

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE**

ROBERT J. MACLEAN,
Appellant,

DOCKET NUMBER
SF-0752-06-0611-I-2

v.

DEPARTMENT OF HOMELAND
SECURITY,
Agency.

DATE: May 12, 2010

Larry A. Berger, Esquire, Glen Cove, New York, for the appellant.

Thomas Devine, Esquire, Washington, D.C., for the appellant.

Eileen Dizon Calaguas, Esquire, San Francisco, California, for the agency.

BEFORE

Franklin M. Kang
Administrative Judge

INITIAL DECISION

INTRODUCTION

The appellant timely appealed the Transportation Security Administration's (TSA) decision to remove him from the position of Federal Air Marshal (FAM), with duties in Los Angeles, California, effective April 11, 2006. Initial Appeal File 1 (IAF-1), Tab 1, 4. On October 5, 2006, an administrative judge dismissed this appeal without prejudice at the request of the appellant. IAF, Tab 29. This initial decision (ID) became final on November 9, 2006 when the parties declined to file a petition for review. *See id.*

On October 15, 2008, the appellant timely refiled this appeal. Initial Appeal File 2 (IAF-2), Tab 1. The Board assigned this refiled appeal to a second administrative judge. IAF-2. On June 22, 2009, the Board issued an Opinion and Order addressing matters certified for interlocutory appeal. IAF-2, Tab 27. On July 13, 2009, the second administrative judge informed the parties that the Board had ruled on the issues certified for interlocutory appeal and advised the parties that the adjudication would resume. IAF-2, Tab 29. Thereafter, this appeal was reassigned to a third administrative judge. IAF-2, Tab 31.

A hearing was held on November 5, 2009 as specified below. Hearing Compact Disc (HCD). The appellant traveled from California to Virginia to appear with his attorneys from the Board's Washington Regional Office by video-conference (VTC), while the agency appeared from the Board's Western Regional Office in California as well as the Washington Regional Office. *Id.* The Board has jurisdiction under 5 U.S.C. §§ 7511-7513 and 7701. For the reasons explained below, the agency's action is AFFIRMED.

ANALYSIS AND FINDINGS

Burden of Proof and Applicable Law

The agency bears the burden of proof by preponderant evidence with respect to the reasons for the action and its choice of penalty. 5 C.F.R. § 1201.56(a). Preponderant evidence is defined as the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.56(c).

Background

At the time of his removal, the appellant, born in 1970 with a service computation date in 1992, was a preference eligible FAM, SV-1801-9, assigned to Los Angeles, California. IAF-1, Tab 4, Subtab 4F; IAF-2, Tab 45, Exhibit S.

It is undisputed that the appellant was an employee pursuant to 5 U.S.C. § 7511(a)(1) at the time of his removal.

According to a Report of Investigation (ROI) in the record evidence, based on a September 2004 report of an unauthorized media appearance by the appellant, the agency initiated an investigation. IAF-1, Tab 4, Subtab 4J. On May 4, 2005, during an investigative interview conducted by the agency's Immigration and Customs Enforcement (ICE) Office of Professional Responsibility (OPR), the appellant submitted a signed and sworn affidavit stating in relevant part:

For the July 29, 2003 article, I informed [the reporter] that all Las Vegas FAMS were sent a text message to their Government issued mobile phones that all RON (Remain Overnight) missions up to August 9 would be canceled. My supervisor told me that the Service ran out of funds for overtime, per diem, mileage and lodging.

....

Due to the fact that my chain of command, the DHS OIG and my Congressmen all ignored my complaints and would not follow them up with investigations, I have NO REGRETS or feel NO REMORSE for going to a credible and responsible media representative, [the reporter]. [The reporter] reporting these gross mismanagement issues has resulted in immediate and positive change in deadly FAMS policies.

IAF-1, Tab 4, Subtab 4J (appellant's affidavit) (upper case lettering in original). Following this interview, the agency's investigators concluded, *inter alia*, that the appellant made an unauthorized release of information to the media. *Id.*, Subtab 4J.

On September 13, 2005, the appellant received a Proposal to Remove (proposal or proposed removal), charging the appellant with Unauthorized Media Appearance, Unauthorized Release of Information to the Media, and Unauthorized Disclosure of Sensitive Security Information (SSI). IAF-1, Tab 4, Subtab 4G. On April 10, 2006, Special Agent in Charge (SAC) Frank Donzanti

issued a decision on the proposed removal, sustaining only the third charge and the proposed penalty. *Id.*, Subtab 4A.

The third charge, Unauthorized Disclosure of SSI, is accompanied by a single specification. IAF-2, Tab 67 at 5-6. The underlying specification contains background information and alleges that on July 29, 2003, the appellant informed the media that all Las Vegas FAMs were sent a text message on their government issued mobile phones that all remain overnight (RON) missions up to August 9th would be cancelled, or words to that effect, and that this constituted an improper disclosure of SSI because the media person to whom this information was disclosed was not a covered person within the meaning of SSI regulations, and the information about RON deployments was protected as SSI. *Id.* On May 10, 2006, the appellant timely filed his petition for appeal. IAF-1, Tab 1.

On August 31, 2006, the agency's SSI Office Director issued a final order (AFO) on SSI related to this appeal, stating in part:

[I]t is my determination that, on July 29, 2003, the information in question constituted SSI under the SSI regulation then in effect, 49 C.F.R. § 1520.7(j),[] as the information concerned specific FAM deployments or missions on long-distance flights.

....

Pursuant to 49 U.S.C. § 46110, any person disclosing a substantial interest in this Order may, within 60 days of its issuance, apply for review by filing a petition for review in an appropriate U.S. Court of Appeals.

IAF-1, Tab 22, Attachment. The AFO explained through a footnote that on May 18, 2004, the agency recodified section 1520.7(j) at section 1520.5(8)(ii). *Id.*

The text of 49 C.F.R. § 1520.7(j)¹ in effect at that time, current through October 1, 2003 defined SSI as follows:

¹ Under 49 C.F.R. § 1520.5(b)(8)(ii), information concerning deployments, numbers, and operations of FAMs is considered SSI.

Specific details of aviation security measures whether applied directly by the TSA or entities subject to the rules listed in § 1520(a)(1) through 6. This includes, but is not limited to, information concerning specific numbers of Federal Air Marshals, deployments or missions, and the methods involved in such operations.

See IAF-1, Tab 4, Subtab 4M.

In granting the appellant's request for a dismissal without prejudice, the ID stated:

After the action was taken and the appellant filed his appeal, the agency issued a "Final Order" dated August 31, 2006, determining that the appellant's disclosure is covered under the regulation at issue. A right of review is provided in the U.S. Court of Appeals pursuant to 49 U.S.C. § 46110.

IAF-1, Tab 29. The ID explained that the appellant intended to pursue such a review, and the appellant's appeal was dismissed without prejudice to refiling. *Id.* The ID thereafter became the final decision of the Board. *See id.*

On September 16, 2008, the U.S. Court of Appeals for the Ninth Circuit ruled on the appellant's petition for review of the AFO. *MacLean v. Department of Homeland Security*, 543 F.3d 1145 (9th Cir. 2008). In denying the appellant's petition through this *per curiam* opinion, the 9th Circuit wrote, in part:

In late July, 2003, while working as a Federal Air Marshal in Nevada, MacLean received a text message on his government-issued cell phone stating that "all RON (Remain Overnight) missions ... up to August 9th would be cancelled." This message indicated to MacLean that there would be no Federal Air Marshals on overnight flights from the time of the text message up to August 9, 2003. MacLean believed that the cancellation of these missions was detrimental to public safety. He raised this concern with his supervisor,[] who did not make further inquiry. MacLean then attempted unsuccessfully to alert the Office of Inspector General. On July 29, 2003, MacLean disclosed the text message to members of the press. The Federal Air Marshal Service later confirmed that the text message's contents did not reflect a final decision of its director and there was no cancellation of overnight missions.

....

Pursuant to [49 U.S.C. § 46110\(c\)](#), we have jurisdiction to review only final agency “orders.” We have jurisdiction to review the TSA order.

....

[Section 1520.7\(j\)](#) (2003) designates as “sensitive security information ... [s]pecific details of aviation security measures ... applied directly by the TSA ... [which] includes, but is not limited to, information concerning specific numbers of Federal Air Marshals, deployments or missions, and the methods involved in such operations.” Information falling within this designation is *automatically considered* “sensitive security information” without further action from the TSA. [49 C.F.R. § 1520.7 \(2003\)](#). The TSA has authority to designate information as “sensitive security information” pursuant to [49 U.S.C. § 114\(s\)](#) and [49 C.F.R. § 1520](#).

[] The information contained in the text message qualifies as “sensitive security information.” The message contained “specific details of aviation security measures” regarding “deployment and missions” of Federal Air Marshals. [49 C.F.R. § 1520.7\(j\)](#) (2003).

....

MacLean has failed to demonstrate what more the TSA needed to show to support the order. The order is valid

....

The Whistleblower Protection Act does not apply to the order. The order is not a “personnel action,” as required by the Act.[] It is merely a determination that [] the text message contained “sensitive security information” pursuant to [49 C.F.R. § 1520.7\(j\)](#). The fact that the order has some impact on MacLean's proceedings before the MSPB does not convert it to a “personnel action.”

....

The TSA order does not constitute a retroactive agency adjudication. Rather, the agency applied regulations that were in force in 2003 to determine that information created in 2003 was “sensitive security information.” ... The TSA order comports with the “principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place.”

Id. (italics added). On October 15, 2008, the appellant timely refiled this appeal, and the Board assigned this appeal the second administrative judge. IAF-2, Tabs 1, 2. It is undisputed that at the time of the events at issue, inclusive of the

specification before the Board, the appellant was assigned to the FAM service center in Law Vegas, Nevada. *See* IAF-2, Tab 45, Exhibit X; IAF-2, Tab 49, Exhibit PPP.

On February 10, 2009, the second administrative judge granted a motion to certify specific rulings for interlocutory appeal as follows. IAF-2, Tab 23. The issues were: (1) whether the Board has the authority to review the determination by the agency, and affirmed by the Ninth Circuit, that the information the appellant disclosed constituted SSI; (2) whether the fact that the agency did not issue its order finding the information the appellant disclosed to be SSI until after it had removed him has any effect on the issue in (1), above; and (3) whether a disclosure of information that is SSI can also be a disclosure protected by the Whistleblower Protection Act (WPA).

On June 22, 2009, the Board issued its Opinion and Order, ruling on the above enumerated items as follows. *MacLean v. Department of Homeland Security*, 112 M.S.P.R. 4 (2009). In addressing question (1), the Board held that under the facts of this appeal, the Board does not have the authority to review the agency's SSI determination because the Ninth Circuit has issued a decision upholding the agency's determination. *Id.* at 11. For question (2), the Board explained that the timing of the AFO did not alter its conclusion on question (1) because Congress provided individuals a judicial mechanism to challenge the SSI determination through the U.S. Court of Appeals, and the appellant actually availed himself of that opportunity. *Id.* at 12. The Board continued, explaining that the grant of exclusive jurisdiction in Federal court was triggered in this particular case, therefore, the Board lacks authority to review the agency's determination on this matter. *Id.* On question (3), the Board found that a disclosure in violation of the regulations governing SSI is prohibited by law within the meaning of 5 U.S.C. § 2302(b)(8)(A) and cannot give rise to whistleblower protection. *Id.* at 18.

On July 13, 2009, the second administrative judge scheduled a status conference to address the adjudication schedule for this matter IAF-2, Tab 29. On July 22, 2009, prior to this status conference, this case was reassigned to a third administrative judge. IAF-2, Tab 31.

On September 22, 2009, the parties appeared for a prehearing conference. IAF-2, Tab 59; *see* IAF-2, Tabs 73, 75. At the request of the appellant, the hearing and the remainder of the prehearing conference were delayed. *Id.* The hearing was thereafter further delayed at the request of the agency, then convened on November 5, 2009 as described above. IAF-2, Tabs 62, 75; HCD. On November 16, 2009, the parties filed their closing arguments and the record was closed for all matters. HCD; IAF-2, Tabs 77-79.

On February 23, 2010, the appellant moved to reopen the record to receive additional evidence identified as newly discovered evidence. IAF-2, Tab 80. Through this motion, the appellant argues that on February 17, 2010, the agency's Office of the Inspector General (OIG) issued a report on the breach of SSI finding that the agency's Office of SSI violated many of its own SSI policies, resulting in the unauthorized release of SSI, without appropriate redaction. *See id.* The appellant argues that this evidence is material because the Office of SSI "cannot follow its own directives" then he should not have been removed as a FAM for the charge at issue. *Id.* The appellant adds that the controls for SSI were found to be defective and deficient creating inconsistency and confusion. *Id.* In response, the agency opposed the appellant's motion to reopen the record, arguing that the proffer is procedurally defective, untimely filed without good cause, speculative, and irrelevant. IAF-2, Tab 81. The agency argues that the OIG report involved "inadvertent" disclosures of SSI while the charged misconduct at issue involves an intentional disclosure. *Id.* The appellant thereafter replied to the agency's response, arguing that the OIG report was issued after the close of the record, and that it is relevant to the appellant's argument that the appellant acted in good faith under rules that were inconsistent

and confusing. IAF-2, Tab 82. Through his reply, the appellant correctly points out that the “charge at issue[,]” distinct from the penalty consideration, “does not allege that Mr. MacLean intentionally disclosed SSI information[.]” *Id.* In responding to the appellant’s reply, the agency argued the OIG report did not involve any law enforcement officers, and that the scope of the report did not include any disciplinary actions. IAF-2, Tab 83. The agency further adds that the appellant’s charged misconduct differs from using “the use of computer-made redactions that failed to conceal SSI permanently.” *Id.*

In addressing another point through his underlying motion, the appellant states that Mr. Donzanti has, since the time of the actions at issue, been demoted to Deputy SAC, adding that Mr. Donzanti “is alleged by several current and former Los Angeles Federal Air Marshals” to have a past agreement with the Director of the agency’s FAM Service (Director), based on “an illicit affair” with a subordinate FAM who was previously assigned to headquarters (subordinate FAM). IAF-2, Tab 80. The appellant explains that in 2004, under an agreement between Mr. Donzanti and the Director, the subordinate FAM was transferred from headquarters to Los Angeles and no disciplinary action taken against Mr. Donzanti, in exchange for Mr. Donzanti terminating the appellant at the direction of the Director. *Id.* The appellant argues that this 2004 agreement between Mr. Donzanti and the Director allowed the agency to issue the 2006 decision on the appealed removal at the field level, rather than the headquarters level. *See id.* In addition to the opposition above, the agency argues that the appellant could have introduced and/or cross examined Mr. Donzanti about these 2004 matters at the hearing, adding that the appellant deposed Mr. Donzanti in 2006. IAF-2, Tab 81. Through his reply, the appellant argues that the information about Mr. Donzanti is relevant to showing that Mr. Donzanti acted to ensure his professional survival. IAF-2, Tab 82. Through its response to the reply, the agency argues that the motion on this issue is speculative and irrelevant. IAF-2, Tab 83.

While I have no reason to doubt that there have been subsequent breaches of SSI procedures by the agency employees as alleged, it is unclear how showing the occurrences of other such events constitutes good cause for reopening the record, in light of the fact that the evidence does not address what disciplinary actions or penalties, if any, were taken against or imposed on any agency employees, and the fact that the evidence does not affect whether or not the charged misconduct occurred.

With respect to the allegations involving Mr. Donzanti's change from SAC to Deputy SAC, and his interactions with the agency's headquarters personnel, the appellant fails to explain why these matters are being raised following the close of the record, since the appellant could have elicited testimony about these specific topics during Mr. Donzanti's deposition and/or during the hearing, prior to the record closing. *See* HCD. Specifically, in addition to having the opportunity to depose Mr. Donzanti, the appellant had a subsequent opportunity to question Mr. Donzanti about these matters at the hearing including his service as a Deputy SAC at the hearing:

JUDGE KANG: Please state your full name for the record, spelling your last name.

THE WITNESS: Frank Joseph Donzanti, D-o-n-z-a-n-t-i.

JUDGE KANG: Mr. Donzanti, please state your current position and title for the record.

THE WITNESS: I am the Deputy Special Agent in Charge of the Los Angeles Field Office for the Federal Air Marshal Service.

HCD. With regard to the role of headquarters and/or the Director, including the headquarters Policy Compliance Unit (PCU), the appellant's attorneys questioned Mr. Donzanti as follows:

Q. And did you work on this removal letter with anyone from — from Headquarters?

A. To some extent I may have had some impact. I don't remember exactly what it was. But most of the letter was drafted by

Headquarters personnel. And that would be in HR, Human Resources.

Q. During — thank you. And during the entire process of deciding what to do about Mr. MacLean, did you work with the Policy Compliance Unit at Headquarters?

A. Yes, I did.

Q. And who were the — who was the supervisory official there that you worked with?

A. I believe it was — [BB] was the SAC at the time and [MM] was one of the ASACs.

Q. And who did [BB] report to?

A. At that time I'm not — I'm not sure who he reported to.

Q. So you don't know whether he reported to the Director or not?

A. It wouldn't be the Director. He would have reported to a Deputy Assistant Director, which one I'm not sure of.

Q. So it would have been either [the] Director [] or Director[]'s Assistant?

A. No, what —

Q. Is that correct?

A. I could explain it. You have a — you have a Director, you have a Deputy Director. Then you have an Assistant Director. Then you have a Deputy Assistant Director. So this person would be about four levels down the food chain.

MR. DEVINE: No further questions, Your Honor.

Id. In reviewing the appellant's arguments on these matters, the appellant fails to adequately explain why he could not have probed, elicited, or otherwise introduced these matters now raised, prior to the record closing. For the reasons set forth above, the appellant fails to show good cause for granting his motion on any of the bases raised, whether considered individually or in combination with one another. For these reasons, the appellant's motion to reopen the record is DENIED.

The Charge

As set forth above, the sole charge before the Board is Unauthorized Disclosure of SSI. IAF-2, Tab 67 at 5-6. To prove this charge, the agency must show that the appellant engaged in the conduct with which he is charged. *See, e.g., Otero v. U.S. Postal Service*, 73 M.S.P.R. 198, 201-205 (1997) (charge must be construed in light of accompanying specifications).

The underlying specification contains background information and alleges that on July 29, 2003, the appellant informed the media that all Las Vegas FAMs were sent a text message on their government issued mobile phones that all RON missions up to August 9th would be cancelled, or words to that effect, and that this constituted an improper disclosure of SSI because the media person to whom this information was disclosed was not a covered person within the meaning of SSI regulations, and the information about RON deployments was protected as SSI. IAF-2, Tab 67 at 5-6.

The Appellant's Testimony Regarding Training on Sensitive Information and SSI

In addressing this charge, the appellant testified that in November 2001, he attended FAM training. HCD. The appellant testified that during this month long training, the term "sensitive information" was used to describe flight times, flight numbers, and airline information. *See id.* In the months following the November 2001 training, the appellant testified that he reviewed "a very thick pamphlet of a policy going into - into detail of - of what was SSI." *Id.*

When asked about the vacancy announcement and the conditions of employment for his FAM position, the appellant testified that he knew that disclosing of sensitive information was a basis for removal. *See id.* The appellant testified that in 2002, the issue of SSI was further addressed in training, stating:

I signed a statement acknowledging that I — I attended a SSI training and read the — read the policy.

Id. The appellant further testified:

Well, there were — there were a lot of publications that we were — that we were given. I — I don't remember exactly, but I believe there was a — there was a master — there was a master folder that had probably a quarter-inch thick of — of SSI policies, just very wordy. And you had to — you had to sign a acknowledgement that you — you — you read the policy and understood it.

Id. In explaining the 2002 training, the appellant testified:

We were — we were distributed a list of — of issues that you just didn't — you didn't discuss, such as we were — we were given scenarios saying that some Air Marshals in the past had gotten in trouble for telling their significant others where to pick them up exactly, which gate, and which airline they were flying. It said a lot of guys have been — gotten in trouble and were *fired* for that, so you want to completely avoid it.

Id. (emphasis added). The appellant continued:

So if somebody needs to pick you up from the airport, you need to give them a window and tell them, for instance, a baggage claim area, not an exact flight number and airline that they'll be — you'll be flying in on.

....

The training was done in sort of hypothetical situations. If — if you needed somebody to pick you up from the airport, you — you had them wait for you in the baggage claim. You do not tell them the flight number that you were arriving on, or did you tell them origins, destinations of — of a particular flight because the big issue there was a lot of Air Marshals had gotten into a lot of hot water for telling people the flight numbers and the flight times of certain plane flying that — that they were going to come into.

....

So it was very, very clear that you did not tell flight numbers and times of the flights you flew missions on.

Id. When asked about the known absence of FAMs on a particular flight, the appellant testified:

If I told somebody that a particular flight was not going to have any protection on it, that endangered that specific flight.

Id.

The Appellant's Testimony Regarding the Text Message

The appellant testified that FAMs at that time were issued an encrypted password protected personal digital assistant (PDA) and a Nokia cell phone that the appellant believed was neither encrypted nor password protected in the same way as the PDA. *Id.*

The appellant testified that between July 26-28, 2003, “everybody in the country had received a text message to the Nokia phones” as follows:

And the message simply stated that all overnight missions were going to be canceled — no — and you needed to can- — you needed to cancel your hotel reservations and call the office to get new schedules.

Id. The appellant testified that he did not understand this information to be SSI because the text was sent to his government issued cell phone rather than his PDA, explaining that while both devices were capable of handling text messages:

I figured if — if they weren't going to send — if they didn't send text messages to the plain Nokias, if it was sent to the PDA, I assumed that it is more sensitive — it has some sensibility [sic] to it.

Id. The appellant further explained:

It — not only — it was — not only it didn't have any markings, SSI markings, not even a warning that this — don't disseminate this or — it had — it had nothing on there. It was just a — it was just a plain message.

Id.

The Appellant's Testimony Regarding OIG and the Reporter

In explaining the context of this point in time and his decision to call OIG, the appellant testified that FAMs had “just gotten the - this suicide hijacking alert that was issued” and that he and other FAMs were taking issue with the agency's dress code and grooming standards policy. *Id.* The appellant testified that he learned that the decision to cancel RON missions was one made at the headquarters level. *Id.* The appellant testified:

It just seemed that the — the Agency had — had either lost control or was just making a grave mistake. And I decided, well, I'll try the OIG.

Id. The appellant testified that when he spoke with an OIG Special Agent (SA), the OIG SA informed him “there’s nothing that could be done.” *Id.* The appellant continued:

And so it looked like it wasn't going anywhere. And after I hung up, I kind of stewed on this thing. And I decided to make a phone call to a reporter that had been doing some good reporting on — on TSA. I thought he wrote — wrote some very responsible articles

....

I told him that there — there was a plan to remove Air Marshals off of all long-distance flights, and this was right after we just got our — our suicide hijacking briefings.

....

And the information, I believe, was — may have been potentially harmful had this plan ever gone into effect. I didn't think it was illegal, but I thought that what was happening was illegal and dangerous to the — to the public.

....

There was — yeah, I believe there was — there was a very good possibility that he would have made it public. I didn't know the story was going to be as big as it was.

Id.

When asked about the specifics of his conversation with the reporter in relation to the specification before the Board, the appellant responded to the agency’s questions as follows:

Q. When you spoke to [the reporter] and disclosed the information to him, you told him that RON missions out of Vegas were being canceled; isn't that right?

A. No, I did not.

Q. You were specific to identify that the text messaging went to the Vegas Field — Federal Air Marshals; isn't that right?

A. No, ma'am. Not at all.

Q. You identified yourself as being from the Las Vegas Field Office; isn't that right?

A. Can I see the exhibit? I don't remember if I was identified as a Las Vegas Federal Air Marshal.

Q. You don't remember identifying yourself as coming from Las Vegas when you were talking about these —

A. I don't remember. I thought you were referring to the article.

Q. I'm referring to your discussions with Mr. Meeks.

A. I — I don't remember if I told him I was — I was based in Las Vegas or not.

Q. But you told him that the text messaging went to officers from Las Vegas Field Office; isn't that right?

A. I don't remember saying specifically Las Vegas, because I knew there were Air Marshals across the country that were getting the same message.

Q. In fact, that's what you also told the investigator at the time that the Office of Professional Responsibility was looking into it; isn't that right?

A. Can I — can I re- — I don't know that verbatim. If that's the — if that's what the affidavit states, I — I need to read it. I don't know specific — I do not know from memory if I told anybody — if I stated that I — I identified to [the reporter] that it was Las Vegas Air Marshals.

Id. Upon redirect by his counsel, the appellant testified as follows:

Q. Are you aware whether there are any other sources of information to Mr. Meeks in his various articles other than yourself?

A. Yes. His [the reporter's] subsequent article stated there was more than one source, and he sent me and my attorney, my former representative in this case, that there were — there were more than one. So there were three sources that he — that he spoke to.

Id.; IAF-2, Tab 63, Exhibit RRR (email from the reporter to the appellant's attorney submitted by the appellant). Through his testimony and the referenced email, the appellant appears to challenge the specification at issue in this charge.

Hillen v. Department of the Army, 35 M.S.P.R. 453, 458 (1987).

In observing the appellant's testimony at the hearing, I found the appellant to be evasive, nuanced, and inconsistent. *Id.* Throughout his testimony, the appellant insisted that he did not believe that the text message above constituted SSI or was sensitive information because it was delivered to his government issued cell phone rather than his PDA. *Id.*; HCD. However, as set forth above, the appellant also testified that based on his SSI training, he understood that he was to "completely avoid" telling anyone "where to pick them up exactly, which gate, and which airline they were flying" because it could lead one to learn which flight or flights were secured by a FAM or FAMs. *Id.* The appellant then testified that "If I told somebody that a particular flight was not going to have any protection on it, that endangered that specific flight" because, presumably, this information would lead one to learn that a particular flight was *not* secured by a FAM. *Id.* The appellant's testimony that revealing the presence or absence of a FAM on a particular flight and/or gate in the circumstances above is inconsistent and contrary to his assertion that canceling RON missions for a specified period "was just a plain message" rather the type of message discussed in his SSI training, because such a disclosure necessarily conveys the latter scenario addressed by the appellant above. *Id.* The appellant's assertion that this specific information could not have been sensitive because the text was delivered to his government issued cell phone rather than the PDA, without SSI markings, is inconsistent with his own testimony, and improbable under these circumstances.

Further, the appellant's flat denial that he informed the reporter that RON missions out of Las Vegas were being cancelled is belied by the appellant's sworn and written statement of May 4, 2005, wherein the appellant specified that he informed the reporter that all Las Vegas FAMs were sent a text message to their government issued mobile phones that all RON missions up to August 9, 2003 would be cancelled. *Id.*; IAF-1, Tab 4, Subtab 4J (appellant's affidavit). To the extent the appellant argues that he could not have been the source for the

reporter's story because he, as a law enforcement officer, would not break the law to prevent the agency from executing the actions above, which the appellant believed were incorrect, this assertion is also belied by the appellant's affidavit. *Id.* Specifically, the appellant previously stated in a sworn statement that he had "NO REGRETS or feel NO REMORSE for going to a credible and responsible media representative ... reporting these gross mismanagement issues has resulted in immediate and positive change in deadly FAMS policies" because his chain of command, OIG, and Members of Congress had "all ignored my complaints[.]" *Id.* The appellant agreed that during his deposition, he testified under oath that it did not matter whether or not the information conveyed to the reporter was SSI. *Hillen*, 35 M.S.P.R. at 458; HCD; IAF-2, Tab 44, Exhibit 8 at 2.

In observing the appellant at hearing, I found that the appellant's attempts to distinguish, explain, and qualify his prior written statements under oath, as well as his deposition testimony, were not persuasive. *Hillen*, 35 M.S.P.R. at 458. Indeed, observing the appellant's hearing testimony highlighted the sentiment expressed by the appellant during his May 4, 2005 interview, and illustrated that the appellant was, to some degree, acting on his frustration with OIG and his superiors, in conveying information to the reporter, rather than a belief that the text message at issue was not SSI as stated at the hearing. *Id.* For these reasons, to the extent the appellant now denies that he conveyed the information specified above involving RON missions out of Las Vegas, I find that the appellant's testimony to this effect is not creditable. *Id.*

Based on a careful review of the record evidence, in particular the sworn statement and testimony of the appellant, I find that the agency has shown by preponderant evidence that on July 29, 2003, the appellant informed the reporter that all Las Vegas FAMs were sent a text message on their government issued mobile phones that all RON missions up to August 9th would be cancelled, or words to that effect. *Hicks v. Department of the Treasury*, 62 M.S.P.R. 71, 74 (1994). With respect to the characterization of this information, the Ninth Circuit

has ruled that the information contained in the text message qualifies as SSI because it contained specific details of aviation security measures regarding deployment and missions of FAMs. *Id.*; *MacLean*, 543 F.3d 1145. Accordingly, I find that the agency has met its burden of proving by preponderant evidence that information on RON deployments at issue was SSI; I further find that the agency has met its burden of proving by preponderant evidence that the information disclosed by the appellant to the reporter on July 29, 2003 was SSI. *Id.*

With respect to the reporter's status, the appellant does not dispute that if the information at issue was SSI, the reporter was not authorized to receive this information. *See* HCD (testimony of the appellant). Within the agency's SSI regulations, the agency has shown, and the appellant has not disputed, that the reporter was not a person with a "Need to Know" within the meaning of the Interim SSI Policies and Procedures in effect as of November 13, 2002. IAF-1, Tab 4, Subtab 4N. Accordingly, I find that the agency has shown by preponderant evidence that the media person to whom the SSI was disclosed, was not a covered person within the meaning of SSI regulations. *Hicks*, 62 M.S.P.R. at 74. Because this person was not authorized to receive this SSI, I find that the agency has shown by preponderant evidence that the disclosure of the SSI by the appellant to the reporter was unauthorized. *Id.*

For the above reasons, I find that the agency has proven the factual assertions as set forth in the specification underlying this charge. The specification is SUSTAINED. I further find that the agency has shown by preponderant evidence that the appellant engaged in the unauthorized disclosure of SSI as charged. *Id.*; *see, e.g., Otero*, 73 M.S.P.R. at 201-205. The charge is SUSTAINED.

Affirmative Defenses

The appellant has the burden of proving his affirmative defenses by preponderant evidence. 5 C.F.R. § 1201.56(a)(2)(iii). Following a discussion

with the appellant's attorneys about the affirmative defenses in this appeal, the appellant clarified that he was alleging that the agency discriminated and retaliated against him based on his membership and leadership status with a professional association² (PA) for other than merit reasons in violation of 5 U.S.C. § 2302(b)(10); and that this alleged discrimination and retaliation violated his First Amendment rights. No other affirmative defenses are alleged in this appeal. IAF-2, Tab 67 at 5-6.

The Appellant's Claim Under Section 2302(b)(10)

Section 2302(b)(10) prohibits discrimination for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others. The appellant argues that the agency took the actions at issue in this appeal based on his service with a chapter of the Federal Law Enforcement Officers Association (FLEOA). The appellant specifies that approximately one month after conveying the information to the reporter as set forth in the specification discussed above, he began working on the Federal Air Marshal Service (FAMS) chapter of the FLEOA, thereafter serving as the chapter's executive vice president as follows:

About two to three weeks af- — I'd say about — about a month after I made my July 2003 disclosure, I began to organize the — and I cofounded the Federal Air Marshal Service Chapter within the Federal Law Enforcement Officers Association.

HCD (testimony of the appellant). The appellant testified that he “became a hot target for – by Headquarters” because he was the “number-two guy” in the chapter. *Id.* In discussing the OPR investigation underlying the charge and

² It is undisputed that the appellant does not belong to a recognized union, and that none of his activities in a professional association constituted protected union activities. IAF-2, Tab 67 at 5-6 (prehearing conference summary with the appellant's attorneys and an agency representative).

specification, the appellant testified as follows based on questions posed by his attorneys:

Q. Well, okay. So after the disclosure did you become aware that there was an investigation at some point, whenever it was?

A. Yes.

Q. How long after the disclosure was there an investigation?

A. Approximately 13 — 13 months.

Q. Okay. And —

A. I'm sorry. That's — that's incorrect. I had no — it would have been — it would have been approximately 23 months, 22 months when I knew there — I was under investigation for the — for the SSI disclosure.

Q. Okay. And when you first became aware of the investigation, was it for the SSI issue or were there other issues that you — that were involved?

A. Well, the investigation initially was started because of my appearance on [an evening national network news program]. And I was told by a supervisor in the field office that the Special Agent in Charge has begun an investigation to find out who was the Air Marshal on that program.

Q. Okay. And how soon after your appearance on that program that you became aware that you were the subject of an investigation?

A. Within days.

Q. Okay. And what did you understand the scope and the issues in that investigation were, initially?

A. They just wanted to know who was — it — it was — it was impossible any sensitive security information or classified information was divulged during my interview, so —

Q. With [the national network news anchor]?

A. That's correct.

Q. Okay.

A. It was just who find — just to find out who was — who was on the [evening national network news] program.

Q. Okay. And during the course of that investigation did there come a time when you informed the investigators that you — you had disclosed this information that the Agency considers to be SSI?

A. Yes. Approximately seven months later in May of — early May, the Of- — the Immigration and Customs Enforcement, Office of Professional Responsibility, ICE OPR, the investigators came in and gave me a pep talk, saying, "Be completely and fully forward here. You do not want to lie to us," —

Q. Um-hum.

A. — "because we will find out. So you need to tell us everything."

Q. And they asked you about that?

A. They asked me if I was the person, and I said yes.

Q. Um-hum.

Id. In relating his FLEOA activities to the investigation and OPR³ interview, the appellant testified that he became involved in creating the FAMS chapter of FLEOA approximately two to four weeks after disclosing the SSI because "I figured the best way to start addressing these problems was in a collective voice. ... And that's where things started getting very hectic." HCD.

When asked about his involvement with FLEOA, Mr. Donzanti testified that while he did not recall whether he was a member "on that exact date[,]” he has been a member of FLEOA for 25 years. HCD. To the extent the appellant argues or implies that Mr. Donzanti manipulated the ICE OPR ROI, it is undisputed that Mr. Donzanti did not speak to any of the individuals conducting the investigation and/or writing the ROI at issue. *Id.* (cross examination of Mr. Donzanti by the appellant). Further, there is nothing in the record to indicate that Mr. Donzanti or anyone else in FAMS had the ability to manipulate an active ICE OPR investigation and/or manipulate an actual OPR ROI. *See id.*

³ It is undisputed that ICE, rather than TSA, conducted the underlying investigation and wrote the ROI at issue. *See* HCD (testimony of Mr. Donzanti and the appellant).

While the appellant's involvement in FLEOA did indeed precede the investigation and OPR actions, the appellant's testimony at hearing reflects that his unauthorized appearance on a national network news program, rather than his FLEOA activities, was the catalyst the OPR's investigative actions including the ROI and investigative interview. *See* HCD. Specifically, even though the appellant asserts that he become a "hot target" after he began organizing and leading a chapter of FLEOA in or about August 2003 as set forth above, the appellant himself points out that the investigative actions did not occur until approximately 22 months after he began organizing and leading the chapter. *See id.* To the extent any particular event served as the catalyst for the OPR investigative actions and ROI, the appellant testified that the investigation was started "within days" of his unauthorized appearance on an evening news program, specifying that it was "started because of my appearance" on the evening national network news program. *Id.* After carefully reviewing the record evidence, including the matters discussed above, I find that the appellant has failed to show by preponderant evidence that the agency discriminated and retaliated against him based on his membership and leadership status with the FLEOA. I further find that the appellant has failed to show by preponderant evidence that the agency took the actions at issue in this appeal based on his membership and leadership in FLEOA. IAF-2, Tab 67 at 5-6.

Appellant's First Amendment Claim

The Supreme Court has recognized that public employees, like all citizens, enjoy a constitutionally protected interest in freedom of speech. *Connick v. Myers*, 461 U.S. 138, 142, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983); *Pickering v. Board of Educ.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968); *Smith v. Department of Transportation*, 106 M.S.P.R. 59, 78-79 (2007). Employees' free speech rights must be balanced, however, against the need of government agencies to exercise "wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Mings v.*

Department of Justice, 813 F.2d 384, 387 (Fed. Cir. 1987) (quoting *Connick*, 461 U.S. at 146). Thus, in determining the free speech rights of government employees, a balance must be struck between the interest of the employees, as citizens, in commenting on matters of public concern, and the interest of the government, as an employer, in promoting the efficiency of the public services it performs through its employees. *Pickering*, 391 U.S. at 568; *Mings*, 813 F.2d at 387; *Sigman v. Department of the Air Force*, 37 M.S.P.R. 352, 355 (1988), *aff'd*, 868 F.2d 1278 (Fed. Cir. 1989) (Table). In addressing the issue of whether employee speech is protected by the First Amendment, the Board must determine: (1) Whether the speech addressed a matter of public concern and, if so, (2) whether the agency's interest in promoting the efficiency of the service outweighs the employee's interest as a citizen. *Smith*, 106 M.S.P.R. at 79.

In this case, the agency argues that the appellant's disclosure of SSI does not meet the first prong of the test above because exact nature of any particular deployment or mission is not a matter of public concern. IAF-2, Tab 77. While this argument may apply to a specific mission, the communication at issue involved the potential cancellation of all RON missions out of Las Vegas within the context of a flying public that feared another terrorist attack involving commercial aviation aircraft. *See* HCD (testimony of the appellant and Mr. Donzanti). The potential presence of, or known lack of presence of FAMs on specific types of flights is understandably a matter of public concern because it affects the chances that a terrorist will target the specific flights at issue; in this case, the disclosed SSI directly involved such information. *See id.* Accordingly, I find that the appellant's disclosure at issue satisfies the first prong of this test.

Citing *Pickering*, 391 U.S. at 568, the appellant argues that the information conveyed by the appellant did not cause any harm to the agency mission; rather, the appellant asserts that his actions increased the efficiency of the service in that his disclosure of SSI addressed a vulnerability to aviation security. IAF-2, Tab 79. The appellant argues that the cancellation of RON missions at issue was

“illegal and seriously threatened America’s national security[.]” *Id.* The appellant argues in the alternative that even if TSA had not changed its decision on the RON missions, “the threat would have been minimized by the advance nature of the disclosure six days before the policy was scheduled to take place.” *Id.* The appellant argues that based on the second prong of the balancing test, the agency’s action must be barred as a matter of law. *Id.*; IAF-1, Tab 4, Subtab 4C.

In addressing this issue of whether the agency's interest in promoting the efficiency of the service outweighs the employee's interest as a citizen, Mr. Donzanti testified as follows upon questioning by the appellant’s attorneys:

Q. Was there any actual harm from Mr. MacLean's disclosure?

A. There could have been. From my perspective, I — I know that the division that —

Q. Excuse me, sir. I didn't say "could have." Was there any actual harm? Do you know of any?

A. Well, I'm going to explain that in a minute. We have a division that schedules flights. And in light of that disclosure that Mr. MacLean made, now they would have to do excessive work to either correct that or make some decisions. It would be conversations, and it would be work lost. And ultimately some kind of risk associated with the fact that the people that are scheduling flights and — and looking at intelligence are now busy rescheduling flights or doing whatever they had to do to kind of make a correction here with this vulnerability that now existed.

HCD. Further addressing the effect of the appellant’s disclosure on the efficiency of the FAMS and its mission to protect flights, Mr. Donzanti testified:

Well, he gave information on our — on our flights, a particular group of flights that were not covered, which created a vulnerability. As soon as he gave that information out to the media, it *created* a vulnerability within the aviation system. And it set us up for a possible another 9/11 incident.

....

"How so?" Well, it gave people that would want to do us harm information that certain flights weren't covered by Air Marshals. And if you look at that, it makes the system vulnerable, especially with flights leaving out of Las Vegas, knowing that certain flights aren't covered, long-distance flights are not being covered by Air Marshals.

Id. (italics added). At the heart of this question is whether the vulnerability at issue is the absence of FAMs on RON missions out of Las Vegas, or the appellant's disclosure of this specific facet of Las Vegas FAM deployments for a specific forward date; for the reasons that follow, I find that the latter was applicable.

This matter of FAM deployments is directly related to the FAMS and TSA core mission because the potential and actual presence of one or more FAMs on any particular flight or class of flights is a critical deterrent and/or countermeasure for a terrorist high jacking commercial passenger aircraft. HCD (testimony of the appellant and Mr. Donzanti). Related to this point, the ability to deploy without being readily identified on sight by other aircraft passengers is an important factor in a FAM's effectiveness, because of the positive uncertainty that is then created on flights that are not actually protected by one or more undercover armed FAMs. *See, e.g.,* HCD (testimony of the appellant). Conversely, as pointed out by the appellant:

If I told somebody that a particular flight was not going to have any protection on it, that endangered that specific flight.

HCD (testimony of the appellant).

In this case, the agency appears to agree with the appellant's assertion that his disclosure did not harm the Las Vegas RON flights at issue, and explains what steps were taken to directly address the RON missions for the specific period at issue. *See* HCD (testimony of Mr. Donzanti). Indeed, I have no reason to doubt that the appellant's disclosure at issue improved FAM presence on Las Vegas RON flights up to August 9, 2003, based on the undisputed fact that agency resources were then reallocated to some degree to address these specific Las Vegas RON flights. *See id.* However, it is this allocation of resources within the mission of the FAMS and the TSA, and the inability to cover every commercial passenger flight that remains at issue. *See id.*

As pointed out by Mr. Donzanti, the deployment of FAMs is driven by factors, including “intelligence” gathered and considered. *See id.* While the appellant’s actions may have indeed strengthened FAM presence on the Las Vegas RON mission flights as asserted, it was counter to the agency’s interest in promoting the efficiency of the service because, in addition to considering “intelligence” and other factors, the agency was compelled to shift resources, explaining, “in light of that disclosure that Mr. MacLean made, now they would have to do excessive work to either correct that or make some decisions.” *Id.* Specifically, given the limited number FAMs both in Las Vegas within the broader agency, and given the presumably finite resources of FAMS, TSA, and the broader agency, the agency correctly points out that the result of this disclosure that there would be no FAMs on forward RON missions out of Las Vegas for the period specified, forced the agency to shift resources to address this disclosure. *See id.* In addressing this issue, Mr. Donzanti further explained, “the people that are scheduling flights and — and looking at intelligence are now busy rescheduling flights or doing whatever they had to do to kind of make a correction here with this vulnerability that now existed.” *Id.*

This issue of limited resources and/or inability to staff all commercial passenger flights at all times nationwide and/or worldwide with armed FAMs is what makes FAM deployment a matter of import. *See HCD* (testimony of the appellant). The importance of protecting FAM deployment information in light of the reality that not all commercial passenger flights are protected by armed FAMs was acknowledged to some degree by the Ninth Circuit while adjudicating the petition for review of the SSI AFO at issue:

[Section 1520.7\(j\)](#) (2003) designates as “sensitive security information ... [s]pecific details of aviation security measures ... applied directly by the TSA ... [which] includes, but is not limited to, information concerning specific numbers of Federal Air Marshals, deployments or missions, and the methods involved in such operations.” Information falling within this designation is *automatically* considered “sensitive security information” without

further action from the TSA. 49 C.F.R. § 1520.7 (2003). The TSA has authority to designate information as “sensitive security information” pursuant to 49 U.S.C. § 114(s) and 49 C.F.R. § 1520.

The information contained in the text message qualifies as “sensitive security information.” The message contained “specific details of aviation security measures” regarding “deployment and missions” of Federal Air Marshals. 49 C.F.R. § 1520.7(j) (2003). That there could have been more specific information in the message does not undermine this determination. *See id.*

MacLean, 543 F.3d 1145 (italics added). While I have no reason to doubt the appellant’s assertion that he took these actions to benefit the nation and to increase the efficiency of the service, I find that the appellant’s actions undermined the efficiency of the service for the reasons discussed above.

Following a careful review of the record evidence, I find that the agency’s interest in promoting the efficiency of the service outweighs the employee’s interest as a citizen. *See Smith*, 106 M.S.P.R. at 79. To the extent the appellant maintains that the agency violated his First Amendment right of free association based on his contacts with the media, I find that the agency took these actions not for associating with the reporter, but for the conduct as charged and sustained above, pursuant to the findings and discussion above. *Broadnax v. Department of Transportation*, 15 M.S.P.R. 425 (1983); *Isoldi v. Department of Transportation*, 16 M.S.P.R. 471 (1983). To the extent the appellant maintains that the agency violated his First Amendment right of free association based on his involvement in the FLEOA, I find that the agency took these actions not for associating with this PA, but for the conduct as charged and sustained above, pursuant to the findings and discussions above, including the findings and discussions of the appellant’s claim under section 2302(b)(10). *Id.* Consequently, the appellant’s affirmative defenses are not sustained.

Nexus and Penalty

When such charges of misconduct are sustained by preponderant evidence, the agency must show that there is a nexus between the sustained charges and

either the employee's ability to accomplish his duties satisfactorily or some other legitimate government interest. *See Merritt v. Department of Justice*, 6 M.S.P.R. 585, 596 (1981), *modified*, *Kruger v. Department of Justice*, 32 M.S.P.R. 71, 75 n.2 (1987). Here, there is clearly a direct relationship between the appellant's conduct as described in the charge above, and the appellant's workplace, because all of the appellant's actions were enabled by his position as a FAM, and directly impacted the mission of his workplace, FAMS, TSA, and the agency. To this point, Mr. Donzanti testified that it "created a vulnerability" by identifying "a particular group of flights that were not covered[.]" HCD. Mr. Donzanti explained that based on this disclosure, individuals "looking at intelligence are now busy rescheduling flights or doing whatever they had to do to kind of make a correction here with this vulnerability that now existed." *Id.* Indeed, the appellant testified that if he told someone that a particular flight would not have "any protection on it," that particular flight would be "endangered[.]" HCD. As set forth above, the appellant disclosed SSI in a manner that identified a category of flights from a specific city, thereby "endanger[ing]" those specific flights that are to be protected by this agency. *Id.* Thus, I find that nexus has been established.

Where, as here, all of the agency's charges have been sustained, the Board will review an agency-imposed penalty only to determine if the agency considered all of the relevant factors and exercised management discretion within tolerable limits of reasonableness. *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981). In making that determination, the Board must give due weight to the agency's primary discretion in maintaining employee discipline and efficiency, recognizing that the Board's function is not to displace management's responsibility but to insure that management discretion has been properly exercised. *See, e.g., Brown v. Department of the Treasury*, 91 M.S.P.R. 60, ¶ 7 (2002). Thus, the Board will disturb the agency's chosen penalty only if it finds that the agency failed to weigh relevant factors or that the agency's

judgment clearly exceeded the limits of reasonableness. *Toth v. U.S. Postal Service*, 76 M.S.P.R. 36, 39 (1997).

The deciding official in this case, Mr. Donzanti, testified regarding his consideration of the *Douglas* factors. HCD. The record reflects that Mr. Donzanti considered the relevant factors, most notably the nature and seriousness of the offense, which involved the FAMS mission of protecting flights, stating:

[H]e gave information on our — on our flights, a particular group of flights that were not covered, which created a vulnerability. As soon as he gave that information out to the media, it created a vulnerability within the aviation system. And it set us up for a possible another 9/11 incident.

....

Well, it gave people that would want to do us harm information that certain flights weren't covered by Air Marshals. And if you look at that, it makes the system vulnerable, especially with flights leaving out of Las Vegas, knowing that certain flights aren't covered, long-distance flights are not being covered by Air Marshals.

HCD. The agency considered this a serious matter because the disclosure of this specific FAM deployment information directly related to the appellant's duties, position, and responsibilities as a FAM. *See id.*; *see, e.g.*, HCD (testimony of the appellant). With respect to the appellant's argument that no actual harm resulted from the appellant's misconduct because the RON missions were thereafter covered, Mr. Donzanti responded related questions posed by the appellant's attorneys as follows:

Q. And was there any direct harm from Mr. MacLean's disclosure?

A. It created vulnerability as soon as he made the disclosure. That would be the harm.

Q. Now "vulnerability" is kind of a speculative concept. Was there any direct harm that actually occurred from his disclosure?

MS. CALAGUAS: Objection, move to strike the argumentative comment.

JUDGE KANG: The motion to strike is denied. You know, I'm the Judge here. You don't have to worry about me taking things out of context here. Please repeat your question, Mr. Devine, for clarity.

MR. DEVINE: Yes, sir.

BY MR. DEVINE:

Q. Was there any actual harm from Mr. MacLean's disclosure?

A. There could have been. From my perspective, I — I know that the division that —

Q. Excuse me, sir. I didn't say "could have." Was there any actual harm? Do you know of any?

A. Well, I'm going to explain that in a minute. We have a division that schedules flights. And in light of that disclosure that Mr. MacLean made, now they would have to do excessive work to either correct that or make some decisions.

Id. While the parties disagreed on this aspect of evaluating the seriousness of the misconduct based on how “harm” is defined, the record reflects that Mr. Donzanti considered this factor as more fully discussed in the First Amendment discussion above.

Although this conduct was not frequent or committed for gain, Mr. Donzanti determined that it was intentional because it involved an intentional contact with the reporter, and the conveyance of an intentional statement concerning SSI. *Id.* In describing the clarity of notice, Mr. Donzanti testified that the offense did not involve an obscure security regulation, rather, it was “just very basic[.]” *Id.*

To these points, the appellant argues that he did not intend to disclose SSI, explaining that as a law enforcement officer, he would not break the law in this manner. HCD. However, as noted above, the appellant stated in a sworn statement that he had “NO REGRETS or feel NO REMORSE for going to a credible and responsible media representative ... reporting these gross mismanagement issues has resulted in immediate and positive change in deadly FAMS policies” because his chain of command, OIG, and Members of Congress had “all ignored my complaints[.]” *Id.*; IAF-2, Tab 4, Subtab 45. Moreover, the appellant acknowledged that during his deposition, he testified under oath that it did not matter whether or not the information conveyed to the reporter was SSI.

HCD; IAF-2, Tab 44, Exhibit 8 at 2. To the extent the appellant argues that he was confused as to whether or not this information at issue was SSI, thus did not intentionally convey SSI, because the agency failed to properly transmit this information through the encrypted PDA and/or because the agency failed to transmit the text message with SSI markings as required, and/or because the agency failed to take other precautions as required, I do not credit the appellant's assertions because the appellant's assertions are not creditable for the reasons set forth below. *Hillen*, 35 M.S.P.R. at 458; see *Hawkins v. Smithsonian Institution*, 73 M.S.P.R. 397, 403-04 (1997).

Throughout his testimony, the appellant insisted that he did not believe that the text message above constituted SSI or was sensitive information because it was delivered to his government issued cell phone rather than his PDA. *Id.*; HCD. However, as set forth above in the discussion of the facts underlying the charge, the appellant also testified that "If I told somebody that a particular flight was not going to have any protection on it, that endangered that specific flight" because, presumably, this information would lead one to learn that a particular flight was *not* secured by a FAM. *Id.* The appellant's testimony that revealing the presence or absence of FAMs on particular flights is inconsistent and contrary to his assertion that canceling RON missions for a specified period "was just a plain message" rather the type of message discussed in his SSI training, because such a disclosure necessarily conveys the type of information described by the appellant as SSI based on his training in 2002, prior to his July 2003 contact with the reporter. *Id.* The appellant's recollections of his training as a new FAM and his subsequent training on SSI in 2002, undermine his assertion that he did not intend to convey SSI, because they evince his understanding that deployment of or the absence of FAMs on particular flights was understood by the appellant to be SSI. *Id.* Based on my observations of the appellant at the hearing, and for the reasons set forth above inclusive of the prior credibility determination, the

appellant's assertion that he believed that the text involving RONS was "just a plain message" and not SSI, is not creditable. *Hawkins*, 73 M.S.P.R. at 403-04.

Related to this point, Mr. Donzanti explained that the appellant knew that disclosing SSI in this manner was an offense, and that the information at issue "speaks directly to schedules" because it conveys the "mission tempo" and involves the presence of FAMs on types of flights. *See* HCD. In observing the appellant's testimony at hearing, I noted that the appellant's testimony similarly reflected that the appellant was on actual notice about the type of conduct in question, prior to July 2003, as follows:

We were — we were distributed a list of — of issues that you just didn't — you didn't discuss, such as we were — we were given scenarios saying that some Air Marshals in the past had gotten in trouble for telling their significant others where to pick them up exactly, which gate, and which airline they were flying. It said a lot of guys have been — gotten in trouble and were fired for that, so you want to completely avoid it.

HCD. The appellant also testified:

If I told somebody that a particular flight was not going to have any protection on it, that endangered that specific flight.

Id. For the reasons explained above and consistent with those findings, I was not persuaded by the appellant's assertion that he had not been warned about the conduct in question. *Hawkins*, 73 M.S.P.R. at 403-04.

To the extent the appellant maintains that the AFO constituted an impermissible retroactive agency adjudication affecting the notice factor, the Ninth Circuit addressed this specific argument:

The TSA order does not constitute a retroactive agency adjudication. Rather, the agency applied regulations that were in force in 2003 to determine that information created in 2003 was "sensitive security information." This differs from *Bowen*, where the Court held that the Department of Health and Human Services could not apply a new rule requiring private hospitals to refund Medicare payments for services rendered before the rule existed. *See id.* at 208-09, 215-16, 109 S.Ct. 468. The TSA order comports with the "principle that the legal effect of conduct should ordinarily be assessed under the law

that existed when the conduct took place.” *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994) (internal quotation omitted). We reject MacLean's claim.

MacLean, 543 F.3d at 1152. The record reflects that Mr. Donzanti also considered the status of this information as of the date of the disclosure, in considering the intentional nature of the offense and notice, as set forth above. HCD.

In considering the appellant's job level and type of employment, Mr. Donzanti testified that the offense at issue was related to his position as a FAM, because the appellant was in a public safety position with the responsibility to guard SSI of this sort. *See* HCD. On this point, the Board has previously recognized that law enforcement officers may be held to a higher standard of conduct with respect to the conduct expected of them and the severity of the penalty invoked for failure to meet those expectations. *See Todd v. Department of Justice*, 71 M.S.P.R. 326, 330 (1996).

In addressing the notoriety of the offense, Mr. Donzanti explained that the misconduct brought discredit to the FAMS because it undermined the public's confidence in the agency's ability to prevent a terrorist attack involving commercial passenger aircraft. HCD. Given the importance of the FAM mission, Mr. Donzanti explained that this misconduct went beyond embarrassing the agency, and otherwise explained how the appellant's actions negatively affected the efficiency of the agency's operations. *See id.*

In considering mitigating factors, Mr. Donzanti testified that he considered the fact that the appellant did not act for personal gain. Mr. Donzanti testified that he considered the appellant's lack of prior discipline, his work history, his length of service, and the appellant's satisfactory performance on the job. *Id.* Indeed, Mr. Donzanti testified that the appellant was dependable, showed up for work on time, and that he performed his job “in an exemplary manner[.] Minus the incident he had in Las Vegas[.]” *Id.* Mr. Donzanti testified that he also

considered the appellant's ability to get along with other employees as a positive factor. *Id.* However, Mr. Donzanti testified that these mitigating factors did not outweigh the seriousness of this offense. *See id.*

Mr. Donzanti testified that he also considered the appellant's explanation of the mitigating circumstances surrounding the offense as follows:

He thought there was a vulnerability created in the system when there was — when those types of missions were dropped, when they were not covered. But he is not in a position — he does not have all information. He's not in a position to make that kind of decision. There are other factors that go into that decision he would be unaware of. As he may have good intentions, but he was — he was misguided and didn't have all the information.

Id.

In describing the consistency of the penalty with those imposed on other employees, Mr. Donzanti testified that he was not aware of any similar incidents while he was serving at that duty station as the SAC. *Id.* In *Woebcke v. Department of Homeland Security*, MSPB Docket No. NY-0752-09-0128-I-1, slip op. (Opinion and Order, May 6, 2010), the Board stated that the consistency of the penalty imposed on an appellant may be compared to that of another, even though the two employees are supervised by differing chains of command. In this case, it is undisputed that Mr. Donzanti coordinated with the PCU and the headquarters human resources office (HR) in taking this action. HCD (testimony of Mr. Donzanti). Mr. Donzanti testified that PCU serves a coordination role: "They will make sure certain entities get information that's needed." *Id.* In explaining the role of HR in his decision to remove the appellant, Mr. Donzanti explained that although HR drafted text of the decision letter, he reviewed the draft and adopted it, and that he made the ultimate decision to remove the appellant. *Id.*

To the extent the appellant attempted to identify comparators from different chains of command, the appellant argued that he was similarly situated to FAMs A.R., J.S., J.M., but that they received lesser sanctions for their

offenses. *See, e.g.*, IAF-2, Tab 39 at 15-16. According to the appellant's submission, A.R. posted on an internet message board that flights were being cancelled on a specified international route. *Id.* The appellant's submissions reflect that the information conveyed to this message board was not learned through any official agency source, rather, the information was "solely the result of second or third hand information FAM [A.R.] had received via the FAM grapevine." IAF-2, Tab 45, Exhibit F. The appellant's submission further stated, "FAM [A.R.'s] only intent in posting the information was to confirm whether the information/rumor he had heard was accurate." *Id.* In contrast to the circumstances surrounding A.R.'s decision to post unverified information to a message board, the appellant's misconduct involved the appellant (a) receiving SSI from the agency on his government issued official cell phone; (b) then verifying the authenticity and accuracy of this SSI by "speaking with the supervisor[;]" (c) then seeking out a well-known reporter; and (d) then disclosing SSI to the reporter. *See* HCD (testimony of the appellant). Under these circumstances as presented by the appellant, the appellant's offense and that of A.R. are neither the same nor similar. *Cf. Woebcke*, slip op.

With regard to J.S., the record reflects that J.S. improperly identified himself and his partners to aircraft passengers, but was only suspended prior to his resignation. IAF-2, Tab 45, Subtab MM; *see, e.g.*, IAF-2, Tab 39 at 15-16. According to the appellant's submissions, while flying on a mission, J.S. revealed his FAM status and that of his partner to a passenger and information about the next segment of his mission. *Id.* The appellant's submissions reflect that J.S. broke his cover to a passenger seated next to him because the passenger saw that J.S. was carrying a firearm while onboard the aircraft and asked J.S. how J.S. was able to bring a firearm onto a commercial passenger aircraft. *Id.* The appellant's submissions reflect that J.S. revealed his identity as a FAM to avoid a general panic onboard the aircraft, because of the firearm. *Id.* While J.S. may have revealed more information than necessary to this single passenger, the

circumstances and nature of the appellant's offense and that of J.S. are neither same nor similar, because, *inter alia*, identifying himself as a law enforcement officer to explain his possession of a firearm during a flight differs from the appellant's decision to share SSI with the reporter as set forth in (a) through (d) above. *See id.* With regard to J.M., the appellant states that J.M. shared his flight information with flight attendants in order to coordinate meetings with these flight attendants in his hotel room, for personal reasons. *See, e.g.*, IAF-2, Tab 39 at 15-16. While J.M.'s actions likely involved the disclosure of SSI, the circumstances and nature of the appellant's offense and that of J.S. are neither same nor similar, because, *inter alia*, sharing his flight information with individual airline employees and/or airline flight attendants differs from the appellant's decision to share SSI with the reporter as set forth in (a) through (d) above. *Cf. Woebcke*, slip op. Although the agency did not have a formal table of penalties applicable to the appellant at that time, Mr. Donzanti's testimony reflects that he considered and applied the agency's Interim Policy for Addressing Performance and Conduct Problems effective July 29, 2002, in making his penalty determination, which included consideration of lesser sanctions addressed below. HCD.

In considering the appellant's potential for rehabilitation and the adequacy and effectiveness of alternative sanctions to deter such conduct in the future, Mr. Donzanti explained that while he considered other sanctions, he concluded that no lesser penalty was appropriate based on the seriousness of the offense at issue and because all administrative or law enforcement positions in TSA gives one access to SSI "almost on a daily basis." *Id.* In explaining his conclusion that no alternate sanction or position would be appropriate, Mr. Donzanti explained that the management had "all lost confidence in his ability at that point." *Id.* Mr. Donzanti further explained that in considering the appellant's potential for rehabilitation, the appellant had "no remorse whatsoever." *Id.* Mr. Donzanti's testimony on this point is consistent with the appellant's testimony at the hearing,

inclusive of his testimony regarding his deposition statements, as well as his sworn statement to OPR. *See* HCD.

When asked, by the appellant's attorneys, about the appellant's interim status following the discovery of the appellant's misconduct, Mr. Donzanti testified as follows:

Q. Okay. Let's continue on this course of whether he was — this issue of whether there was potential for rehabilitation. When did you learn that Mr. MacLean had made an unauthorized release of SSI?

A. Probably sometime in — in July of '05, I believe.

Q. And when did he stop performing his duties as an Air Marshal on your watch?

A. It was October that same year.

Q. Okay. So during that five-month interval did you take any steps to protect the Government against this untrustworthy employee who was on the frontlines of defending against security breaches?

A. It was — it was approximately three months, and not anything that we normally wouldn't do, and he'd be involved in training during that time period.

Q. Did you take any extra precautions? I mean this is untrustworthy agent here who's on the front lines. What precautions did you take to make sure that he didn't endanger our country's security again?

A. Nothing that I can recur [sic] that — additional to training.

Q. Okay. Did you take any action against his security clearance because of the trustworthiness problem?

A. That is not in my purview. So I did not.

....

Q. So did you take any action to have those who are — who do handle those — that type of work to review whether his clearance should be revoked in light of his untrustworthiness?

A. That's done by our Policy Compliant Unit. They handle that. I wouldn't get —

Q. Did you —

A. — involved in it. I —

Q. Did you suggest to the Policy — excuse me. Did you communicate with the Policy Compliance Unit that it might be appropriate for them to consider this?

A. I don't recall.

Q. Okay. Did you engage in any restriction of Mr. MacLean's duties during that interim period?

A. No.

Q. Okay. Let's turn then now to whether or not there was any basis for him to be confused about the status of the information as SSI information.

HCD. Mr. Donzanti explained that at that time, he was not able to accomplish administrative actions as quickly as desired, explaining:

Things don't happen that fast. We had a very small staff back then. We were still a nascent organization. And it wasn't unusual to take that long.

Id. Although the appellant argues that the approximately three month period above undermines Mr. Donzanti's conclusion on the appellant's rehabilitation potential, the timeline as set forth at the hearing does not support such a finding. *See id.* The record reflects that the SSI disclosure occurred on July 29, 2003, and the testimony above reflects that Mr. Donzanti learned that the appellant was responsible for the SSI disclosure approximately two years later, in approximately July 2005, following the ICE OPR interview. *See id.* Moreover, Mr. Donzanti testified that he did not have the authority to suspend and/or revoke the appellant's security clearance, nor did he believe that he, as the SAC at that time, had the unilateral authority to place the appellant on immediate administrative leave in July 2005 under these circumstances, without following a unspecified "procedure" and process. *Id.* Under these circumstances, it is unclear how the three month gap addressed above evinces an improper consideration of the appellant's rehabilitation potential by Mr. Donzanti. *See id.*

In view of the considerations just cited, I find that the deciding official considered relevant factors and exercised his discretion within tolerable limits of reasonableness. *Douglas*, 5 M.S.P.R. at 306.

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD:

Franklin M. Kang
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **June 16, 2010**, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. You must establish the date on which you received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.,
Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (<https://e-appeal.mspb.gov>).

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you claim that you received this decision more than 5 days after its issuance, you have the burden to prove to the Board the date of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j).

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.