



## U.S. MERIT SYSTEMS PROTECTION BOARD

### Case Report for July 26, 2019

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#### COURT DECISIONS

##### PRECEDENTIAL:

**Petitioner: Robert Smith**

**Respondent: General Services Administration**

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

**Case Number: [2018-1604](#)**

**Docket Number: AT-0752-17-0470-I-1**

**Date Issued: July 19, 2019**

##### **Adverse Action Charges**

- **Failure to comply with IT policy**
- **Failure to follow instructions**

##### **Whistleblower Reprisal**

- **Clear and convincing analysis**

##### **Penalty**

The appellant filed an appeal challenging his removal and asserting that the agency retaliated against him for his disclosures of gross mismanagement and waste. In the initial decision, the administrative judge upheld the appellant's removal based on charges of failure to comply with IT policy, failure

to comply with instructions, and frequent disrespectful conduct towards his supervisors, charges he found had an “obvious nexus” to the efficiency of the service. The administrative judge also found that the appellant had shown that he was a whistleblower based on a December 2015 disclosure in a report to upper management and, based on the knowledge-timing test, that his disclosure contributed to the decision to remove him. However, the administrative judge found “based on the strength of the agency’s evidence” that the agency proved by clear and convincing evidence that it would have removed him absent any disclosure. Notably, the administrative judge found that “the defiantly disrespectful misconduct described . . . alone would have justified his removal, especially in light of his previous suspension for similar misconduct.” The appellant sought judicial review.

The Court found that the administrative judge erred in finding the appellant’s misconduct alone justified the agency’s action because the merits of a whistleblower defense do not turn on the strength of the agency’s evidence alone. The proper inquiry, it stated, is whether the agency would have acted in the same way in the absence of the whistleblowing. The Court noted that the administrative judge did not analyze the second and third factors described in *Carr v. Social Security Administration*, 185 F.3d 1318 (Fed. Cir. 1999), in the clear and convincing analysis. In particular, the Court noted the following evidence, among other evidence, which relates to these factors, including the appellant’s large number of disclosures of management failures, some of which embarrassed agency managers, the communication restrictions and other actions imposed against him by his managers, and his punishment for working over a weekend when the record did not show whether another employee working on that same weekend was punished. The Court thus vacated the administrative judge’s whistleblower analysis and remanded for application of the proper standard and consideration of relevant evidence.

The Court also reviewed the three sustained charges on which the appellant’s removal was based. With respect to the failure to comply with IT policy charge, the Court noted that the policy required users to remove PIV cards from their laptops, the appellant was trained in the IT policy, and he did not remove his PIV card. However, the Court concluded that the record lacked substantial evidence to show that this policy was applicable to the appellant, who was a quadriplegic and could not physically remove a PIV card. Therefore, the Court reversed the administrative judge’s decision to sustain this charge.

The Court also addressed one of the specifications of the failure to follow instructions charge, involving the appellant’s decision to send a short email on a weekend after his supervisor instructed him not to work on a weekend. The Court noted that the administrative judge failed to discuss the propriety of the no weekend work instruction, particularly since the agency introduced no formal policy forbidding weekend work, no evidence that other employees had been

instructed not to work on the weekend, and no supporting rationale for imposing the ban on the appellant alone. The Court therefore reversed the administrative judge's decision to sustain this specification. The Court affirmed the administrative judge's decision to sustain the remaining specifications of this charge, but it remanded for a determination of whether the charge as a whole could be sustained. The Court also affirmed the administrative judge's decision to sustain the disrespectful conduct charge.

Finally, in light of the charge and specification that were not sustained and the decision to vacate the whistleblower analysis, the Court also vacated the penalty decision and remanded to reassess the appropriate penalty, which should include consideration of the mitigating circumstances cited by the appellant and the propriety of the breadth of his supervisors' communication bans.

**NONPRECEDENTIAL:**

*Winterton v. Merit Systems Protection Board*, No. [2018-1774](#) (Fed. Cir. July 19, 2019) (MSPB Docket No. SF-0752-18-0030-I-1): The court affirmed, per rule 36 judgment, the administrative judge's initial decision, which dismissed the appellant's involuntary retirement appeal for lack of jurisdiction.

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