NOT RECOMMENDED FOR PUBLICATION

No. 20-3459

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

(Filed May 17, 2021)

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

/s/ Deb S. Hunt
Deborah S. Hunt, Clerk

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

JOSEPH P. CARSON,

Appellant,

v.

DEPARTMENT OF ENERGY,

Agency.

DOCKET NUMBER
AT-1221-19-0536-W-1

DATE: June 21, 2019

ORDER DENYING MOTION FOR RECUSAL AND FOR EXTENSION

On June 12, 2019, the appellant was Ordered to provide argument and evidence concerning the Board's jurisdiction over this appeal, with a ten-day response deadline of June 22, 2019. On June 20, 2019, the appellant moved for all Administrative Judges of the MSPB, and the Board itself, to recuse from hearing this appeal under 5 C.F.R. § 1201.92(b), and refer the matter to an administrative law judge (ALJ) outside of the Board organization due to an alleged conflict of interest. The appellant's motion further requested an extension to reply to the jurisdictional issue until July 19 to allow preparation before the ALJ assuming the recusal motion was granted.

The appellant has sought the Board's recusal in very similar prior Board appeals unsuccessfully. For example, in MSPB Docket No. AT-1221-15-0092-W1, he filed a very similar motion which I denied as frivolous.

Specifically, I stated in an Order dated November 3, 2014 that "[t]he appellant's claim that the Board has turned a blind-eye to decades of illegal activity by OSC is not supported, and is deemed frivolous. The appellant identified no finding from any competent legal authority to support this sweeping conspiracy theory, and I am aware of none." My ruling in that prior case was upheld by the Board in a Final Order dated August 17, 2015. *See* PFR File, Tab 22. The Board's disposition of that appeal was in turn upheld in its entirety by the Court of Appeals for the Federal Circuit on March 17, 2017. *See* CAFC Opinion, for CAFC Docket Nos. 2015-3135, and 2015-3211. For the reasons previously explained and previously upheld, the motion for recusal is **DENIED**.

Since the appellant and his counsel knew – or certainly should have known – that the motion for recusal would not be granted, their request for an extension to litigate the issue before addressing the Board's jurisdiction over the appeal is **DENIED**. The appellant's response to my June 12 Order is due **June 22, 2019**.

FOR THE BOARD: /S/
Brian Bohlen
Administrative Judge

[Certificate Of Service Omitted]

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

JOSEPH P. CARSON,
Appellant,
v.
DEPARTMENT OF ENERGY,
Agency.

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

DATE: October 28, 2019

ORDER ACKNOWLEDGING REFILED APPEAL, DENYING RECUSAL, AND SCHEDULING STATUS CONFERENCE

On October 1, 2019, the appellant, Joseph Carson, timely refiled this appeal after it was dismissed without prejudice on July 2, 2019. The appeal was dismissed without prejudice on July 2, 2019, based on the appellant's proffer that the Office of Special Counsel (OSC) was considering reopening its investigation into his underlying whistleblower retaliation claims. The appellant's refiled appeal indicates that OSC has not completed an additional investigation, nor has OSC notified him that it intends to investigate further.

The appellant's refiled appeal indicates that the appeal should be reassigned to an administrative law judge because the three prior members of the Board recused themselves from hearing a prior appeal since the appeal accused the Board itself of whistleblower retaliation. *See* Carson v. MSPB, Docket No. AT-1221-14-0637-W-1.

In the cited prior appeal, the appellant contended that he disclosed violations of the Board's statutory duty to conduct certain "special studies" in accordance with 5 U.S.C. §§1204(a)(3) and (e)(3). He further contended that the Board retaliated against him for such disclosures by refusing or failing to obtain a timely or objective resolution of his alleged protected disclosure. He posits that this constituted a personnel action within the meaning of the WPA, 5 U.S.C. §2302(a)(2)(A)(xii), as "any other significant change in duties, responsibilities or working conditions" because it might dissuade a reasonable coworker from making a protected disclosure. The Board recused itself from deciding the prior appeal, and an administrative law judge (ALJ) from outside the Board adjudicated the matter. The ALJ issued an initial decision on November 6, 2014 which dismissed the appeal for lack of jurisdiction. Specifically, the ALJ found that the appeal must be dismissed because the Board took no appealable personnel action within the meaning of the WPA. The initial decision became the Board's final decision due to the Board's continued recusal from the matter. The appellant does not appear to have filed an appeal of the underlying decision with the Court of Appeals for the Federal Circuit, so the ALJ initial decision appears to be the final say in the matter.

Within the present appeal, the appellant alleges that OSC has failed to honor its statutory obligations by refusing to investigate whistleblower complaints made by contractors working indirectly for the

Department of Energy (DOE). The appellant is a career federal employee – not a contractor.

The present appeal was filed against his "entire chain of command" and the Secretary of the DOE. Neither the Board nor OSC are identified as parties, and the issues appear to be distinguishable from the issues the appellant raised in the cited 2014 case. The appellant's motion for the Board to recuse itself from this case is **DENIED**.

If the appellant believes that some or all of the issues in this appeal are indeed indistinguishable from his prior 2014 appeal, then we must consider whether this appeal – or same claims within it – should be dismissed under the doctrine of collateral estoppel. Collateral estoppel bars relitigation of an issue when: (1) an issue is identical to that involved in a prior action; (2) the issue was actually litigated in the prior action; (3) the determination on the issue in the prior action was necessary to the resulting judgment; and (4) the party precluded was fully represented in the prior action. *Milligan v. U.S. Postal Service*, 106 M.S.P.R. 414, & ¶ 8 (2007). Further, "unlike *res judicata*, collateral estoppel may bar a party from relitigating an issue in a second action even when the prior appeal was dismissed for lack of subject matter jurisdiction." *Noble v. U.S. Postal Service*, 93 M.S.P.R. 693, 697 (2003). An issue is considered "actually litigated" when it was "properly raised by the pleadings, was submitted for determination, and was determined." *Id*., at 698.

Order Scheduling Status Conference

A telephonic status conference will be held on **November 4, 2019, at 10:30 a.m. EST**. To join the conference, the parties should dial **1-800-793-9878**, and then dial **1238022**.

FOR THE BOARD: /S/
Brian Bohlen
Administrative Judge

[Certificate Of Service Omitted]

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

JOSEPH P. CARSON,
Appellant,
v.
DEPARTMENT OF ENERGY,
Agency.

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

DATE: January 28, 2020

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

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

BEFORE
Brian Bohlen
Administrative Judge

INITIAL DECISION

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

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

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

JURISDICTION

Background

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

The appellant's September 11, 2018 letter through his supervisory chain to the Secretary of Energy constitutes his alleged protected activity. This letter starts by arguing broadly that "the 7.5 billion crew members of planet earth" are facing nuclear Armageddon as well as other existential crises due to the Office of Special Counsel (OSC) and the Board – both lawbreaking frauds in the appellant's eyes – shirking their

responsibilities toward whistleblowers. To drive this point home, he then claimed – without evidence or further explanation – that the Board and OSC were, he believes, "a 'but for' factor or proximate cause for much which has befallen and besets America in (sic) past 40 years, particularly including 9/11, and the illnesses and premature deaths of thousands of 9/11 recovery workers." *Id.*, p. 36.

The appellant next vented his anger at various named and unnamed DOE attorneys for demonstrating "sociopathic legal ethics" through allegedly failing to properly respond to his discovery requests from the 1999-2003 timeframe, as well as for the content of their later litigation filings. *Id.*, pp. 38-39. The appellant then alleged that the heads of the FBI and other intelligence agencies, the Secretary of the Energy, and the President of the United States were each unwilling or unable to fulfill their statutory duties under 5 U.S.C. § 2301(c) to protect merit system principles. *Id.*, p. 39.

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

Analysis

The Board has jurisdiction over an IRA appeal if the appellant exhausts his administrative remedies before OSC, and makes nonfrivolous allegations that: (1) he made a disclosure described under 5 U.S.C. § 2302(b)(8), or engaged in protected activity described under 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D); and (2) the disclosure or protected activity was a contributing factor in the agency's decision to take or fail to take a personnel action as defined by 5 U.S.C. § 2302(a). *Linder v. Department of Justice*, 122 M.S.P.R. 14, ¶ 6 (2014).

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

A disclosure is protected under the WPA if it meets the reasonable belief test. The Court of Appeal for the Federal Circuit explained the meaning of the reasonable belief test in *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999). As the Court explained in *Lachance*, the proper test is:

> . . . could a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee reasonably conclude that the actions of the government evidence gross mismanagement? A purely subjective perspective of an employee

> is not sufficient even if shared by other employees. The WPA is not a weapon in arguments over policy or a shield for insubordinate conduct. Policymakers and administrators have every right to expect loyal, professional service from subordinates who do not bear the burden of responsibility.

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

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

Further, to satisfy the exhaustion requirement of 5 U.S.C. § 1214(a)(3) in an IRA appeal, an appellant must inform OSC of the precise ground of his charge of whistleblowing, giving OSC a sufficient basis to pursue an investigation which might lead to corrective action. *Ward v. Merit Systems Protection Board*, 981 F.2d 521, 526 (Fed. Cir. 1992). The test of the sufficiency of an employee's charges of whistleblowing to OSC is the statement that he makes in the complaint requesting corrective action, not his characterization of those statements later. *Id.*; *Ellison v. Merit Systems Protection Board*, 7 F.3d 1031, 1036 (Fed. Cir. 1993).

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

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

WPA's protection. *See* Final Board Order, dated May 21, 2015, Docket No. AT-1221-14-0520-W-1.

Collateral estoppel bars repeat litigation of an issue when: (1) the issue is identical to that involved in a prior action; (2) the issue was actually litigated in the prior action; (3) the determination on the issue in the prior action was necessary to the resulting judgment; and (4) the party precluded was fully represented in the prior action. *Milligan v. U.S. Postal Service*, 106 M.S.P.R. 414, & ¶ 8 (2007). Further, "unlike *res judicata*, collateral estoppel may bar a party from relitigating an issue in a second action even when the prior appeal was dismissed for lack of subject matter jurisdiction." *Noble v. U.S. Postal Service*, 93 M.S.P.R. 693, 697 (2003). An issue is considered "actually litigated" when it was "properly raised by the pleadings, was submitted for determination, and was determined." *Id.*, at 698.

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

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

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

> (1) The head of each agency, in consultation with the Director of the Office of Personnel Management and the Special Counsel, shall develop criteria that –

(A) the head of the agency shall use as a critical element for establishing the job requirements of a supervisory employee; and

(B) promote the protection of whistleblowers.

(2) The criteria required under paragraph (1) shall include –

(A) principles for the protection of whistleblowers, such as the degree to which supervisory employees –

(i) respond constructively when employees of the agency make disclosures described in subparagraph (A) or (B) of section 2302(b)(8);

(ii) take responsible actions to resolve the disclosures described in clause (i); and

(iii) foster an environment in which employees of the agency feel comfortable making disclosures described in clause (i) to supervisory employees or other appropriate authorities; and

(B) for each supervisory employee –

(i) whether the agency entered into an agreement with an individual who alleged that the supervisory employee committed a prohibited personnel practice; and

(ii) if the agency entered into an agreement described in clause (i), the

> **number of instances in which the agency entered into such an agreement with respect to the supervisory employee. (Emphasis added)**

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

It is easy to see how the above statutory language could form the basis for a protected disclosure under 5 U.S.C. § 2302(b)(8) if an employee showed that he reasonably believed that his agency neglected to update its supervisory performance metrics to capture how its supervisors were handling whistleblower issues. However, this is not the appellant's argument. Instead, the appellant contends that his agency is culpable of taking a personnel action against him as defined by 5 U.S.C. § 2302(a)(2)(A) in light of the above statutory language simply by not responding affirmatively to his complaint letter. In my view, this argument falls well outside any reasonable interpretation of the cited statutory language from 5 U.S.C. § 4302(b), and also bears no support in case law concerning the scope of what constitutes a significant change in duties, responsibilities, or working conditions under 5 U.S.C. § 2302(a)(2)(A). Accordingly, I find dismissal of the appeal appropriate.

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

DECISION

FOR THE BOARD: /S/
Brian Bohlen
Administrative Judge

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

No. 20-3459

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOSEPH P. CARSON, Petitioner, v. MERIT SYSTEMS PROTECTION BOARD, Respondent, U.S. DEPARTMENT OF ENERGY, Intervenor.	)	ORDER (Filed Sep. 9, 2021)

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

/s/ Deb S. Hunt
Deborah S. Hunt, Clerk