



## **U.S. MERIT SYSTEMS PROTECTION BOARD**

### **Case Report for February 14, 2020**

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#### **COURT DECISIONS**

##### **PRECEDENTIAL:**

**Appellant: Jose Sanchez**

**Appellee: Department of Veterans Affairs**

**Tribunal: U.S. Court of Appeals for the Federal Circuit**

**Case Number: [2018-2171](#)**

**Issuance Date: February 10, 2020**

**MSPB Docket Number: NY-1221-01-0225-C-2**

##### **SETTLEMENT**

- **BREACH**
- **INTERPRETATION**

The appellant filed an individual right of action appeal in 2001, which the parties resolved by entering into a settlement agreement. In pertinent part, that settlement agreement provided that the agency would reassign the appellant from where he had been working, in San Juan, to a clinic much further away, in Ponce. The agreement further provided that the appellant would have a compressed work schedule of 10 hour days, 4 days per week, including 3 hours per workday for travel. The parties adhered to that agreement for 16 years.

In 2017, the agency unilaterally decided that the appellant's schedule would change, requiring that he be at the Ponce clinic from 7:30 a.m. to 4:00 p.m., Monday through Friday.

The appellant filed a petition for enforcement with the Board, arguing that the agency was in breach of the settlement agreement. The administrative judge denied the petition, finding that the agency permitted the compressed schedule for a reasonable amount of time and that the agreement did not bar the change in schedule.

**Holding: The Board correctly determined that 16 years of adherence was reasonable, and the appellant failed to prove a breach of the settlement agreement.**

When a contract contains no time limit for the agreed upon terms, those terms will ordinarily control for "a reasonable time." To determine what amounts to a reasonable time, it is appropriate to consider the underlying circumstances. Here, the parties agreed to the reassignment to alleviate any hostilities in San Juan that resulted from the appellant's whistleblowing. After the passage of 16 years, the court found it reasonable to conclude that those hostilities had dissipated, and the record contained no evidence to the contrary. The court further noted that it was highly unusual for the agency to agree to compensate the appellant for his lengthy commuting time as part of the settlement agreement, thereby suggesting that the parties did not intend for the arrangement to remain in place indefinitely.

To the extent that the appellant argued that the administrative judge erroneously closed the record and denied him a hearing, the court was not persuaded because the appellant merely sought evidence pertaining to the agency's "claimed needs for efficiency," which was irrelevant in this particular case.

**Appellant: Tiffany Potter**

**Appellee: Department of Veterans Affairs**

**Tribunal: U.S. Court of Appeals for the Federal Circuit**

**Case Number: [2019-1541](#)**

**Docket Number: DE-1221-18-0165-W-1**

**Issuance Date: February 13, 2020**

**COURT REVIEW**

**- MISCELLANEOUS**

The appellant filed an individual right of action appeal with the Board, alleging that she was subjected to retaliation for engaging in protected whistleblowing activities. In particular, the appellant alleged that she made four protected disclosures and cooperated with the Office of Inspector General (OIG), resulting in four retaliatory personnel actions.

The administrative judge found that the appellant proved that her disclosures were protected, but failed to prove that her cooperation with OIG was protected. He then determined that the appellant proved that these disclosures were a contributing factor in only the first of the alleged retaliatory personnel actions, i.e. a change in her title from Chief Nurse Manager to Nurse Manager. Finally, the administrative judge concluded that the appellant was not entitled to corrective action for that remaining personnel action because the agency met its burden of proving that it would have taken the same action in the absence of the appellant's whistleblowing.

**Holding: The administrative judge incorrectly found that the appellant failed to prove that her second disclosure was a contributing factor in a subsequent personnel action. Because the error necessitated additional findings of fact, remand was required.**

Before the court, the parties agreed that a relevant party had knowledge of the appellant's July 2014 disclosure prior to her November 2015 nonselection, and the administrative judge erred in finding otherwise. The agency further conceded that the appellant likely met her corresponding burden of presenting a prima facie case of whistleblower reprisal.

The agency argued that the aforementioned error did not necessitate remand because the court could reach findings in the first instance concerning the agency's burden of proving that it would have taken the same action in the absence of the appellant's whistleblowing. The court disagreed. In doing so, the court recognized a distinction between cases in which the central question is one of law versus one of fact. Where, as here, the central question involves one of fact—whether the agency would have taken the same November 2015 nonselection action in the absence of the appellant's July 2014 disclosure—the administrative judge must conduct that fact finding in the first instance.

To the extent that the appellant presented arguments concerning the other alleged retaliatory personnel actions or any other matter, the court was not persuaded.

**NONPRECEDENTIAL:**

*Lehr v. Merit Systems Protection Board*, No. [2019-1677](#) (Fed. Cir. Feb. 7, 2020) (MSPB Docket No. CH-1221-19-0002-W-1): The court affirmed the administrative judge's decision, which dismissed the appellant's individual right of action appeal for lack of jurisdiction. Although the appellant responded to the administrative judge's jurisdictional order, that response provided insufficient information about the nature of any disclosures she may have exhausted before the Office of Special Counsel. To the extent that the appellant argued that she had additional information to meet her jurisdictional burden, the court found no basis for excusing the appellant's failure to present such information below.

*Rutila v. Department of Transportation*, No. [2019-1712](#) (Fed. Cir. Feb. 10, 2020) (MSPB Docket No. DC-1221-18-0474-W-1): The court affirmed the administrative judge's decision, which denied the appellant's request for corrective action in an individual right of action appeal. The administrative judge found that the appellant failed to prove that he engaged in protected whistleblowing activity. She further found that, even if the appellant had met that burden, the agency proved that it would have taken the same removal action in the absence of that activity. Although the appellant argued that the administrative judge erred by relying on 5 U.S.C. § 2302(b)(9)(A)(i) rather than section 2302(b)(8), the court found it unnecessary to rule on this issue. The court noted that the Board has jurisdiction over individual right of action appeals under both sections and that the appellant did not show how he was prejudiced by the administrative judge's reliance on § 2302(b)(9). The court also found it unnecessary to rule on whether the appellant's activity was protected. Instead, the court agreed with the administrative judge's alternative conclusion—that the agency proved by clear and convincing evidence that it would have removed the appellant in the absence of the alleged protected activity. The court found the appellant's remaining arguments unavailing, including ones concerning additional alleged disclosures, discovery, and the right to a hearing.

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