



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for November 6, 2020

Note: These summaries are descriptions prepared by individual MSPB employees. They do not represent official summaries approved by the Board itself, and they are not intended to provide legal counsel or to be cited as legal authority. Instead, they are provided only to inform and help the public locate Board precedents.

COURT DECISIONS

PRECEDENTIAL:

Petitioner: Adam Delgado

Respondent: Department of Justice

Tribunal: U.S. Court of Appeals for the Seventh Circuit

Case Number: [No. 19-2239](#)

Docket Number: CH-1221-14-0737-M-1 & CH-1221-18-0149-W-2

Issuance Date: October 29, 2020

COURT REVIEW

- MISCELLANEOUS

WHISTLEBLOWER PROTECTION ACT

- CLEAR AND CONVINCING EVIDENCE
- CONTRIBUTING FACTOR
- PROOF OF CLAIM, GENERALLY
- PROTECTED DISCLOSURE
- VIOLATION OF LAW

This report summarizes the Seventh Circuit's recent panel opinion amending its [July 16, 2020 decision in this matter](#), *Delgado v. Merit Systems Protection Board*, 966 F.3d 556 (2020), and updates the [Case Report for July 17, 2020](#) discussing that prior opinion.

In these individual right of action (IRA) appeals, the petitioner sought corrective action for retaliation based on alleged protected disclosures. The Board dismissed the first appeal for lack of jurisdiction, finding that the petitioner had not exhausted his administrative remedies. The Seventh Circuit found that the petitioner had proven exhaustion. The court therefore remanded the appeal to the Board for further adjudication. In remanding the appeal, the court also indicated that the petitioner's allegations to the Office of Special Counsel and the Board were sufficient to allege that he made protected disclosures regarding possible perjury by one of his coworkers.

Around the same time the Seventh Circuit issued its remand decision, the petitioner filed a second IRA appeal with the Board, alleging additional acts of retaliation for the same or similar disclosures alleged in the first appeal. After holding a consolidated hearing in the two pending appeals, the administrative judge issued separate initial decisions denying the petitioner's requests for corrective action in both cases. The administrative judge found that the petitioner's disclosures were a contributing factor in at least some of the challenged personnel actions. However, she found that the petitioner's disclosures were not protected because he did not have a reasonable belief that the coworker committed perjury. She therefore found that the appellant had not established a prima facie case of whistleblower reprisal. The petitioner sought review of both decisions.

On review, the court vacated the Board's decisions in both appeals, found that the petitioner was entitled to corrective action, and remanded the appeal for further proceedings regarding the appropriate remedy. The agency filed a petition for panel rehearing. The court granted the agency's petition only as to its request for the court to correct an error and consider in more detail its arguments pertaining to its affirmative defense; the court denied the petition in all other respects. The court issued an amended opinion, in which it expanded its analysis of the agency's clear and convincing burden, but still found that the petitioner was entitled to corrective action.

Holding: The court vacated the Board's decisions in both IRA appeals, found that the petitioner was entitled to corrective action, and remanded the appeal for further proceedings regarding the appropriate remedy.

1. The following holdings were largely unchanged from the court's July 16, 2020 opinion:
 - a. The court determined that in light of its prior decision and the evidence submitted on remand, the Board was bound by the law of the case doctrine to find that the petitioner's disclosures of

alleged perjury were protected.

- b. The court agreed with the administrative judge that the petitioner proved that his disclosures were a contributing factor in several nonselections. The court also found that, contrary to the administrative judge's findings, the petitioner established that his disclosures were a contributing factor in two additional nonselections.
2. As before, the court found that the administrative judge did not address whether the agency met its burden to prove by clear and convincing evidence that it would have taken the same actions in the absence of the petitioner's disclosures. Although the court normally would remand the case to the Board to consider that issue in the first instance, it determined that remand was not necessary because the record was fully developed and the agency failed as a matter of law to meet its burden.
 - a. On this latter issue, the court amended its July 16, 2020 opinion and set forth more detailed reasoning for finding that the agency failed to meet its burden. The court applied the Federal Circuit's decision in *Whitmore v. Department of Labor*, 680 F.3d 1353 (Fed. Cir. 2012), and weighed the evidence as a whole. The court found ample evidence that members of the selection panels harbored animus towards the petitioner because of his disclosures and took decisive actions that prevented the petitioner's selection for several promotions. The court further found the agency's evidence to be "highly subjective" and "so inconsistent with the record that it could support a finding of pretext."
3. The court again "strongly urge[d]" the Board to assign a new administrative judge to the appeal on remand.

[MSPB](#) | [Case Reports](#) | [Recent Decisions](#) | [Follow us on Twitter](#) | [MSPB Listserv](#)