

# United States Court of Appeals for the Federal Circuit

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ROBERT WESLEY SMITH,  
*Petitioner*

v.

GENERAL SERVICES ADMINISTRATION,  
*Respondent*

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2018-1604

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Petition for review of the Merit Systems Protection Board in No. AT-0752-17-0470-I-1.

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Decided: July 19, 2019

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JOHN THOMAS HARRINGTON, The Employment Law Group, PC, Washington, DC, argued for petitioner. Also represented by ROBERT SCOTT OSWALD.

JESSICA R. TOPLIN, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent. Also represented by LISA LEFANTE DONAHUE, ROBERT EDWARD KIRSCHMAN, JR., JOSEPH H. HUNT.

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Before WALLACH, TARANTO, and STOLL, *Circuit Judges*.

STOLL, *Circuit Judge*.

Mr. Robert Smith worked at the General Services Administration for nearly 30 years before GSA removed him. Mr. Smith appealed that decision to the Merit Systems Protection Board, asserting that the agency failed to show his actions warranted removal and that the agency had retaliated against him for his repeated disclosure of gross mismanagement and waste.

The Board agreed that Mr. Smith was a whistleblower and that his protected disclosures contributed to the agency's decision to remove him. The Board nevertheless affirmed the agency's decision. Without addressing evidence relevant to the agency's motive to retaliate or its treatment of other similarly situated non-whistleblowers—legal error in itself—the Board ruled that because the agency had introduced strong evidence of misconduct, removal was justified. In doing so, the Board conflated two distinct inquiries: whether the agency's penalty was reasonable and whether the agency would have imposed that same penalty *absent* Mr. Smith's protected whistleblowing. This was error. The Board additionally erred in sustaining certain charges. Accordingly, we reverse those charges, affirm others, and vacate the Board's decision. We remand for it to address the merits of Mr. Smith's whistleblower defense, as well as the agency's chosen penalty, under the proper legal standards.

#### BACKGROUND

Mr. Smith began working at GSA in 1989. Over the course of his career, he worked in various realty and financial management positions, eventually becoming a Senior Financial Advisor. For much of his career, Mr. Smith received positive performance evaluations and faced no discipline. In each of his fiscal year evaluations from 2006 through 2015, Mr. Smith received either "highly" or "fully successful" ratings, and in 2011, Mr. Smith received a National Achievement Award for Asset Management.

Over time, Mr. Smith became concerned that GSA was under-collecting rent and ineffectively managing its assets. He began sending emails to the agency's regional leadership describing these issues and advocating change. *See, e.g.*, J.A. 818–19 (asserting region was “\$47 million behind” in billing in April 2012), 822–956 (providing 134 pages detailing management failures in March 2014), 978–1039 (arguing agency should “[r]eview the consistency in which all regions have applied . . . national policies and procedures” in July 2014), 1943–44 (describing “[t]he Road to Ineffective Management” in November 2014).

As Mr. Smith continued to send these emails, his immediate supervisors began restricting his ability to correspond directly with upper management. In late 2014, his second-line supervisor informed him that sending such “message[s] to the Regional Commissioner was inappropriate.” J.A. 1940. And his then first-line supervisor wrote that because “the tone of many of your communications . . . is inappropriate” and “concerns have been raised regarding the accuracy of [your] information”:

[A]ny communication that you wish to transmit (verbally or electronically) to managers outside of the [group] *must be approved by me before* doing so. Please note that failure to comply with these instructions may result in disciplinary action.

J.A. 961 (first emphasis added); *see also* J.A. 1948 (reiterating “[a]ny communication that you wish to transmit (verbally or electronically) to managers outside of [standard management channels] must be approved by me before doing so”).

In 2015, GSA reorganized, and Mr. Smith received a new first-line supervisor and a revised position description. Mr. Smith understood his new position description to eliminate any communication restriction. Though his new supervisor reiterated that “your new Position Description does not supersede the communication instructions you

received via e-mail on December 11 and 12, 2014 from [your previous supervisor],” J.A. 1932–33, Mr. Smith nevertheless sent another email to upper management in December 2015. The 87-page document, titled “Performance Diagnostic: A Guide to Move the Region to Performance Sustainability,” identified areas of mismanagement and offered strategies to recapture lost rents and reduce inefficiencies. J.A. 1848–1930. Additional emails followed in January and February 2016.

In February 2016, Mr. Roman Augustus became Mr. Smith’s immediate supervisor. In March, he again instructed Mr. Smith to “please communicate and coordinate with me via email prior to generating, compiling and forwarding any reports, direction, data requests or analytical narratives to the region.” J.A. 513. Shortly thereafter, Mr. Augustus proposed that Mr. Smith be suspended for his failure to follow his previous supervisors’ similar communication instructions. The agency imposed that suspension in June 2016.

Over the spring and summer of 2016, Mr. Smith’s and Mr. Augustus’s relationship became increasingly contentious. Mr. Augustus complained that Mr. Smith failed to timely forward documents, and Mr. Smith responded by email “[c]all me a liar—or just confront me with any mild infraction of your rules—I can handle it.” J.A. 1840. During meetings, Mr. Smith challenged Mr. Augustus’s authority, stating, “[y]ou are my administrative supervisor,” “[y]ou cannot self-direct me,” “[d]on’t put regulations on me,” J.A. 371–72, “[y]ou’re not supposed to be giving me tasks,” and “I am next to you, not under you,” J.A. 378–79. In a letter, Mr. Smith complained to human resources that Mr. Augustus’s management approach amounted to “dictates or child-like amonmondishments [sic].” J.A. 1614. And in another document, Mr. Smith urged agency officials that “moving forward, [Mr. Augustus] is prohibited from interfering with the duties, obligations, and authorities as promulgated in the [2015 revised position description].”

J.A. 4. Mr. Augustus felt that on each of these five occasions, Mr. Smith had been disrespectful.

Mr. Augustus responded by informing Mr. Smith that “such conduct will not be tolerated and may result in disciplinary action.” J.A. 1840. He reprimanded Mr. Smith for failing to follow instructions regarding how and when tasks should be completed. And he issued a record of infraction, accusing Mr. Smith of violating GSA’s information technology (“IT”) policy by leaving his computer access card (“PIV” card) unattended in his laptop in his cubicle. Mr. Augustus did not acknowledge that Mr. Smith, a quadriplegic, had never removed the PIV card from his laptop because he was physically unable to do so.

On September 14, 2016, Mr. Augustus proposed removing Mr. Smith from his position. Mr. Augustus charged Mr. Smith with failure to comply with IT policy, failure to follow supervisory instructions, and disrespectful conduct towards a supervisor.<sup>1</sup> The deciding official determined that “the reasons for [the] proposed removal fully support and justify” removal, and the agency removed Mr. Smith from his position. J.A. 1664.

## II

Mr. Smith appealed to the Board, arguing that the charged conduct did not merit discipline and that the agency was retaliating against him for his whistleblowing. *See* 5 U.S.C. §§ 7511–15; 5 C.F.R. § 1201.3(a)(1). The Administrative Judge (“AJ”) agreed that Mr. Smith was a whistleblower because of his December 2015 “Performance Diagnostic” disclosure. The AJ further found that, based on the timing, a reasonable person could conclude that Mr. Smith’s disclosure contributed to the agency’s decision to remove Mr. Smith. Nevertheless, the AJ affirmed GSA’s

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<sup>1</sup> A fourth charge, absence without leave, was not sustained by the Board and is not at issue on appeal.

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