



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for June 14, 2019

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NONPRECEDENTIAL COURT DECISION

Freeman v. Department of the Air Force, [No. 2019-1509](#) (Fed. Cir. June 12, 2019) (MSPB Docket No. AT-0752-16-0688-I-2): The court affirmed the administrative judge's initial decision sustaining the agency's decision to remove the appellant for unauthorized disclosure of classified information and for being absent without leave (AWOL). The court found no merit to the appellant's argument that the administrative judge erred in finding that his disclosure of classified information was not entitled to whistleblower protection because such protection is not available when the information is "specifically required by Executive order to be kept secret in the interest of national defense" unless the information is disclosed only to the designated recipients and that, in this case, it was uncontested that the appellant sent the classified information to unauthorized recipients. The court also found that the administrative judge did not err in declining to consider the appellant's argument that the agency improperly classified the information he disclosed because the Board was not the proper forum for resolving such a dispute and lacks authority to assess the propriety of national security determinations. Finally, the court found that the appellant's assertion that the administrative judge ignored his arguments about the AWOL charge was inconsistent with the thorough factual analysis in the initial decision.

Ingram v. Department of the Army, No. [2018-2415](#) (Fed. Cir. June 12, 2019) (MSPB Docket No. AT-1221-17-0498-W-1): The court affirmed the administrative judge's initial decision denying corrective action in this individual right of action (IRA) appeal, in which the appellant, a Computer/Systems Engineer, argued that the agency retaliated against him for his protected whistleblowing activity by giving him unfairly low performance appraisals in 2014 and 2015 and by moving him from his position as a lead engineer to a non-lead engineer on a different project. The court found no error in the administrative judge's determinations that the appellant failed to show that his transfer to a different position constituted a covered personnel action under the Whistleblower Protection Act (WPA) and failed to show that his prior protected activity contributed to his 2014 performance appraisal. The court further found no error in the administrative judge's determination that the agency established by clear and convincing evidence that it would have issued the appellant the same 2015 performance appraisal in the absence of his prior protected activity.

Mohammed v. Department of the Army, [No. 2019-1226](#) (Fed. Cir. June 11, 2019) (MSPB Docket No. SF-1221-18-0101-W-1): The court affirmed the administrative judge's initial decision denying corrective action in this IRA appeal, in which the appellant, who served as an assistant professor at the Defense Language Institute Foreign Language Center, argued that the agency retaliated against her for filing a prior IRA appeal and for disclosing that her supervisors retaliated against her and subjected her to a hostile work environment by generating a red flag notification reporting negative student comments about her class, issuing her a memorandum of counseling, transferring her to a different school, changing her duties, denying her requests to conduct Oral Proficiency Interview tests and to teach study hall, placing her on administrative leave, and not renewing her contract. The court found no basis to disturb the administrative judge's determination that the red flag notification and informal memorandum of counseling were not covered personnel actions under the WPA. The court further agreed with the administrative judge that, although the appellant made one protected disclosure that contributed to the personnel actions that were covered under the WPA when she redisclosed the retaliation at issue in her previous IRA appeal, the agency proved by clear and convincing evidence that it would have taken the same covered personnel actions in the absence of that disclosure. The court considered, but found no merit to, the appellant's arguments that the administrative judge abused her discretion in crediting the hearing testimony of several agency witnesses, that collateral estoppel or res judicata precluded the

agency from punishing her twice for the same act, and that the agency deprived her of due process.

Nelson v. Department of Transportation, [No. 2018-1880](#) (Fed. Cir. June 11, 2019) (MSPB Docket No. DC-0752-17-0840-I-1): The court affirmed the administrative judge's initial decision sustaining the appellant's demotion from a GS-13 Protective Service Specialist position to a GS-12 position and a 60-day suspension on the basis of the following charges: (1) conversion of Government property supported by 455 instances in which the appellant used the agency's parking facilities without paying; and (2) inability to perform the essential functions of his position due to the revocation of his Special Deputation upon the initiation of the investigation into his failure to pay for parking. The court found unavailing the appellant's argument that the 60-day suspension penalty was too harsh for the unpaid parking, finding that he knew he was required to pay for the parking and thus violated 18 U.S.C. § 641, which makes it unlawful for a person to "knowingly convert[] to his use . . . any . . . thing of value of the United States" and that the administrative judge properly considered the record evidence and testimony in determining that the penalty was reasonable.

Joseph v. Merit Systems Protection Board, [No. 2018-2241](#) (Fed. Cir. June 7, 2019) (MSPB Docket No. PH-0841-16-0228-I-1): The court affirmed the administrative judge's initial decision, which became the final decision of the Board after the appellant withdrew his previously filed petition for review, that the Board lacked jurisdiction to consider his challenge to an Office of Personnel Management (OPM) refund action in the absence of any initial or final decision by OPM on the issue of his entitlement to a refund of his retirement payments rather than a retirement annuity.