonfrivolous allegation that OSC took a personnel action against him. *See Godfrey v. Department of the Air Force*, 45 M.S.P.R. 298, 303 (1990) (jurisdiction over an IRA appeal requires more than generalized assertions unsupported by reference to any specific matter).

¶9 The statute authorizing Board jurisdiction over IRA appeals authorizes an employee to seek corrective

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

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

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

¶10 On review, the appellant argues that the administrative judge misinterpreted the nature of the personnel action that he alleged that OSC took against him. PFR File, Tab 3 at 4, 10-13. He contends that the administrative judge misconstrued his appeal as alleging that the personnel action was OSC's failure to

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

protect him from reprisal by his employing agency, the Department of Energy. *Id.* at 4, 12-13. We find that the appellant's argument is not supported by the initial decision or any other evidence in the record below. The administrative judge did not state that the appellant alleged that OSC had failed to protect him from reprisal by the Department of Energy. *See* ID. Instead, he found that the appellant alleged that OSC's "failure to resolve or refusal to resolve [his] allegations of whistleblower reprisal in a timely and objective manner" was a personnel action. ID at 3. We find the administrative judge's interpretation to be consistent with the appellant's allegations below that OSC retaliated against him by failing or refusing to resolve his claims regarding OSC's own violations of law.[5] *See* IAF, Tab 2 at 1 (the appellant's allegations below), Tab 11 at 2 (same).

Absent a personnel action, the Board lacks jurisdiction to review the appellant's claims that OSC violated the law.

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

¶11 On review, the appellant contends that the administrative judge erred in failing to address whether he made a protected disclosure.[6] PFR File, Tab 3 at 12. However, absent a "personnel action," the Board lacks jurisdiction over the appellant's IRA appeal. *See Shivaee v. Department of the Navy*, 74 M.S.P.R. 383, 387 (1997) (in order for a right of appeal to accrue under the WPA, the predecessor to the WPEA, the appellant must establish that he was subject to a threatened personnel action); *see also Yunus*, 242 F.3d at 1371 (in order to establish Board jurisdiction over an IRA appeal, an appellant must establish both that he made a protected disclosure and that the disclosure was a contributing factor in the decision to take or fail to take a personnel action). Therefore, once the administrative judge found that the appellant had failed to raise a nonfrivolous allegation that OSC took or failed to take a personnel action against him, he was not required to address whether the appellant had a reasonable belief that OSC was violating the law. *See Shivaee*, 74 M.S.P.R. at

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

387-89 (dismissing an IRA appeal on the ground that the appellant failed to raise a nonfrivolous allegation of a personnel action, without addressing whether he had a reasonable belief that the agency violated the law).

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

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

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

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

conduct special studies was itself a "significant change in working conditions." PFR File, Tab 6 at 5.

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

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

further.[9]

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

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

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

If you want to request review of the Board's decision concerning your claims of prohibited personnel practices under 5 U.S.C. § 2302(b)(8), (b)(9)(A)(i), (b)(9)(B), (b)(9)(c), or (b)(9)(D), but you do not want to challenge the Board's disposition of any

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

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

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

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

FOR THE BOARD:

William D. Spencer
Clerk of the Board

Washington, D.C.

APPENDIX E

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

JOSEPH P. CARSON,
Appellant,

v.

OFFICE OF SPECIAL COUNSEL,
Agency.

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

DATE: January 13, 2015

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

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

BEFORE
Brian Bohlen
Administrative Judge

INITIAL DECISION

On October 22, 2014, the appellant, Joseph Carson, sought to file an individual right of action

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

JURISDICTION

The Board generally has jurisdiction over an IRA appeal if the appellant has exhausted his administrative remedies with OSC and makes non-frivolous allegations that: (1) he engaged in whistleblowing activity by making a protected disclosure or otherwise engaged in protected activity, and (2) the disclosure or activity was a contributing factor in the agency's decision to take or fail to take a personnel action.

In an IRA appeal, an employee or applicant for employment may seek corrective action from the Board with respect to any "personnel action" taken, or proposed to be taken, against him as the result of a protected disclosure or protected activity as described in 5 U.S.C. § 2302(b)(8) or 2302(b)(9)(A)(I), (B), (C), or (D). 5 U.S.C. § 1221(a). In this context, a "personnel action" is defined as follows: (i) an appointment; (ii) a promotion; (iii) an action under 5 U.S.C. chapter 75 or other disciplinary or corrective action; (iv) a detail,

transfer, or reassignment; (v) a reinstatement; (vi) a restoration; (vii) a reemployment; (viii) a performance evaluation under 5 U.S.C. chapter 43; (ix) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other personnel action; (x) a decision to order psychiatric testing or examination; and (xi) any other significant change in duties, responsibilities, or working conditions. 5 U.S.C. § 2302(a)(2)(A).

The Office of Special Counsel as the responding agency contends that the Board lacks jurisdiction over this appeal because OSC's investigation and subsequent decision to close its investigation of the appellant's whistleblower claim against another agency do not themselves constitute a "personnel action" within the meaning of 5 U.S.C. 2302(a)(2)(A). *See* IAF, Tab 20. OSC also argued that the appeal should be dismissed on grounds of collateral estoppel or adjudicative efficiency because the appellant has already received an Initial Decision examining these identical issues from another MSPB Administrative Judge, and a Petition for Review is already pending on that appeal. *See Carson v. OSC*, Docket No. AT-1221-14-0620-W-1.

For the reasons explained below, the appeal is dismissed because I find that the appellant has failed to non-frivolously allege that OSC committed a personnel action within the meaning of 5 U.S.C. 2302(a)(2)(A). While the reasoning and outcome of this

initial decision are very similar to those employed by Judge Vitaris in Carson v. OSC, Docket No. AT-1221-14-0620-W-1, collateral estoppel is improper because that initial decision is not a final Board decision.

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

In this case, however, the Board lacks jurisdiction because the appellant has failed to non-frivolously allege that the agency has taken a covered personnel action concerning him. The appellant contends that OSC committed a personnel action under the WPA when it conducted incompetent investigations leading to unjustified closures of two

whistleblower reprisal claims against other agencies. I disagree that such conduct by OSC constitutes a "personnel action" within even a very expansive view of 5 U.S.C. § 2302(a)(2)(A). The claimed "personnel action" does not constitute one of the personnel actions enumerated by 5 U.S.C. § 2302(a)(2)(A). Nor does it meet the definition of the statute's catch-all provision, which includes "any other significant change in duties, responsibilities, or conditions." 5 U.S.C. § 2302(a)(2)(A)(xii). In closing, I adopt Judge Vitaris' well-crafted and persuasive finding below from his initial decision in MSPB Docket No. AT-1221-14-0620-W-1:

> OSC is not the appellant's employing agency nor did the appellant apply to OSC for any type of work, transfer, detail, emolument, restoration or other attribute of employment. Rather, OSC is a Federal investigative and prosecutorial agency. It does not take personnel actions concerning employees other than its own. While the appellant may be dissatisfied with the quality and timeliness of OSC's investigations and with the merits of OSC's prosecutorial decisions, those investigations and decisions are not personnel actions within the meaning of 5 U.S.C. § 2302(a)(2)(A) even though they may be of keen interest to the appellant and to his career with his own employing agency, the Department of Energy.

DECISION

The appellant's request for corrective action is DENIED.[1]

FOR THE BOARD: _____/S/_____
Brian Bohlen
Administrative Judge

[1]All pending motions are DENIED. Specifically, the appellant's motion for an interlocutory appeal of my prior Order denying his request to disqualify all MSPB administrative judges from adjudicating this appeal based on a supposed global conspiracy between OSC and the MSPB is DENIED for the reasons previously explained in my Order from November 3, 2014, and because the request does not meet the criteria for granting such a request under 5 C.F.R. § 1201.92(b). *See* IAF, Tabs 9 and 13. The appellant's Motion to Compel Discovery from OSC is likewise DENIED since the material he sought in discovery has no bearing on my jurisdictional findings above. And finally, the appellant's Motion for Sanctions against the agency is DENIED since I find the agency timely requested an extension to reply to the appellant's jurisdictional submissions, and supported the extension request with good cause. *See* IAF, Tabs 18, 20, and 22.

NOTICE TO APPELLANT

This initial decision will become final on **February 17, 2015**, 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 you believe that the settlement agreement is unlawful, was involuntary, or was the result of fraud or mutual mistake. Your petition, with supporting evidence and argument, must be filed with Clerk of the Board at the address below.

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.

APPENDIX F

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

JOSEPH P. CARSON,
Appellant,

v.

OFFICE OF SPECIAL COUNSEL,
Agency.

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

DATE: July 25, 2014

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

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

BEFORE
Richard W. Vitaris
Administrative Judge

INITIAL DECISION

INTRODUCTION

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

JURISDICTION

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

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

appellant filed two responses on the jurisdictional issue which I have considered.

In an IRA appeal, an employee may seek corrective action from the Board with respect to any "personnel action" taken, or proposed to be taken, against him as the result of a prohibited personnel practice described in 5 U.S.C. § 2302(b)(8). 5 U.S.C. § 1221(a). In this context, a "personnel action" is defined as follows: (I) an appointment; (ii) a promotion; (iii) an action under 5 U.S.C. chapter 75 or other disciplinary or corrective action; (iv) a detail, transfer, or reassignment; (v) a reinstatement; (vi) a restoration; (vii) a reemployment; (viii) a performance evaluation under 5 U.S.C. chapter 43; (ix) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other personnel action; (x) a decision to order psychiatric testing or examination; and (xi) any other significant change in duties, responsibilities, or working conditions. 5 U.S.C. § 2302(a)(2)(A).

The agency contends that the Board lacks jurisdiction because the appellant was never employed by the agency, nor was he an applicant for employment with them. Thus, the agency claim that the appellant is not an employee within the meaning of 5 U.S.C. § 2302(b)(8).

It was Congress's intent in drafting 5 U.S.C. § 2302(b)(8) to protect whistleblowers from a broad

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

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

personnel action. 5 U.S.C. § 2302(a)(2)(A)(xii).

OSC is not the appellant's employing agency nor did the appellant apply to OSC for any type of work, transfer, detail, emolument, restoration or other attribute of employment. Rather, OSC is a Federal investigative and prosecutorial agency. It does not take personnel actions concerning employees other than its own. While the appellant may be dissatisfied with the quality and timeliness of OSC's investigations and with the merits of OSC's prosecutorial decisions, those investigations and decisions are not personnel actions within the meaning of 5 U.S.C. § 2302(a)(2)(A) even though they may be of keen interest to the appellant and to his career with his own employing agency, the Department of Energy.

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

DECISION

The appeal is DISMISSED.

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

NOTICE TO APPELLANT

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

BOARD REVIEW

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

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

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

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

Criteria for Granting a Petition or Cross Petition for Review

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

(a) The initial decision contains erroneous findings of material fact. (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge's credibility determinations

when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

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

(c) The judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case.

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

As stated in 5 C.F.R. § 1201.114(h), a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double

spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

If you file a petition or cross petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. A petition for review must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see*

5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

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

NOTICE TO AGENCY/INTERVENOR

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

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit.

The court must receive your request for review

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

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

If you need further information about your right to appeal this decision to court, you should refer to the

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

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

APPENDIX G

United States Court of Appeals
for the Federal Circuit

JOSEPH P. CARSON,
Petitioner

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent

2015-3135, 2015-3211

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

ON MOTION

Before NEWMAN, MOORE, and O'MALLEY, *Circuit Judges.*

PER CURIAM.

O R D E R

Petitioner moves to reconsider the court's order from August 11, 2017 denying petitioner's motion to reissue the opinion as precedential.

The opinion and judgment in this case were filed on March 17, 2017. (ECF Doc. 84.) On April 27, 2017, and June 7, 2017, petitioner filed motions for extensions of time to file a petition for rehearing. (ECF Docs. 85, 87.) The panel granted both motions, and in its order regarding the second motion, authorized petitioner to file a petition for panel rehearing on or before July 31, 2017, and instructed him that no further extensions of time would be granted. (ECF Doc. 86, 88.)

Petitioner did not file a petition for panel rehearing that "state[s] with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended . . . ." Fed. R. App. P. 40(a)(2). Instead, three days before the expiration of the July 31, 2017 deadline, petitioner filed a document titled "Petitioner's Petition for Panel Rehearing Requesting a Precedential Decision," asking the panel to "issue a precedential decision to replace its non-precedential decision" for the benefit of Congress and the President. (ECF Doc. 89.) The panel, operating under the principle "that pro se pleadings are to be liberally construed," *Durr v. Nicholson*, 400 F.3d 1375, 1380 (Fed. Cir. 2005) (citations omitted), construed this petition as a motion to reissue the panel opinion as precedential based on the relief requested therein. (ECF Doc. 90.) On August 11, 2017, the panel denied the motion, as construed, and issued a formal mandate to the Merit Systems Protection Board pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure. (ECF Doc. 90.) The matter was then closed by the court.

While he has not directly asked that we do so, in the best light, we could construe petitioner's current motion as a motion to recall the mandate so that we may reissue our decision. Even so construed, we see no reason to grant the motion. Petitioner has neither demonstrated a basis on which this court should grant the relief requested, nor explained why we are required to do so as he asserts. If petitioner wishes to seek review in the Supreme Court, he must comply with that Court's procedural rules.

IT IS ORDERED THAT:

(1) The motion is denied.

(2) The court considers this matter closed.

FOR THE COURT

November 13, 2017
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court