

**United States Court of Appeals
for the Federal Circuit**

ELFINA MCINTOSH,
Petitioner

v.

DEPARTMENT OF DEFENSE,
Respondent

MERIT SYSTEMS PROTECTION BOARD,
Intervenor

2019-2454

Petition for review of the Merit Systems Protection Board in No. DC-0752-17-0803-I-4.

Decided: November 9, 2022

PHILIP SHENG, Davis Polk & Wardwell LLC, Menlo Park, CA, argued for petitioner. Also represented by COREY M. MEYER, New York, NY.

GALINA I. FOMENKOVA, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent. Also represented by BRIAN M. BOYNTON, MARTIN F. HOCKEY, JR., ALLISON KIDD-

MILLER.

STEPHEN FUNG, Office of General Counsel, United States Merit Systems Protection Board, Washington, DC, argued for intervenor. Also represented by TRISTAN L. LEAVITT, KATHERINE MICHELLE SMITH.

Before LOURIE, BRYSON, and HUGHES, *Circuit Judges*.

HUGHES, *Circuit Judge*.

The Department of Defense removed Elfina McIntosh from her position. Ms. McIntosh alleged she was removed for protected whistleblowing activity. The Merit Systems Protection Board sustained the removal and concluded that the Department would have removed her even absent her protected whistleblowing activity. She now challenges the Board's decision, arguing (1) that the Board's administrative judges are improperly appointed principal officers under the Appointments Clause and (2) that substantial evidence does not support the Board's decision on her removal. We affirm.

I

Elfina McIntosh was employed by the Department of Defense Education Authority as a Program and Budget Analyst. In her role as a Contracting Officer's Representative (COR), Ms. McIntosh was responsible for approving travel expenses for two government contracts. Generally, contractor employees would submit a travel request to the Program Manager, Heather McIntosh-Braden (no relation to Ms. McIntosh), who would then forward them to Ms. McIntosh for review. Ms. McIntosh would ensure the requests complied with Federal Travel Regulations and approve or reject them.

Ms. McIntosh received a promotion around October 2016. Following her promotion, Ms. McIntosh's superiors

noted that her “demeanor degraded” and her “work ethic deteriorated.” J.A. 887. The agency raised two repeated problems with Ms. McIntosh’s job performance: refusal to approve invoices and refusal to provide contract information to her coworkers as directed.

First, in December 2016, Ms. McIntosh refused to approve a travel authorization request that was submitted to her on the same day as the scheduled travel because she believed she would need to change the start date for it to be contractually appropriate. Her supervisor, Wayne Boswell, stated that this was an emergency circumstance and that the request should be approved to prevent negative impacts on the armed forces. He stated that if she would not approve it, he would. Ms. McIntosh maintained that it would be inappropriate for Mr. Boswell to do so because he was not the designated COR, even though he was the Director of the Office of Financial Readiness.

This was not the only instance of Ms. McIntosh refusing to approve invoices, as she also refused to approve invoices if she herself had not authorized the travel, even if the travel had been authorized by others, like Mr. Boswell, Ms. McIntosh-Braden, or the Contracting Officer Louis Gilden. Mr. Boswell explained to Ms. McIntosh that the contracting officer had informed him that he, as the Director, and Ms. McIntosh-Braden, as the Program Manager, could also approve travel requests. On February 8, 2017, Mr. Boswell informed Ms. McIntosh that her refusal to review and approve invoices amounted to a “refus[al] to perform [her] job requirements.” J.A. 1074. That same day, Ms. McIntosh filed a grievance against Mr. Boswell, alleging that he had directed her to approve invoices she had not authorized.

Second, Ms. McIntosh was asked, but repeatedly refused, to provide detailed information about one of her assigned contracts to Mr. Boswell, Ms. McIntosh-Braden, and her coworker, Andy Cohen, who had been asked to review

the contract processes. Ms. McIntosh objected because “the documents and information at issue were sensitive and could only be shared on a need-to-know basis.” J.A. 15. Ms. McIntosh also asserted that Mr. Cohen was not a COR on the contract and so was not authorized to receive any information about it. Mr. Boswell, as the Director, gave his authorization. Ms. McIntosh filed more formal grievances on these incidents, alleging that she was being forced to disclose unauthorized information and was harassed and belittled by Mr. Cohen and Mr. Boswell.

The agency investigated Ms. McIntosh’s grievances, interviewing several of her co-workers and supervisors. Ms. McIntosh did not respond to the investigator’s request for an interview. Based on its investigation, the agency denied Ms. McIntosh’s grievances on June 27, 2017, determining that the agency “did not create a hostile work environment or violate any law, rule, or regulation, as alleged.” J.A. 258–59.

In February 2017, Mr. Boswell asked Ms. McIntosh to send him her annual leave plan because she had significant use-or-lose leave left over from 2016. In response, Ms. McIntosh sent Mr. Boswell an email with “Tentative Leave Dates” that “may be changed or modified,” including March 27–April 3, 2017. J.A. 176.

On March 22, 2017, Ms. McIntosh sent Mr. Boswell an email with the subject line “Sick Leave, 3-22” and no other text. J.A. 1030. Mr. Boswell wished her a speedy recovery but also found her absence curious because they had scheduled her performance review for that day, before Mr. Boswell’s imminent retirement. Mr. Boswell sought guidance from Employee Relations, who advised that he could require Ms. McIntosh to submit medical documentation from a licensed doctor that should “[i]nclude a statement that the medical problem rendered her incapacitated for the performance of her duties[.]” J.A. 1031. Mr. Boswell requested the documentation.

Ms. McIntosh again emailed in sick on March 23 and 24. She was also absent from work from March 27–April 4, 2017. She asserted that she had been granted that leave after she sent Mr. Boswell the email with her tentative leave dates. But Mr. Boswell asserted in his sworn statement that, while he received that email, Ms. McIntosh never submitted an actual leave request, nor did Mr. Boswell approve all the dates at issue. He also provided email documentation that showed he had tried to contact Ms. McIntosh about the tentative leave dates because he had no active request for the leave in the attendance system.

Ms. McIntosh returned to work on April 5, by which time Mr. Boswell had retired and Mr. Cohen had become her supervisor. Upon her return, Ms. McIntosh submitted a letter from her doctor that said she “should be excused from work due to illness from 3/22/2017 through 3/24/2017.” J.A. 1035. Mr. Cohen, who had since been promoted to replace Mr. Boswell, consulted Employee Relations and determined that the documentation was not administratively acceptable. He requested further documentation and gave her 15 days to procure it. Ms. McIntosh never provided the added documentation.

Upon returning to work on April 5, Ms. McIntosh went to meet with John T. Hastings, her second-level supervisor, to discuss her grievances. He directed her to meet with Mr. Cohen, but she refused, reiterated her grievances, and requested reassignment. She then emailed the contracting officers of the two contracts she managed and told them to remove her as COR immediately.

On the morning of April 6, Mr. Cohen sought to speak with Ms. McIntosh, but she told him that he should email her instead and left. She then went to Mr. Hastings’s office to speak with him. After he asked her to wait a few moments as he finished a task, he turned to her. She responded, “[n]ever mind, I’ll handle it myself. I’m not doing COR duties anymore.” J.A. 495. She then left and, on her

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