



## U.S. MERIT SYSTEMS PROTECTION BOARD

### **Case Report for September 11, 2020**

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#### **NONPRECEDENTIAL COURT DECISIONS**

*Lewis v. Department of the Treasury*, No. [2020-1684](#) (Fed. Cir. September 8, 2020) (MSPB Docket No. DC-1221-19-0365-W-2): The appellant filed an individual right of action appeal, alleging that in reprisal for a whistleblowing disclosure that she made, the agency rated her as “met expectations” and denied her a detail. In an initial decision, which later became the Board’s final decision, the administrative judge found that the appellant made a whistleblowing disclosure that was a contributing factor to the agency taking the contested personnel actions. However, in denying the appellant’s request for corrective action, the administrative judge held that the agency proved by clear and convincing evidence that it would have rated the appellant as it did and denied her the detail regardless of whether she made such disclosure. Before the Federal Circuit, the appellant argued that the administrative judge abused his discretion by finding the agency’s witnesses credible. She also alleged that he incorrectly interpreted a statute along with the agency’s performance provisions. The court rejected these arguments and affirmed the Board’s final decision, finding no justification to overturn any credibility determination and holding the Board’s merit findings supported by substantial evidence and not contrary to law or arbitrary and capricious.

*Gibson v. Office of Personnel Management*, No. [2020-1651](#) (Fed. Cir. September 9, 2020) (MSPB Docket No. PH-0831-20-0011-I-1): The appellant sought survivor annuity benefits under the Civil Service Retirement System,

contending that she is a “widow” of a retired Federal employee. OPM denied the appellant’s application for benefits, finding that she did not meet the statutory definition of “widow” for benefit purposes under 5 U.S.C. § 8341(a)(1)(A), because the marriage to her husband lasted from May 21, 2018, until his death on February 15, 2019 (270 days). This was short of the “at least 9 months” requirement. On appeal, the Board affirmed OPM’s determination. Before the Federal Circuit, the appellant contested the application of the term “months” and argued that each month should be counted as having 30 days, meaning her 270-day marriage was 9 months in duration. The court rejected this argument and affirmed the Board’s final decision. Citing Supreme Court precedent as support, the court concluded that the phrase “9 months” has an “ordinary public meaning” that counts time as calendar months. The court further explained that Congress often uses, including in the statute at issue, “days” as a unit of measurement and could have done so in 5 U.S.C. § 8341(a)(1)(A) if that were its intention. The appellant presented no grounds for “erasing the clear distinction between familiar counting methods.”

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