

**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: February 10, 2009

**ORDER GRANTING MOTION FOR CERTIFICATION AS
INTERLOCUTORY APPEAL AND STAYING PROCEEDINGS**

Background

On May 10, 2006, the appellant timely filed a petition appealing the decision of the Transportation Security Administration (TSA or “the agency”) to remove him from the position of Federal Air Marshal, SV-1, effective April 11, 2006. The Board has jurisdiction over this appeal under 5 U.S.C. §§ 7512(1), 7513(d), 7701(a), and 7702(a).

The agency proposed the appellant’s removal on three charges. After the appellant responded to the proposal, the deciding official sustained only the charge of Unauthorized Disclosure of Sensitive Security Information (SSI). More specifically, the sustained charge alleged that, on July 29, 2003, the appellant disclosed to the media that all Las Vegas Federal Air Marshals were sent a text message to their government-issued mobile phones that all Remain Overnight (RON) missions would be cancelled, or words to that effect, in violation of 49 C.F.R. § 1520.5(b)(8)(ii). The deciding official found that removal remained the appropriate penalty.

After the appellant filed his appeal, on August 31, 2006, the agency issued a “Final Order,” signed by Andrew Colsky, Director SSI Office, finding that the appellant’s disclosure of information at issue in the charge was SSI, covered by 49 C.F.R. § 1520.7(j).¹ The administrative judge to whom this appeal was assigned at the time denied the appellant’s request to either extend the close of discovery or postpone resolution of this appeal while the appellant petition for review of the agency’s Final Order to the Court of Appeals, pursuant to 49 U.S.C. § 46110. The administrative judge suggested, however, that he would agree to dismiss the appeal without prejudice to refiling under certain conditions. The appellant moved for such a dismissal, unopposed by the agency, and on October 5, 2006, the administrative judge issued an initial decision dismissing the appeal without prejudice, subject to refiling, *inter alia*, no later than 30 days after the Court of Appeals issues a final determination in the appellant’s petition for review of the agency’s Final Order.

On September 16, 2008, the U.S. Court of Appeals for the Ninth Circuit issued a *per curiam* Opinion denying the appellant’s petition, finding that the agency’s determination that the information the appellant disclosed was SSI was supported by substantial evidence. The appellant timely refiled this appeal and, during an October 20, 2008 conference call, the parties expressed an interest in briefing certain issues the resolution of which they believed could make adjudication of this appeal more efficient. They could not agree on which issues should be the subject of such briefing, however, and submitted separate lists of issues. In a November 14, 2008 Order, I ordered the parties to brief six issues. Both parties complied, and I granted the appellant’s request to respond to the agency’s brief.

¹ Colsky noted that, on May 18, 2004, TSA had recodified § 1520.7(j) at 49 C.F.R. 1520.5(b)(8)(ii).

On December 23, 2008, I issued an Order ruling on three of the issues and holding in abeyance a final ruling on two issues, pending further evidence and argument. I found that, as a result of my ruling on one of the issues, it was no longer necessary to decide a remaining issue. The appellant has requested that I reconsider my ruling on one issue, and the agency has moved for certification as an interlocutory appeal of the other two issues on which I ruled. The appellant opposes the agency's motion for certification, and the agency has filed a reply in opposition to the ~~agency's~~ request for reconsideration.

Issues

appellant

The three issues on which I ruled are as follows:

(1) Whether the Board has the authority to review the determination by the agency, and affirmed by the U.S. Court of Appeals for the Ninth Circuit, that the information the appellant disclosed constituted Sensitive Security Information (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.²,

(3) Whether a disclosure of information that is SSI can also be a disclosure protected by the Whistleblower Protection Act under 5 U.S.C. § 2302(b)(8)(A).

Discussion and Findings

Issues (1) and (2)

² As to the second issue, I had requested that the parties also address in their briefs “whether the timing of the determination [the agency’s Final Order] has any other effect on the issues for adjudication in this appeal.” The appellant argued that the agency’s issuance of the Final Order after the appeal had been filed evidenced retaliatory animus, but this assertion is not relevant to the issues under consideration in this order, and being certified for interlocutory appeal, and I have therefore edited the second issue to remove the irrelevant portion.

In my December 23, 2008 order, I found that the Board has authority to review the determination by the deciding official in the appellant's removal action that the information the appellant disclosed was SSI. I addressed issues (1) and (2) together because I found that the timing of the agency's issuance of a Final Order on this issue had an effect on my determination. I re-state my analysis below, with some additional explanation.³

The only charge at issue in this appeal-Unauthorized Disclosure of SSI-was brought on September 13, 2005, and was sustained by the deciding official on April 10, 2006. In the charge, the agency alleged that the appellant's act of informing the media on July 29, 2003 that all Las Vegas FAMs had received a text message from the agency notifying them that all RON missions up to August 9, 2003 would be cancelled was an improper disclosure of SSI, as SSI is defined in 49 C.F.R. § 1520.5(b)(8). The agency's Final Order finding that the information the appellant disclosed constituted SSI under the SSI regulation then in effect-49 C.F.R § 1520.7(j)-was not issued until August 31, 2006.

It is well-settled that, in reviewing the agency's charge, the Board will review the charge the agency brought, not a charge it could have, but did not, bring. See, e.g., *Gustave-Schmidt v. Department of Labor*, 87 M.S.P.R. 667, 673 (2001). Moreover, the Board has held that the nature of an agency's action against an appellant at the time that an appeal is filed with the Board is determinative of the Board's jurisdiction. See *Himmel v. Department of Justice*, 6 M.S.P.R. 484, 486 (1991). Applying these precepts to the issue before me, I find that the agency's decision to issue a Final Order finding that the information the appellant disclosed constituted SSI did not have any effect on its burden to prove each of the elements of its charge by preponderant evidence, including that the

³ Portions of the Discussion and Findings section in this order are similar in many respects to my December 23, 2008 order, with slight changes to clarify some points and to address additional argument by the parties presented after the previous order was issued.

information he disclosed met the regulatory definition of SSI. While the agency is correct that Congress gave the TSA Administrator authority to “prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security ... if the Under Secretary decides that disclosing the information would ... be detrimental to the security of transportation,” 49 U.S.C. § 114(s),⁴ I read the statute as providing to the Administrator or his designee authority to set out categories of information that may not be disclosed; the statute does not state that only a TSA official may determine whether a specific disclosure falls within a specific category in the context of an adverse action under appeal before the Board.

The agency asserts in its motion to certify this issue as an interlocutory appeal that “the information was SSI at all relevant times: when it was created, when it was transmitted to Appellant and when Appellant improperly disclosed it to the media.” The agency has not shown that any individual with authority to make a determination that the appellant had disclosed SSI had done so at the time the appellant was removed, however, and it has never argued that the deciding official had such authority. Under the agency’s construction of the statute and its own regulations, any agency employee who serves as a deciding official in an adverse action has the authority to determine that a given disclosure of information falls within the definition of SSI, and that determination cannot be questioned in a proceeding before the Board. I find no support for such a reading of the applicable statute, or even the agency’s own regulations and other guidance. To the contrary, if an agency official with proper authority had issued a Final Order finding that the information the appellant disclosed constituted SSI, and then the agency removed him based on the Order, the Board would likely

⁴ The Board has previously noted that TSA changed the title of Under Secretary to Administrator after the agency was transferred from the Department of Transportation to the Department of Homeland Security. See *Wilke v. Department of Homeland Security*, 104 M.S.P.R. 662, ¶ 5 n.3 (2007).

lack the authority to review the conclusion in the Order, and would be bound by any court decision on appeal of the order. Although the Board lacks the authority to review the Final Order issued by Andrew Colsky on August 31, 2006, pursuant to 49 U.S.C. § 46110,⁵ the Final Order is not at issue in this appeal, as it did not, in fact, exist at the time the agency brought its charge.

The agency also argues that the doctrine of collateral estoppel applies to the decision of the 9th Circuit Court of Appeals that substantial evidence supports the finding in the Final Order that the information the appellant divulged was SSI.⁶ The Board has found that issue preclusion, or collateral estoppel, is appropriate when: (1) The issue is identical to that involved in the prior action; (2) the issue was actually litigated in the prior action; (3) the determination on the issue in the prior action was necessary to the resulting judgment; and (4) the party against whom issue preclusion is sought had a full and fair opportunity to litigate the issue in the prior action, either as a party to the earlier action or as

⁵ I do not find the agency's cite to *Croft v. Department of the Air Force*, 40 M.S.P.R. 320 (1989) on point. In *Croft*, the Board agreed with the agency that it lacked authority to review the agency's determination that certain information was classified, based on the Supreme Court's decision in *Department of the Navy v. Egan*, 484 U.S. 518 (1988). In *Egan*, the Court grounded its decision, in large part, on the primacy of the executive branch, under the Constitution, in assessing what information must be classified in the interest of national security. Here, while it is inarguable that Transportation security is highly important, and that Congress directed the agency to identify categories of information that cannot be disclosed, there is no separation of powers question at issue, and, absent issuance of a Final Order upon which the agency based its action, no precedent for foreclosing Board review of the agency's SSI assessment. In fact, the Board has read *Egan* narrowly, and has been loath to extend it to circumstances that do not involve classified information. And, TSA's Interim Sensitive Security Information (SSI) Policies And Procedures For Safeguarding And Control states that "SSI is not classified national security information subject to the handling requirements governing classified information."

⁶ The agency cites the 9th Circuit opinion to support several of its points, particularly that the order would have an impact on the appellant's Board appeal of his termination. The Board may look to opinions of Circuits other than the Federal Circuit for guidance, but the opinions are not binding precedent. See, e.g., *Bullock v. Department of the Air Force*, 88 M.S.P.R. 531, ¶ 14 n.7 (2001).

one whose interests were otherwise fully represented in that action. *See McNeill v. Department of Defense*, 100 M.S.P.R. 146, ¶ 15 (2005). As explained below, however, I agree with the appellant that the issue that the Board must adjudicate in this appeal is not “identical” to that decided by the court of appeals.

First, the agency charged the appellant with disclosing information that was SSI under 49 C.F.R. § 1520.5(8)(ii), a version of the regulation promulgated in 2004, while the Final Order found that his action had disclosed information that was SSI as defined in 49 C.F.R. 1520.7(j), which had been in effect in 2003. Although the two regulations are quite similar, the appellant has submitted evidence that Mr. Colsky, the agency’s own expert on SSI, considered the differences between the regulations to be significant. Second, the issue before the 9th Circuit was whether substantial evidence supported the agency’s contention that the information the appellant had disclosed amounted to SSI while, before the Board, the agency must prove by preponderant evidence that the information he divulged constituted SSI. *See, e.g., Parikh v. Department of Veterans Affairs*, 110 M.S.P.R. 295 (2008) (finding collateral estoppel inapplicable because issues were not identical where issue in first appeal required showing of preponderant evidence and in second appeal standard was nonfrivolous allegation). Because of these differences in the issue presented, I find that collateral estoppel may not be applied to the court’s finding to preclude the appellant from challenging in this appeal whether he divulged information that was SSI.

For the reasons stated above, I conclude that the Board has authority to review the determination in the agency’s adverse action that the appellant disclosed information that falls within the regulatory definition of SSI.

Issue (3)

In my December 23, 2008 Order, I found that a disclosure of information that falls within the meaning of SSI is “specifically prohibited by law,” pursuant to 5 U.S.C. § 2302(b)(8), and therefore cannot be a “protected” disclosure under

the WPA. I have given full consideration to the appellant's request that I reconsider my ruling on this issue, and for the reasons explained below, the agency's request is **DENIED**.

appellant

The agency argued that a disclosure of SSI is "prohibited by statute and regulation, and as such, Appellant cannot seek the protection of the Whistleblower Protection Act (WPA) to cover his misconduct." The appellant contended that only agency regulations prohibit disclosure of information that is SSI, and that the Board has interpreted the ineligibility of whistleblower protection for disclosures that are "prohibited by law or Executive Order" to apply only to those disclosures not allowed by "statutes and court interpretations of statutes." Both parties have cited *Kent v. General Services Administration*, 56 M.S.P.R. 536 (1993) in discussing this issue, with the appellant asserting that the holding in the case is directly on point and the agency attempting to distinguish it.

I agree with the parties that *Kent* appears to be the seminal case on the question of whether agency regulations fall within the ambit of the "prohibited by law" language in 5 U.S.C. § 2302(b)(8)(A). And, after careful consideration, I agree with the agency that the facts in the instant case are distinguishable from those in *Kent* in one important respect, and as a result, a disclosure of information that is SSI under the TSA regulations is a disclosure that is "prohibited by law," and is therefore not "protected" under the WPA. First, I agree with the appellant that *Kent* stands for the general proposition that regulations promulgated by a federal agency do not fall within the term "law" as it is used in the Civil Service Reform Act, as amended by the WPA, and that the Board came to that conclusion in *Kent* after reviewing the construction of the statute and the legislative history. In *Kent*, however, the regulations at issue were the Federal Acquisition Regulations (FAR), which are the procurement rules for the federal government that the General Services Administration (GSA) promulgated under a specific delegation of authority by Congress in the Federal Property and Administrative

Services Act of 1949. *Kent*, 56 M.S.P.R. at 542. After review of that statute, however, I could find no language requiring GSA to include in its regulations categories of information that may not be disclosed to a third party, as GSA alleged Mr. Kent did in a charge underlying its action against him. Therefore, at most, Mr. Kent's disclosure(s) violated the regulations, but not the law that mandated them.⁷

In contrast, in the instant case, as noted above, Congress required in the ATSA that the agency “prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security ... if the Under Secretary decides that disclosing the information would ... be detrimental to the security of transportation.” 49 U.S.C. § 114(s)(1)(C). Thus, unlike in *Kent*, disclosure of information that is determined to be covered by the SSI regulations also constitutes a disclosure that was explicitly mandated to be prohibited by statute, even if the regulations set the exact parameters, rather than the statute itself. I agree with the agency that it would be an absurd result for Congress to direct TSA to issue regulations prohibiting the disclosure of information that is considered a threat to transportation security, and at the same time to intend that a TSA employee be shielded from discipline by the WPA for violating the regulations by disclosing such information. See *Preyor v. U.S. Postal Service*, 83 M.S.P.R. 571, 580 (1999) (an interpretation of a statute that would lead to absurd results is to be avoided when it can be given a reasonable application consistent with its words and legislative purpose). I find it highly unlikely that Congress would have tasked TSA with prescribing regulations prohibiting the disclosure of SSI if it believed that those regulations lacked the force and effect of “law” for purposes of the WPA, under all circumstances. See *Kligman v. Office of*

⁷ The fact that the Board found that Mr. Kent's disclosure violated the Trade Secrets Act does not impact the relevant analysis in this order regarding whether regulations can be considered “law” in 5 U.S.C. § 2302(b)(8), as the Board addressed the Trade Secrets Act and the FAR separately in its opinion in *Kent*. 56 M.S.P.R. 536.

Personnel Management, 103 M.S.P.R. 614, ¶ 12 (2006) (Congress is assumed to be aware of administrative interpretations of statute). Accordingly, I conclude that the fact that Congress specifically mandated the SSI regulations, unlike in *Kent*, brings the regulations within the definition of “law” in 5 U.S.C. 2302(b)(8)(A), and that a disclosure of information falling within the meaning of the SSI regulations is therefore “specifically prohibited by law,” and cannot be a “protected disclosure” under the WPA.⁸

Certification for Interlocutory Appeal

I hereby **GRANT** the agency’s motion, over appellant’s opposition, and certify my ruling on the first two questions above for interlocutory appeal, pursuant to 5 C.F.R. § 1201.91.⁹ I find that the issues “involve[] an important question of law or policy about which there is substantial ground for difference of opinion; and... [a]n immediate ruling will materially advance the completion of the proceeding,” in that a ruling will clarify the agency’s burden of proof at hearing on the only charge in this appeal. Further, I certify my ruling on the third question for interlocutory appeal on my own motion, as it also meets the standard set out above. Moreover no precedent on the issue exists and a ruling will

⁸ I have afforded specific consideration to the appellant’s argument that the use of the word “specifically” in the statute, which I left out in some of my discussion in my prior order, undermines my analysis. I am nonetheless unconvinced that inclusion of the word means that regulations to prohibit disclosure of certain information, promulgated at the direction of Congress, can never be considered “law” for purposes of the WPA.

⁹ The agency slightly altered the issues I set out in my December 23, 2008 order in its motion. The changes to issue (1) are insignificant, but the agency states issue (2) as “Whether the fact that the Agency’s final order post-dated Appellant’s removal affects the Board’s jurisdiction over the Agency’s final order.” It is undisputed, however, that the Board lacks jurisdiction to review the agency’s final order. The question is whether the Board has authority to review the agency’s determination that the appellant disclosed SSI as part of the charge because the agency issued the order after it removed the appellant. Accordingly, although I granted the agency’s motion to certify the issue for interlocutory appeal, I did not alter the issue to match the question stated in the agency’s motion.

determine whether the appellant may raise the defense that the agency's action was taken in retaliation for what he believes to be protected disclosures.

Proceedings Stayed

Pursuant to 5 C.F.R. § 1201.93(c), I hereby stay all further proceedings at the Regional level pending the full Board's resolution of the certified issues.

It is so **ORDERED**.

FOR THE BOARD:


Craig A. Berg
Administrative Judge

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent as indicated this day to each of the following:

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February 10, 2009

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