



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for November 9, 2018

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NONPRECEDENTIAL COURT DECISIONS

Labio v. Office of Personnel Management, [No. 2018-1796](#) (Fed. Cir. Nov. 7, 2018) (MSPB Docket No. SF-0831-18-0026-I-1): The court affirmed the administrative judge's decision affirming the Office of Personnel Management's denial of the appellant's application for deferred annuity under the Civil Service Retirement Act (CSRS). At issue was the appellant's service with the Department of the Navy in Subic Bay, Philippines. The court relied on its precedent in *Lledo v. Office of Personnel Management*, [886 F.3d 1211](#) (Fed. Cir. 2018), to reject the appellant's argument that 5 C.F.R. § 831.303(a) converted his service in this CSRS creditable position to CSRS covered service, thereby entitling him to a deferred annuity.

Lucchetti v. U.S. Department of the Interior, [No. 17-71081](#) (9th Cir. Nov. 5, 2018) (MSPB Docket No. SF-1221-16-0091-W-3): The court affirmed the Board's decision denying the appellant's request for corrective action under the Whistleblower Protection Act. The Board found that the agency proved by clear and convincing evidence that it would have terminated the appellant during his probationary period absent his protected disclosures. The court agreed with the Board's analysis of the three factors set forth in *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999). In doing so, the court stated that it "would have been aided by a more detailed discussion from the Board" regarding the second *Carr* factor, which

concerns the agency's motive to retaliate. The court also found that the relevant inquiry for the third *Carr* factor, which concerns the agency's treatment of similarly situated employees, is not whether other whistleblowers faced adverse personnel actions for making similar disclosures. Although it found it instructive that the agency did not discipline others who made similar disclosures, the court observed that the relevant inquiry is whether the agency took action against any similarly situated probationary employees who were not whistleblowers.

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