Case No. VWA-0026

February 17, 1999

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Hearing Officer Decision

Name of Petitioner: Joseph Carson

Date of Filing: October 26, 1998

Case Number: VWA-0026

This Decision involves the referral of a whistleblower matter involving Joseph Carson (Carson), a Department of Energy (DOE) employee. Pursuant to an order of an administrative judge of the United States Merit Systems Protection Board (http://www.mspb.gov) (MSPB) that implemented a settlement agreement between the DOE and Carson, Carson was permitted to submit documents to the Office of Hearings and Appeals regarding six instances of retaliation that he claims occurred because of certain protected disclosures that he made. The DOE was also permitted to submit documents at the same time. Both parties were permitted to submit replies to the initial submissions of documents. No provision for personal appearances or oral testimony was made. The agreement (hereinafter referred to as "the settlement agreement") calls for an OHA Hearing Officer to evaluate whether there is merit to Carson's claims that DOE management took any of those six actions in reprisal for activities protected under the Whistleblower Protection Act of 1989 (WPA) (hereinafter referred to as protected disclosures). This Decision is that evaluation.

I. Introduction

Carson is a former site representative at Oak Ridge, Tennessee, for the Office of Environment, Safety and Health Residents (its most current name) within the Office of the Assistant Secretary for Environment, Safety and Health (http://www.eh.doe.gov) (EH). He worked as a site representative from 1990 through August 1993, when he was reassigned to another office within EH. Carson alleges that DOE management, including his supervisor, his second line supervisor, and a number of DOE managers, retaliated against him for making disclosures about safety and fraud concerns. During the time in question, Mr. William T. Cooper, Jr. was Carson's supervisor, Mr. Bernard Michael Hillman, the Director of the Site Representatives Program, was Carson's second level supervisor, and Mr. Joseph E. Fitzgerald, Jr. was the Deputy Assistant Secretary for Safety and Quality Assurance who supervised Mr. Hillman.

Carson has been fighting this fight for many years. Carson has filed multiple claims that the DOE retaliated against him for making protected disclosures. Carson has filed these claims, among other

places, with the U.S. Office of Special Counsel (http://www.osc.gov) (OSC) and the MSPB. OSC's primary mission is to safeguard the federal employee merit system by protecting federal employees and applicants from prohibited personnel practices. It does this by investigating claims of reprisal for whistleblowing and prosecuting them before the MSPB.

The record is voluminous. Carson has submitted 415 exhibits for my review--the record before the MSPB

with Exhibits labeled Exhibit A through Exhibit MA (339 exhibits) and 76 additional exhibits. I have read all of them. I will not summarize them, the factual background in this matter, or the procedural history in this determination because this is a process limited by the original MSPB order, and a number of the exhibits are not germane to my evaluation. Furthermore, the MSPB order establishing this process requires my evaluation to be based upon the law that the MSPB would follow in determining whether any of Carson's claims are meritorious. As a result, the record of evidence should be limited to those materials that Carson submitted to the OSC in support of his complaints that he made protected disclosures for which he was retaliated against.

In reviewing [a whistleblower's] claim, the Board is limited to review of only those materials submitted to the OSC. The rationale behind submitting the claim first to the OSC is to enable the OSC to remedy any wrongdoing it finds without involving the Board. See Ward, 981 F.2d at 526. The exhaustion requirement would be rendered meaningless if a claimant were permitted to submit evidence of protected disclosures to the Board that was not submitted to the OSC. In Ellison, we stated that a failure to explicitly raise disclosures a claimant believes are protected with the OSC precludes consideration of these issues by the Board. See Ellison, 7 F.3d at 1037.

Willis v. Department of Agriculture, 141 F.3d 1139, 1144 (Fed. Cir. 1998). Nevertheless, this evaluation procedure is significantly different from the process that would have occurred before the MSPB because there is no provision for the presentation of oral testimony at a hearing. Oral testimony would have been useful in clearing up some ambiguities in the documentary evidence. Oral testimony also would have allowed me to gauge the credibility of witnesses. This omission has hindered my evaluation process, because there are a number of factual issues as to whether Carson's view or his supervisors' views are accurate. However, the MSPB order established the procedures I am to follow, and my review of the entire record gives me some additional insight into the interchanges between Carson and his colleagues, supervisors, and managers.

In a case involving allegations that personnel actions were taken against a federal employee in retaliation for making disclosures protected under the Whistleblower Protection Act of 1989, the analysis can be stated quite simply. The employee must show that he or she made a protected disclosure and that the disclosure was a contributing factor in the agency's personnel action. The employee makes a prima facie case if he shows that the official taking the personnel action knew of the protected disclosure and that the action occurred within a reasonable time of that disclosure. *Kewley v. Department of Health and Human Services*, 153 F.3d 1357 (Fed. Cir. 1998). If the disclosure were a contributing factor, the burden of proof shifts to the agency, which in order to prevail, must prove by clear and convincing evidence that it would have taken the same personnel action in the absence of the disclosure.

II. The Alleged Disclosures

Carson claims to have made a number of protected disclosures beginning in December 1991. First, he alleges that in that month he spoke with his supervisor about his concern that a former site representative who had recently resigned had been hired as a consultant for the program. Carson also complained about other aspects of the use of consultants. He complained to his supervisor that a particular consultant was charging for time that Carson considered to be nonproductive. (Carson characterized this as fraud.) He also claims that he was concerned that consultants were being hired who his second line manager liked on a personal basis.

Carson also states that in December 1991 he called a hotline maintained by the DOE's Office of Inspector General (hereinafter referred to as OIG) and "voiced concerns about the use of consultants in my program . . . ." Exhibit 1 at page numbered 5.

Carson also maintains that in April 1992 he alleged to the assistant to his second level manager that Carson's supervisor Cooper had falsified Cooper's time and attendance reporting because Cooper had not accounted for all hours that he was on sick leave. Carson also claims in one sentence to have made the

same allegation to the OIG, and then in the next sentence he says he thinks he also informed the OIG. Exhibit 1 at page numbered 6.

Carson also claims that allegations against his supervisors in grievances he filed in response to reprimands and performance evaluations were protected disclosures. Carson claims that a certification in his 1991 performance plan had been falsified, possibly by his second level supervisor. Carson also claims that he notified the OIG of what he characterized as threatening conversations with a DOE Deputy Assistant Secretary and a DOE Labor Relations Specialist.

In May 1993, Carson alleges that he told his supervisor of "specific instances indicative of widespread fear or retaliation for identifying and reporting inadequate safety programs in DOE and DOE contractor safety organizations." Exhibit 1 at page numbered 7. In July 1993, Carson claims to have complained to his supervisor that safety deficiencies he had uncovered were not included in a report that he had drafted. After he did not receive a response to that claim, Carson states that he wrote to the Secretary of Energy and the Manager of the DOE Oak Ridge Operations Office to disclose his concerns.

III. The Alleged Retaliation

Under the settlement agreement, the issues to be addressed here are whether there is merit to Carson's claims that DOE management took the following actions against Carson for making disclosures protected under the Whistleblower Protection Act of 1989:

1. The 1991 performance appraisal of Fully Successful signed by the Reviewing Official on August 9, 1992;
2. A written reprimand that Carson received on August 19, 1992;
3. An unacceptable performance evaluation that Carson received on September 29, 1992;
4. A marginal performance evaluation that Carson received on January 28, 1993;
5. The denial of a within grade step increase as a result of the unacceptable and marginal performance evaluations, as well as Carson's failure to receive notification of the denial of a within grade step increase after the marginal performance evaluation in January 1993; and
6. The unacceptable advisory rating that Carson received on October 14, 1993.

In making those determinations, the settlement agreement states that I will use "applicable legal precedents related to allegations of whistleblower reprisal, primarily those found in decisions issued by the Merit Systems Protection Board." Stipulation of Settlement and Dismissal, *Carson v. Department of Energy*, No. SL-1221-94-0179-B-1, Attachment A at 1 (MSPB Oct. 20, 1998). In other words, the issue here is whether any of these actions would be found under MSPB law to be unlawful retaliation for the making of a protected disclosure.

IV. Procedural History

The procedural history of the disputes between Carson and his management is long and complex. Since this evaluation is focused on a small part of the overall picture, it is not necessary to go into much detail about the larger disputes; the parties know the procedural history all too well. This evaluation process began when an administrative judge at the MSPB signed an order on October 20, 1998, approving a settlement agreement between Carson and the DOE. That agreement provides that "[t]he allegations of whistleblower reprisal made by Mr. Carson in this appeal will be evaluated by the process . . . before the Office of Hearings and Appeals ("OHA") to determine whether they were meritorious." Stipulation of Settlement and Dismissal, *Carson v. Department of Energy*, No. SL-1221-94-0179-B-1, at 2 (MSPB Oct. 20, 1998). The agreement provides for the submission of documents during the OHA evaluation process and a determination whether DOE management took any of six actions in reprisal for whistleblower activities. The evaluation is supposed to be governed by the criteria used by the MSPB in evaluating whistleblower complaints.

Under the rules governing this type of action at the MSPB, a person who claims to have been retaliated against for making a protected disclosure must first file a complaint with the U.S. Office of Special Counsel. That office will investigate the claim and either prosecute it before the MSPB or close its processing of the complaint without any action. If the OSC stops processing a complaint without any action, an individual can prosecute his claim by starting an "Individual Right of Action" at the MSPB. The MSPB has held that an individual's cause of action at the Board is restricted to the actions that the OSC investigated. In other words, an individual may not raise at the Board in the first instance a disclosure or personnel action that he did not call to the attention of the OSC. *Willis v. Department of Agriculture*, 141 F.3d 1139 (Fed. Cir. 1998).

The Office of Special Counsel issued three letters to Carson about his complaints, one dated June 2, 1992 (Exhibit BO but listed in the index as Exhibit BP), one dated October 26, 1993 (Exhibit 46), and one dated February 24, 1994 (Exhibit 50). In his first complaint to the OSC, Carson had alleged that the lowering of his 1991 annual performance appraisal from the previous year was because of his whistleblowing activity. Specifically, Carson alleged that he told his supervisor and the OIG about his concerns that the hiring of a former government employee as a consultant in the same program violated government rules. Carson also alleged that his second level supervisor was "hiring contractors based on his personal relationship with the contractors rather than adhering to government regulations." Exhibit BO. The Office of Special Counsel stated that it would not inquire further into this matter because the information reported to Carson's supervisor and the IG did not constitute a disclosure protected by the Whistleblower Protection Act of 1989. Furthermore, the OSC stated that Carson had not provided any evidence to support his belief that his second level supervisor was not following government regulations when hiring consultants. *Id*.

In its October 26, 1993 letter, the OSC found that with the exception of a disclosure alleging the misreporting of sick leave by his supervisor, it was not clear that the MSPB would find any of the other disclosures protected by the Whistleblower Protection Act of 1989. Those disclosures were (1) a disclosure to Carson's supervisor and OIG that a former site representative had been hired as a consultant in possible violation of DOE regulations, (2) a disclosure in December 1991 that Carson characterized as possible fraud among consultants in his program, (3) a disclosure about a concern that consultants were being hired based on their personal relationship with DOE management, (4) a disclosure to other site representatives about Carson's concerns about possible fraud among the consultants in the program, and (5) a disclosure that Carson's supervisor was misreporting his time and attendance. The OSC also concluded that the "personnel actions at issue were based on legitimate management concerns and not because of your disclosures or grievances." Exhibit 46 at 2.

The February 24, 1994 letter from the Office of Special Counsel found no basis for further inquiry into the marginal performance rating that Carson received in January 1993 and a subsequent denial of a within grade increase of salary in February 1993. The Office of Special Counsel found that it would not consider Carson's allegation of receipt of an unacceptable advisory performance rating in October 1993 because an advisory performance rating is not considered a personnel action that may form the basis of a whistleblower complaint. Exhibit 50.

V. Whether Carson Had Made A Prima Facie Case Of Retaliation

In order to establish a case on which the MSPB might grant relief, Carson needs to show that he has exhausted his remedies at the OSC. Exhibit 1 clearly shows that he did. He also needs to show that he made a protected disclosure under 5 U.S.C. § 2302(b)(8), that he was subjected to a "personnel action" within the meaning of 5 U.S.C. § 2302(a)(2), and that the disclosure was a contributing factor in the agency's personnel action. At the outset of my analysis, I want to make clear that I view the findings of the OSC in these matters to be evidence but not at all dispositive or binding on the issue of whether there is merit to Carson's positions. The findings are simply the OSC's views given the information and arguments presented to it. I will now turn to a discussion of Carson's disclosures.

Carson has made a number of allegations concerning the hiring and use of consultants in the Site Representatives program. He first alleged that he had concerns about the hiring of a former employee as a consultant in the same program. Carson has stated in the index to his exhibits:

6. Copy of pages of book on Federal Retirement that mentions "post-employment restrictions." Carson bases his concern about the rehiring of Myers as a consultant in a program in which he had been a manager based on what he read in this book.

Exhibit 6 is a portion of a booklet entitled **Your Retirement – How to Prepare for It, How to Enjoy It**. It was written by Bill Olcheski and published by Federal Employees News Digest Inc. of Reston, Virginia (http://www.clubfed.com/fedforce/fedforce.html). It is not an official government publication. Carson has provided in Exhibit 6 two pages of Chapter 11 that deals with Post-Retirement Employment. The discussion of post retirement restrictions on working as a consultant for a contractor to the federal government starts by saying that the rules are "long and involved . . . ." Exhibit 6. Then the author writes a very general summary of the restrictions that is three paragraphs long.

No reasonable person could read these passages and conclude that the hiring of a former government employee as a consultant is against government rules. The material that Carson claims is the basis for his knowledge and concern itself says that the rules are "long and involved and read like the small print on an insurance policy." Exhibit 6. While this would put people on notice that an issue exists when hiring a former government employee as a consultant, it is a leap to say that these passages indicate that the hiring of a former government employee is a violation of government rules. In a memorandum dated in July 1992, Carson said that he "was concerned that hiring Myers back so soon was a breach of regulations." Exhibit CE at 2. Yet, this concern rapidly shifted to the latter position, that hiring Myers was in fact a violation of regulations. The rules for hiring any federal employee are long and involved; the rules for letting any government contract are long and involved. This does not mean that merely pointing out that someone has been hired, or that a government contract has been let, constitutes a disclosure of wrongdoing.

Carson claims that he made this disclosure to both his supervisor and the OIG. The record in this case is unclear about what he disclosed to the OIG. Carson maintains that in December 1991 he called the OIG hotline and "voiced concerns about the use of consultants in my program . . . ." Exhibit 1 at page numbered 5. Nothing in the record shows what those concerns were. This characterization by Carson is in stark contrast to the lengthy explanation that he wrote about the concerns raised to his supervisors at the same time, and without further evidence causes me to question what transpired in the call to the OIG hotline, if it happened at all. Nevertheless, it appears that Carson did indeed raise this concern to the OIG. The record indicates that the OIG brought this issue to the attention of the DOE, and the DOE Office of General Counsel responded about this issue. Exhibits FI and GA. Nevertheless, the fact that an issue exists does not evidence a violation of law or an abuse of authority, and such a disclosure is not protected under the Whistleblower Protection Act of 1989. To hold otherwise would allow any question about federal employment or a federal contract to be a protected disclosure.

Indeed, the record indicates that DOE management was well aware that this issue existed. In a deposition given on January 24, 1994, Joseph Edward Fitzgerald, Jr., Deputy Assistant Secretary for Safety and Quality Assurance at DOE, testified as follows:

Q During that meeting did Mr. Carson bring up his concerns of - - [sic] about consultants and their use?

A Yes, I believe that was one of the issues that he had expressed.

Q What was your reply when he brought that up?

A I had indicated I had understood that - - [sic] that his concern had been relayed to me by [his second level supervisor] Mr. Hillman, and that we had, in fact, went through and reverified, if you may, that, in fact, all of the procedures were being satisfied, there was no conflict of interest from our standpoint, which

we had done.

Exhibit 54 at 14-15. This comment clearly points out that DOE management took steps to assure that government regulations were followed in the hiring of this consultant. The WPA, in 5 U.S.C. § 2302(b)(8), states in part that a protected disclosure must evidence a violation of law or regulations. Based on the record before me, I find that Carson's disclosure that he had a concern about the hiring of a former employee as a consultant in the Site Representatives Program, whether made to his supervisor or the OIG, is not such a disclosure, and it is not protected under the WPA.

Carson also alleged that contractors were charging time for which Carson believed was not productive. He also claims to have alleged fraud in the use of contractors in his program. With respect to the former claim, Carson apparently believes that time he spent with one consultant in particular was not productive. Five U.S.C. § 2302(b)(8) states that a protected disclosure must evidence a violation of law or regulations, or evidence "gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." Disclosing that several interactions with a particular contractor may have been less than ideally efficient hardly rises to the level of a protected disclosure evidencing a gross waste of funds.

Evidence that Carson submitted in this proceeding undercuts his position. In a December 3, 1998 memorandum that Carson asked him to write, Ari Krasopoulos, a site representative from 1989 to the present, stated his experience with consultants thusly:

Regarding my observations on the use of support contractors during the 91-93-time period: I worked with a lot of support contractors over the years and my experience has been overwhelmingly positive (with a couple of exceptions). That includes the time period you are interested in. The support contractors that I worked with all were professionals with good work ethic, they were good at what they were doing and yes with strong opinions and often with big egos. I guess if you are good at what you do, you can have the luxury of a big ego and strong opinion. For the most part I did not mind that because it did not interfere with what I did.

Although overall I have been pleased by the contractors performance and professional behavior not all of my experiences with contractors were great. Once I had a bad experience with one individual support contractor (near the time frame you are interested in). That fellow did not know his position in the organization and as a result I made sure he did not work for me or with me again. My supervisor at the time (Hillman) did not interfere with my decision not to have that fellow on my team again. Also there was another contractor who worked on my team once that I did not think he was being very productive. I made sure that he was not on my teams after that.

Memorandum Dated December 3, 1998, to Joseph Carson from Ari Krasopoulos regarding Response to Your Letter Dated Nov. 23, 1998 Requesting My Views at 2. It is a tautology to say that upon reflection not all time is spent being the most productive one can be. Statements about that do not evidence gross mismanagement or a gross waste of funds.

Carson also alleges that in April 1992 he told Carol Peabody, as assistant to the Deputy Assistant Secretary, that his supervisor reported his time and attendance inaccurately. As noted above, he also states that he notified the OIG of this matter, then in the next sentence says "I think I also informed the DOE IG of these allegations." Exhibit 1 at page numbered 6. These statements were included in an Appeal Form that Carson filed with the MSPB. The form is signed by Carson and dated December 20, 1993. Exhibit 1.

While further development of evidence might confirm these disclosures, there is no evidence in the record before me to support these allegations. Carson's conflicting statements about whether he informed the OIG of this concern in April 1992 cast doubt as to whether Carson in fact relayed these concerns to the Inspector General. Although Carson has submitted the deposition testimony of 15 people associated with the events here, Ms. Peabody's testimony is absent, even though she was available. Exhibit 52 at 2. There is no evidence to show what Carson said to Ms. Peabody, if indeed he said anything to her about Cooper's

reporting of his attendance. This lack of evidence is more compelling because the OSC informed Carson in its letter dated October 26, 1993, that one alleged action that the MSPB would likely consider a protected disclosure was his disclosure that his supervisor has falsified his time and attendance reporting. Exhibit 46. All of the depositions Carson has entered into the record before me took place in January 1994, approximately three months after the OSC letter and one month after he filed his appeal with the MSPB. Exhibits 51 through 65. Yet nowhere in those depositions is this disclosure mentioned. Indeed, Carson alleged that he also told his supervisor and his second level manager about his concerns. Exhibit 46. Nevertheless, the deposition of his supervisor, Exhibit 51, and his second level manager, Exhibit 52, are silent about this issue. Based on this record, Carson has failed to make a prima facie case that he made this protected disclosure.

Nevertheless, there is evidence in the record that he made similar disclosures to the OIG on July 8, 1992. Exhibit CF purports to be an unsigned memorandum from Carson to the OIG alleging that Carson's supervisor filed inaccurate time and attendance records. DOE has not challenged the authenticity of this document. While the July 1992 memorandum states that Carson has spoken to the OIG on a previous occasion, nowhere is it mentioned that the issue of time and attendance reporting came up. This lends support to my conclusion above that Carson had not in fact made a disclosure of this matter to the OIG in April 1992.

Carson also states that he disclosed safety lapses that his management deleted from drafts of reports that his office issued. The record indicates that he complained to his supervisor and management that safety lapses he uncovered had been later deleted from reports that he had drafted. When his supervisors were not receptive to reincorporating these matters into the final reports issued by the Site Representatives Program, Carson disclosed them to the Secretary of Energy and the Manager of DOE's Oak Ridge Operations Office.

In *Willis v. Department of Agriculture*, 141 F.3d 1139 (Fed. Cir. 1998), the United States Court of Appeals for the Federal Circuit dealt with an issue similar to this. There, an employee argued that his supervisors reversed six findings that farms were not in compliance with approved soil conservation plans. Willis argued that his complaints to supervisors regarding the reversal of his findings constitute protected disclosures. In rejecting this position, the Court stated that:

Willis's complaints to supervisors are not disclosures of the type the WPA was designed to encourage and protect. Discussion and even disagreement with supervisors over job-related activities is a normal part of most occupations. It is entirely ordinary for an employee to fairly and reasonably disagree with a supervisor who overturns the employee's decision. In complaining to his supervisors, Willis has done no more than voice his dissatisfaction with his superiors' decision.

Id. at 1143. This holding applies in this matter as well. Carson complained to his supervisor and second level manager about the changes they made to reports that he drafted. He was particularly angered by items that were deleted from his drafts as his supervisor and second level manager made changes to conform his drafts to their ideas of quality. But as the *Willis* court held, these types of complaints are not disclosures protected by the Whistleblower Protection Act of 1989.

Carson further alleges that when his supervisors did nothing to include the matters that he thought should be in the report, he notified the Secretary of Energy and the Manager of DOE's Oak Ridge Operations Office of his concerns. Evidence in the record confirms these disclosures. See Exhibits 28 and FW. A DOE employee should be free to disclose safety concerns to high-level DOE officials without the fear of retaliation. While a disclosure that he disagreed with how his supervisors edited his reports would not be a protected disclosure, the allegation made to senior DOE officials—the Secretary of Energy and the Manager of DOE's Oak Ridge Operations Office—that safety concerns were not making it up the chain of command are the types of disclosures that are covered by the Whistleblower Protection Act of 1989.

In summary, the evidence shows that Carson did notify the OIG that he suspected that his supervisor was

reporting time and attendance inaccurately in July 1992. In addition, his disclosure to the Secretary of Energy and the Manager of the Oak Ridge Operations Office in July 1993 that safety deficiencies were deleted from reports was a disclosure protected by the WPA. I also find that the other disclosures that Carson has identified are not disclosures protected by the WPA.

After a finding that an employee has shown that he or she made a protected disclosure, the employee must show that the disclosure was a contributing factor in the agency's personnel action. The employee makes a prima facie case if he shows that the official taking the personnel action knew of the protected disclosure and that the action occurred within a reasonable time of that disclosure. The first issue to be analyzed is whether the actions complained about are personnel actions for purposes of the WPA.

As noted before, this evaluation focuses on whether any of six actions were taken against Carson in reprisal for activities protected under the WPA. Those activities include:

1. The 1991 performance appraisal of Fully Successful signed by the Reviewing Official on August 9, 1992;
2. A written reprimand Carson received on August 19, 1992;
3. An unacceptable performance evaluation the Carson received on September 29, 1992;
4. A marginal performance evaluation that Carson received on January 28, 1993;
5. The denial of a within grade step increase as a result of the unacceptable and marginal performance evaluations, as well as Carson's failure to receive notification of the denial of a within grade step increase after the marginal performance evaluation in January 1993; and
6. The unacceptable advisory rating that Carson received on October 14, 1993.

Clearly a formal performance evaluation or appraisal (items 1, 3, and 4 above) is a personnel action for purposes of the WPA. 5 U.S.C. § 2302(a)(2)(A)(viii). The remaining items on the list above are as follows: Item 2 is a written reprimand. Item 5 is a denial of a salary increase based on poor performance evaluations. Carson also complains that he did not receive notification of the denial of the salary increase. Item 6 is an unacceptable advisory rating that Carson received from his former supervisor after he was transferred to another program.

The reprimand Carson received is also a personnel action for purposes of the WPA. *McVay v. Arkansas National Guard*, 80 MSPR 120 (1998); *Gonzales v. Department of Housing & Urban Development*, 64 MSPR 314, 319 (1994). However, it presents some different considerations. By its terms, the August 1992 reprimand was to remain in Carson's personnel file for one year and be withdrawn from there after one year. Exhibit CY. A settlement agreement between Carson and the DOE dated February 25, 1994, stated that "all negative materials will be expunged from Mr. Carson's files. That is, any references to the matters contained in the 1991 or 1992 ratings and other derogatory references to him or to his work will not be maintained by the agency . . . ." Exhibit 14. The MSPB has held that "[w]hen an appellant cannot obtain effective relief before the Board, even if his [Individual Right of Action, namely whistleblower] appeal is within the Board's jurisdiction and he shows that he was subjected to a retaliatory personnel action, the appeal should be dismissed for failure to state a claim upon which relief can be granted." *McVay v. Arkansas National Guard*, 80 MSPR 120 (1998). As the MSPB has stated:

Under 5 U.S.C. § 1221(g), as corrective action, the Board is authorized to order "that the individual be placed, as nearly as possible, in the position the individual would have been in had the prohibited personnel practice not occurred," including "back pay and related benefits, medical costs incurred, travel expenses, and other reasonable and foreseeable consequential changes." Here, the appellant has lost no pay or benefits as a result of his oral reprimands and he has not alleged that he incurred medical costs, travel expenses, or other reasonable and foreseeable changes. Moreover, because there is no allegation and no evidence that the oral reprimands are a matter of record, there is no relief that the Board can fashion to return the appellant to the status quo ante; there is no file that the Board can order expunged and there is no action that the Board can order canceled. Indeed, we can conceive of no remedy at all. Under these circumstances, even assuming that the Board has jurisdiction over this appeal with respect to the three oral

reprimands, the appellant has failed to state a claim for which relief can be granted, and his appeal must be dismissed.

McGowen v. Department of the Air Force, 72 MSPR 601, 607 (1996). That reasoning applies here. By its terms the August 1992 reprimand remained in Carson's personnel file for one year. The February 1994 agreement between Carson and DOE confirmed that any derogatory references to Carson's work during the 1991 and 1992 period would be expunged from his personnel file. There is no evidence in the record that this has not occurred. Accordingly, with respect to the August 1992 reprimand, under the Board's precedents Carson has failed to state a claim for which relief can be granted. This portion of his submission should therefore be dismissed.

Other actions that Carson complains about are not personnel actions for which relief may be granted. While a denial of salary increase is a personnel action because it affects terms of employment, 5 U.S.C. § 2302(a)(2)(A)(ix), the lack of receipt of notification of the denial of a salary increase is not a personnel action that can sustain a whistleblower complaint. Nor is an advisory performance rating a personnel action for purposes of the WPA. *King v. Department of Health and Human Services*, 133 F.3d 1450 (Fed. Cir. 1998).

In summary, the following events are "personnel actions" within the meaning of 5 U.S.C. § 2302(a)(2)(A) for which Carson might receive relief:

1. The 1991 performance appraisal of Fully Successful signed by the Reviewing Official on August 9, 1992;
2. An unacceptable performance evaluation the Carson received on September 29, 1992 (Exhibit 9);
3. A marginal performance evaluation that Carson received on January 28, 1993 (Exhibit 11);
4. The denial of a within grade step increase because of the unacceptable and marginal performance evaluations.

In making a prima facie case of whistleblower retaliation, individuals generally show that disclosures were a contributing factor to agency personnel actions "by establishing circumstantial evidence of knowledge of the protected disclosure and a reasonable relationship between the time of the protected disclosure and the time of the personnel action." *Wojcicki v. Department of the Air Force*, 72 MSPR 628, 636 (1996). I have found that Carson has shown that he made protected disclosures in July 1992 and July 1993. The disclosures in July 1993 cannot constitute protected disclosures for purposes of this proceeding because they occurred after the four personnel actions listed above. *See Willis v. Department of Agriculture*, 141 F.3d 1139 (Fed. Cir. 1998). I have also found that Carson has provided no evidence to support his allegation that another protected disclosure—that his supervisor was misreporting leave—was a contributing factor to personnel actions. Indeed, the depositions of people who would have been in a position to take action on that matter are silent on this issue. Exhibits 52 and 54. There is no evidence in the record that suggests that his supervisor or anyone in his management chain knew that Carson had reported his suspicions about his supervisor's reporting of time and attendance to the OIG. A disclosure to the OIG that is not communicated to agency personnel that had responsible for taking personnel actions against Carson may not form a basis for a whistleblower action. *Brewer v. Department of the Interior*, 76 MSPR 363 (1997). Thus, Carson has failed to show that a protected disclosure was a contributing factor to personnel actions covered by the WPA.

VI. Evidence Concerning Personnel Actions

Even if Carson had shown that a protected disclosure was a contributing factor to an adverse personnel action, clear and convincing evidence in the record indicates that DOE would have taken the same personnel actions in the absence of any disclosures. For this part of the analysis, I will assume that Carson had been able to show that he made a protected disclosure that was known to his supervisors who took the personnel actions. Since its appears from the record that the personnel actions occurred over a short period of several months, and the criticism of Carson's work was very much the same, I will analyze as one issue

whether the record supports a finding that the agency has shown by clear and convincing evidence that it would have taken the same personnel actions.

After reading the entire record, I must say that at the bottom of this case seems to be a dispute between an employee and his management about what should be contained in official reports of the Site Representatives Program. Throughout the record are discussions between Carson and his supervisor and management about the analytic framework and focus of official reports to be issued from the Site Representatives Program. There is a general recognition by everyone that the focus of the reports changed when Michael Hillman became the director of the program. Mr. Hillman's supervisor, Mr. Fitzgerald, testified during his January 1994 deposition that:

I know that the adequacy of preparation of reports was an issue. In fact, I, personally, in terms of charging the objectives of the site representative program in terms of mission and functions, was asking for more comprehensive, more validated assessment reports as a going in proposition. I know there was a transition period by which we were asking that these reports be prepared with more validation, more evidence of facts, and more clearly stated conclusions, and that we were helping a number of site representatives achieve that.

Exhibit 54 at 9.

My summary of the voluminous evidence submitted by Carson is that he did not change the focus of the drafts he submitted and that this was the major contention between Carson, on the one hand, and his supervisor and management on the other. In his January 1994 deposition, Mr. Hillman, who was the director of the Site Representatives Program at the time in question, testified that both he and Carson's supervisor "were frustrated with trying to get Mr. Carson to write reports in accordance with the EH's instructions." Exhibit 52 at 16. Mr. Hillman testified that Mr. Humphries, someone familiar with Carson's work, told him that Carson had identified lots of specific instances of non-compliance with safety rules, but that his work failed to document management processes to carry out the safety programs. It was also disjointed and pejorative in nature. Exhibit 52 at 20. Mr. Hillman also testified that Ron Wright told him the same thing about Carson's work. *Id*. at 22. These comments reflect the same message that is contained in Carson's performance evaluations. *Id*. at 20 and 22. Rather than accept that there may be some truth to these evaluations, Carson's reaction was to challenge his supervisors and tell them why his work was good and correct.

Carson's performance standards for 1992 are instructive. The standards were formally adopted on March 19, 1992, and by their terms were effective for the 1992 calendar year. Exhibit 9 at 2. They contained six performance elements that were described at the marginal, fully successful, and outstanding levels. From my long experience in the DOE, they appear to me to be written very much like other standards with which I am familiar. Carson attached a comment at that time indicating that his supervisor had agreed to define what was expected of Carson at the fully successful level for each performance element. Id. at 3. Carson's supervisor did this in a memorandum dated April 8, 1992. Exhibit AN (listed as Exhibit AO in Carson's index). In an April 16, 1992 memo entitled "Meeting to Discuss Performance," Carson's supervisor said:

. . . I have some concerns with the writing style presented, the number of comments I am having to ask regarding the content. As Hillman would say, there have been several questions that begged to be asked. Also, I haven't seen your incorporation of my comments for those portions of the report you submitted to me on 4/8. 4/9. and 4/13. At the meeting on Monday, I would like to see all of the pieces of the Y-12 report assembled on one package so that I can review the entire report, and not review on portion at a time.

Exhibit AO. Carson's supervisor also stated that he had not seen the assessment guide that Carson was using, even though one week earlier he has told Carson that, as part of the fully successful level on Element 1 of his performance standards: "I should not have to come to you to request a status on your

current assessment activity." Exhibit AN at 1.

Carson's supervisor criticized his work product in a series of memoranda dated April 21, 1992 (Exhibit AR) and April 27, 1992 (Exhibit AT). Carson's reaction to this criticism was that one of his supervisors was "engaged in a process of discrediting me," Exhibit AS, or that he simply could not understand what changes he should make or what was expected of him. Exhibit AV. This is difficult to accept. Carson is a GS-14 General Engineer. He has earned the right to call himself a Professional Engineer. Nevertheless, Carson's work product clearly did not meet the standards of his supervisor and management. The Director of the Site Representatives Program routinely reviewed Carson's work. The director saw reports from all site representatives, and there was no indication that he did not understand the quality of work and the general quantitative range on which Carson's performance ratings were based.

Carson work was rated in September 1992 as unsatisfactory. Apart from the standard "check the boxes" evaluation, Carson's supervisor wrote a nine-page detailed evaluation covering each of the six performance elements in place. Exhibit 9. Carson's reaction, as reflected in comments he attached to the evaluation, was that the performance review was "further evidence of the concerted campaign EH management has been engaged in since December 1991 to retaliate against me for openly voicing concerns about possible abuses of consultant labor in this program." Id. at 11. (It is important to remember at this point that I have found that Carson's concerns in December 1991 are not disclosures that are protected by the WPA and that the DOE Office of General Counsel concluded that there was no violation of post-employment restrictions, as Carson suggested might have occurred.)

As a result of the September 1992 unsatisfactory rating, Carson was placed on a performance improvement plan. Exhibit 10. A progress report was given to Carson; it is dated December 15, 1992. Exhibit 12 at 7. The report notes where Carson is not performing at the fully successful level and states with specificity why his supervisor believes that and what actions Carson needs to take to achieve fully successful performance. His supervisor also notes successes that Carson has had as well as improvements since the performance improvement plan was implemented. Yes Carson's response, as recorded in comments that appear to be dated January 11, 1993, starts by saying: "This is little but misrepresentation and distortions . . . ." Exhibit 12 at 12. Carson's supervisor then gave him a performance evaluation at the end of the performance improvement plan. The rating he gave him was better than the rating in December, although still at the overall rating of marginal. Exhibit 11. In addition to the usual check box evaluation, Carson's supervisor wrote a 10-page evaluation justifying the level of the evaluation with respect to each performance standard. At this point, Carson simply disagrees with his supervisor's, and his second level supervisor's, evaluation.

Carson also argues that his performance standards and evaluation were stricter than other site representatives and suggests that this was done in reprisal for his disclosures. Carson offers the work product of other site representatives and asks that I compare that work product to his in order to confirm his position. This argument is also not persuasive. As has been pointed out to Carson many times by DOE personnel specialists, his performance rating is not done by comparing his work product to the work product of other site representatives. Rather, the rating is made by comparing his work to the performance standards in place for him.

VII. Conclusion

This evaluation proceeding started with an October 19, 1998 settlement agreement by Carson and the DOE to refer Carson's allegations of whistleblower retaliation to a hearing officer at the Office of Hearings and Appeals. Both parties were permitted to file documents in support of their positions; however, no provision was made for oral testimony. Carson has submitted more than 400 exhibits in support of his position.

My evaluation of the record indicates that Carson has failed to make a prima facie case that he made a disclosure protected by the Whistleblower Protection Act of 1989 that was a contributing factor to a

personnel action as defined in that Act. In any event, the record further shows that the DOE would have taken the actions it took even if Carson were able to show that a protected disclosure was a contributing factor to a personnel action.

It is Therefore Ordered That:

Having made the evaluation required by the order of the administrative judge of the U. S. Merit Systems Protection Board issued on October 20, 1998 in *Carson v. Department of Energy*, No. SL-1221-94-0179-B-1 (MSPB 1998), this matter is closed.

Roger Klurfeld

Hearing Officer

Office of Hearings and Appeals

Date: February 17, 1999