No. 20-3459

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

**FILED**
Sep 09, 2021
DEBORAH S. HUNT, Clerk

JOSEPH P. CARSON,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent,

U.S. DEPARTMENT OF ENERGY

Intervenor.

ORDER

**BEFORE:** GRIFFIN, KETHLEDGE, and MURPHY, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

**ENTERED BY ORDER OF THE COURT**

**Deborah S. Hunt, Clerk**

**NOT RECOMMENDED FOR PUBLICATION**

No. 20-3459

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

**FILED**
May 17, 2021
DEBORAH S. HUNT, Clerk

JOSEPH P. CARSON,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent,

U.S. DEPARTMENT OF ENERGY,

Intervenor.

ON PETITION FOR REVIEW FROM THE MERIT SYSTEMS PROTECTION BOARD

ORDER

Before: GRIFFIN, KETHLEDGE, and MURPHY, Circuit Judges.

Joseph P. Carson, a Tennessee resident proceeding pro se, petitions for review of the final decision of the Merit Systems Protection Board ("MSPB" or "Board") dismissing his appeal in which he claimed that he was retaliated against for his protected activity under the Whistleblower Protection Act, 5 U.S.C. § 2302(b)(8). This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

On September 11, 2018, Carson, working as an engineer for the Department of Energy ("DOE") in Oak Ridge, Tennessee, sent a memorandum to three of his managers, alleging numerous violations of law by the Secretary of Energy, attorneys for the DOE, the United States Office of Special Counsel ("OSC"), and the MSPB. The memorandum alleged that OSC and the MSPB were "decades-long, law-breaking" entities whose actions have been a proximate cause of

"illnesses and premature deaths of thousands of 9/11 recovery workers." Carson cited eighteen prior cases in which he made whistleblower disclosures but asserted that the issues raised in those complaints remain open and unresolved because OSC interprets certain statutes to prevent whistleblower complaints from being properly investigated and handled. One of the statutes he cited was 5 U.S.C. § 4302(b), a newly enacted law that requires the heads of administrative agencies to develop criteria for supervisors to "promote the protection of whistleblowers" by responding constructively to complaints and taking actions to resolve the disclosures. *See* 5 U.S.C. § 4302(b)(1)(B).

Carson filed a complaint with OSC in December 2018, alleging that the failure of "Secretary of Energy Rick Perry and every supervisor in [his] chain of command" to comply with 5 U.S.C. § 4302(b) and to investigate his complaint constituted a significant change in his working conditions, which constituted a "prohibited personnel practice" in violation of 5 U.S.C. § 2302(b). The OSC ultimately terminated its inquiry into Carson's allegations and informed Carson that he could file an "individual right of action" ("IRA") appeal with the MSPB.

Carson filed an IRA appeal with the MSPB in June 2019, raising the following issue: "whether an Agency's failure to respond constructively and/or take responsible actions to resolve a subordinate employee's whistleblower disclosures constitutes a significant change in working conditions (and therefore a personnel action) under title 5, Sections 2302 and 4302 sufficient to state a claim for whistleblower reprisal." He also filed a motion requesting that the MSPB administrative judge recuse himself on the basis that the judge was an MSPB employee and that Carson had alleged wrongdoing by the Board. The administrative judge denied the motion for recusal. The MSPB issued an order to Carson that he must establish that it had jurisdiction over his appeal. Carson did not respond to the order but filed a motion to dismiss the appeal without prejudice to refiling, which was granted.

Carson thereafter refiled his appeal and filed a statement in support of MSPB's jurisdiction, raising the same claim he previously asserted. The DOE filed a response, asserting that Carson failed to identify a prohibited personnel action. Carson filed a reply.

The administrative judge issued his decision on January 28, 2020. The judge found that Carson's appeal was precluded by collateral estoppel because it was not the first appeal wherein he had argued "that OSC and the Board have violated a law, rule, or regulation by failing to investigate whistleblower claims." And the judge concluded that, even if the appeal was not barred by collateral estoppel, the Board lacked jurisdiction because the "complained-of retaliation—*i.e.*, that management ignored [Carson]'s September 11[, 2018] letter—is not a covered personnel action within the meaning of 5 U.S.C. § 2302(a)(2)(A)." The judge rejected Carson's contention that the recent changes to 5 U.S.C. § 4302(b) "created an affirmative duty on the part of every supervisor within his chain of command to respond in some fashion to his September 11, 2018 letter." The judge therefore dismissed Carson's appeal. When neither party filed an administrative petition for review with the full Board, the judge's decision became final.

Carson thereafter filed a petition for review in this court. DOE moved to designate the MSPB as the proper respondent and to intervene. Over Carson's objection, we granted DOE's motion to intervene and designated the MSPB as the proper respondent. Carson then filed a counseled brief, arguing that the Board's failure to recuse itself deprived him of a fair and impartial adjudication and that its finding that DOE's conduct did not constitute a personnel action was an abuse of discretion. Carson also asserted that the appeal was not barred by collateral estoppel. In addition to his petition for review, Carson has filed motions requesting that his court invite an amicus brief from the United States Office of Special Counsel, seeking sanctions against the DOE, and for the court to take judicial notice of certain information contained on the MSPB's website, certain news articles, and legislative hearings. We permitted Carson's counsel to withdraw, after which Carson filed a pro se reply brief.

We review the Board's interpretation of a statute de novo, *Marano v. DOJ*, 2 F.3d 1137, 1141 (Fed. Cir. 1993), and its factual determinations for substantial evidence, *McGuffin v. SSA*, 942 F.3d 1099, 1107 (Fed. Cir. 2019) (citing *McMillan v. DOJ*, 812 F.3d 1364, 1371 (Fed. Cir. 2016)). We may reverse the decision of the MSPB only if it is "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required

by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c). The petitioner bears the burden of establishing reversible error in the Board's final decision. *Fernandez v. Dep't of the Army*, 234 F.3d 553, 555 (Fed. Cir. 2000) (citing *Harris v. Dep't of Veterans Affairs*, 142 F.3d 1463, 1467 (Fed. Cir. 1998)).

For the MSPB to determine that an agency action merits corrective action under the Whistleblower Protection Act, it must first find that (1) there was a disclosure or activity protected by the Act; (2) there was a personnel action authorized for relief under the Act; and (3) the protected disclosure or activity was a contributing factor to the personnel action. *See* 5 U.S.C. § 1221(e)(1). The petitioner must prove these elements by a preponderance of the evidence. *Whitmore v. Dep't of Labor*, 680 F.3d 1353, 1367 (Fed. Cir. 2012).

The MPSB accepted that Carson's September 11, 2018, memorandum constituted a disclosure but concluded that the failure of his supervisors to investigate the issues raised in that memorandum did not constitute a personnel action. This was not an abuse of discretion.

"[N]ot every agency action is a 'personnel action' under the W[histleblower] P[rotection] A[ct]." *King v. Dep't of Health & Human Servs.*, 133 F.3d 1450, 1453 (Fed. Cir. 1998). The Act defines the set of qualifying personnel actions as: (i) an appointment; (ii) a promotion; (iii) an action under 5 U.S.C. § 75 or other disciplinary or corrective action; (iv) a transfer or reassignment; (v) a reinstatement; (vi) a restoration; (vii) a reemployment; (viii) a performance evaluation; (ix) a decision concerning pay, benefits, education, or training; (x) a decision to order psychiatric testing; and (xi) the implementation or enforcement of any nondisclosure agreement. *See* 5 U.S.C. § 2302(a)(2)(A)(i)-(xi). Finally, the last subcategory is a catch-all provision making "any other significant change in duties, responsibilities, or working conditions" a qualifying personnel action. *Id.* § 2302(a)(2)(A)(xii). Because the failure to investigate a claim is not specifically listed as a personnel action, Carson had to establish that his supervisors' failure to investigate constituted a "significant change" in his job duties, responsibilities, or working conditions to satisfy the MSPB's jurisdiction in order to obtain relief.

The catch-all provision does not further define what type of change is "significant" or what "working conditions" entails. In practice, courts have concluded that actions that had no impact on day-to-day duties and responsibilities do not constitute a significant change. *See, e.g.*, *Hesse v. Dep't of State*, 217 F.3d 1372, 1378-81 (Fed. Cir. 2000) (security clearance determination is not a significant change in working conditions); *Carson v. MSPB*, 573 F. App'x 4, 4 (D.C. Cir. 2014) (mem.) (email from supervisor telling petitioner that he acted inappropriately did not constitute a significant change in working conditions); *but see Rumsey v. DOJ*, 2013 M.S.P.B. 82, ¶ 23 (2013) (finding that cancellation of telework agreement constituted a significant change in working conditions). Even an allegedly retaliatory investigation of an employee does not qualify as a personnel action under the catch-all provision. *See Sistek v. Dep't of Veterans Affairs*, 955 F.3d 948, 955-56 (Fed. Cir. 2020).

Construing Carson's claims very liberally, he made no allegations that the failure of his supervisors to investigate his whistleblower disclosures resulted in a difference in the physical conditions of his job or affected his duties or responsibilities. *Cf. Wine v. MSPB*, 815 F. App'x 518, 520 (Fed. Cir. 2020) (per curiam) (rejecting petitioner's claim that OSC took a personnel action against him by failing to investigate his complaint on the basis that he did not work for OSC and it had no authority to change his working conditions).

Noting the lack of specific definitions for "significant" change and "working conditions" in § 2302(a)(2)(A)(xii), Carson argues that we should instruct the MSPB to adopt the test set forth in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), to determine what constitutes a personnel action under that statute. In *Burlington*, the Court considered the anti-retaliation provision of Title VII of the Civil Rights Act of 1964 and concluded that, to qualify as retaliation, an "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." *Id.* at 57. The MSPB did not address the application of this standard in Carson's IRA appeal, however, and whether *Burlington* applies to Board determinations under § 2302(a)(2)(A)(xii) is thus beyond the scope of this appeal. Carson has therefore failed to establish that he suffered a personnel action as defined

by § 2302(a)(2)(A). And, because the MSPB lacked jurisdiction, it is unnecessary to review the Board's finding that Carson's claims were barred by collateral estoppel.

Nor did the administrative judge abuse his discretion by denying Carson's motion for recusal. Recusal is warranted if an administrative judge displays a "deep-seated . . . antagonism that would make fair judgment impossible." *Bieber v. Dep't of Army*, 287 F.3d 1358, 1362 (Fed. Cir. 2002). "[O]pinions held by judges as a result of what they learned in earlier proceedings" are "not subject to deprecatory characterization as 'bias' or 'prejudice.'" *Liteky v. United States*, 510 U.S. 540, 551 (1994). Carson asserted that, because he had accused the MSPB of wrongdoing, an administrative judge from the MSPB could not decide his case absent bias. However, Carson's allegations in this case related to his supervisors at DOE; he made no allegations that MSPB had taken a personnel action against him, which raises no appearance of bias. Even if it did, the Supreme Court has never held that the mere appearance of judicial bias requires automatic recusal of a judge. *See Richardson v. Quarterman*, 537 F.3d 466, 478 (5th Cir. 2008) (collecting cases). Further, although the Board had previously denied claims brought by Carson, unfavorable rulings do not provide a valid basis for recusal. *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966); *Youn v. Track, Inc.*, 324 F.3d 409, 422-23 (6th Cir. 2003).

Carson's petition for review is **DENIED**. His motions relating to the filing of an amicus brief and for sanctions are also **DENIED**. Finally, his motions for judicial notice are **GRANTED,** although we note that the materials Carson seeks this court to take judicial notice of do not affect the outcome of this appeal.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk