U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for January 23, 2015

The U.S. Supreme Court Issued a Decision in the Following Case:

Petitioner: Department of Homeland Security
Respondent: Robert J. MacLean
Tribunal: U.S. Supreme Court
Case Number: No. 13-894
Decision Below: 714 F. 3d 1301 (Fed. Cir. 2013)
MSPB Docket No. SF-0752-06-0611-I-2
Issuance Date: January 21, 2015
Appeal Type: Adverse Action
Action Type: Removal

Statutory Interpretation of Whistleblower Protection Act
Disclosure of Security Sensitive Information (SSI) Prohibited by Regulation

The appellant was a Federal Air Marshall (FAM) assigned to the agency's Las Vegas, Nevada airport. In July 2003, the TSA briefed all federal air marshals about a potential plot to hijack long-distance passenger flights. A few days after the briefing, the agency canceled all overnight missions from Las Vegas until early August. The appellant, who was stationed in Las Vegas, disclosed the agency's cancelation of the missions to an MSNBC reporter based on his belief that cancelling those missions during a hijacking alert was dangerous and illegal. MSNBC published a story based on this information. The appellant later disclosed his disagreement with agency policy regarding clothing

requirements for FAMs to an NBC reporter. After discovering that the appellant was the source of the disclosed information, the agency removed him for disclosing sensitive security information without authorization.

The appellant appealed his removal to the Board, arguing that his disclosure was whistleblowing activity because he disclosed information that revealed a "violation of any law, rule, or regulation," or "a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law." The Board upheld the removal, holding that the appellant did not qualify for protection as a whistleblower because his disclosure was "specifically prohibited by law"—namely, by 49 U.S.C. § 114(r)(1). On appeal, the Court of Appeals for the Federal Circuit vacated and remanded the Board's decision, holding that § 114(r)(1) did "not expressly prohibit employee disclosures," and even if it were a prohibition, it was not "sufficiently specific," because the statute provided only general criteria for withholding information and gave discretion to the TSA to fashion regulations for prohibiting security sensitive disclosures.

The Supreme Court granted certiorari to examine the scope of "specifically prohibited by law" within § 2302(b)(8)(A).

Holding: The Court affirmed the Federal Circuit. Justices Sotomayor and Kennedy joined in a dissent.

1. A disclosure that is specifically prohibited by regulation is not "specifically prohibited by law" under § 2302(b)(8)(A) because the statutory language refers only to a "law" and not a "rule or regulation," unlike other parts of the same statute.

2. The appellant's disclosure regarding the canceled missions was not "specifically prohibited" by 49 U.S.C. § 114(r)(1) because that statute "does not prohibit anything." Instead, according to the Supreme Court, the statute *authorizes* something— the TSA Administrator to "prescribe regulations."

3. The dissent would have affirmed the appellant's removal based on a finding that the statutory provision at issue provides a legislative mandate that assumes that the regulations would fall within the provision.

- **The MSPB did not issue any precedential decisions this week**

- **The U.S. Court of Appeals for the Federal Circuit did not issue any decisions this week**