Case Report for September 20, 2019

NONPRECEDENTIAL COURT DECISIONS

Feuer v. National Labor Relations Board, No. 2019-1390 (Fed. Cir. Sept. 13, 2019) (MSPB Docket No. NY-1221-17-0200-W-1): The court affirmed the Board's decision in this individual right of action appeal. The petitioner, an administrative law judge with the Social Security Administration, filed an appeal alleging that the agency retaliated against him for his protected disclosures by not selecting him for an administrative law judge position. The administrative law judge assigned to the petitioner's appeal concluded that the petitioner made protected disclosures, established contributing factor, but failed to establish that he was subjected to a personnel action under 5 U.S.C. § 2302(a)(2)(A) because his disclosures were made after the agency selected the new administrative law judges, and thus, there was no remaining vacancy. The administrative law judge found that, even if the petitioner had established a personnel action, the agency proved by clear and convincing evidence that he would not have been selected for the position. The court rejected the administrative law judge's finding that the agency did not take any personnel action against the petitioner but affirmed the finding that the agency had shown by clear and convincing evidence that it would have taken the same action regardless of the petitioner's protected disclosures.

Tang v. Merit Systems Protection Board, No. 2018-2188 (Fed. Cir. Sept. 13, 2019) (MSPB Docket No. DC-1221-17-0763-W-1): The court affirmed, per Rule 36 judgment, the administrative judge's initial decision, which dismissed the petitioner's individual right of action appeal for lack of jurisdiction.