



## U.S. MERIT SYSTEMS PROTECTION BOARD

### **Case Report for February 7, 2020**

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#### **NONPRECEDENTIAL COURT DECISIONS**

*Simon v. Department of Justice*, No. [2019-1982](#) (Fed. Cir. Feb. 5, 2020) (MSPB Docket No. DA-1221-18-0396-W-2): The court affirmed the administrative judge's initial decision, which denied the appellant's request for corrective action under the Whistleblower Protection Enhancement Act. Although the appellant presented a prima facie case of reprisal concerning his prior Board appeals and a nonselection that followed, the agency proved by clear and convincing evidence that it would have taken the same action in the absence of the appellant's protected activities. Among other things, the record established that, while the agency posted its vacancy announcement for two geographic locations, it had a strong preference for filling the vacancy at the location for which the appellant chose not to apply. Further, the agency offered the position to an individual who both applied to the preferred location and previously represented the appellant in his prior Board appeal, which suggested that the agency did not harbor strong retaliatory animus.

*Pamintuan v. Department of the Navy*, No. [2019-2232](#) (Fed. Cir. Feb. 4, 2020) (MSPB Docket No. SF-1221-19-0179-W-1): The court affirmed the administrative judge's initial decision, which denied the appellant's request for corrective action under the Whistleblower Protection Enhancement Act. Although the appellant presented a prima facie case of reprisal concerning a

disclosure that preceded his letter of reprimand, a detail assignment, and the denial of his request for reinstatement of a Contracting Officer warrant, the agency proved by clear and convincing evidence that it would have taken the same actions in the absence of the disclosure. While the appellant argued that his retirement was involuntary and constituted another relevant personnel action, he failed to prove the same. The court confirmed that the strength of any retaliatory motive is a proper consideration in determining whether the agency met its burden, despite the appellant's suggestion to the contrary. The court also declined to reweigh the evidence and credit the appellant's positions concerning both the involuntariness of his retirement and his explanation for the conduct that precipitated the other alleged retaliatory personnel actions. Finally, the court considered the effect of a decision by the California Unemployment Insurance Appeals Board (CUIAB), which awarded the appellant unemployment benefits based on its determination that he was subjected to an illegal discriminatory act and had good cause to leave his position. The CUIAB decision had no preclusive effect on the Board, and its reference to illegal discrimination did not clearly implicate a type of discrimination that would require treating the appellant's Board appeal as a mixed case, outside of the court's jurisdiction.

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