UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011MSPB 70

Docket No. SF-0752-06-0611-I-2

Robert J. MacLean,

Appellant,

v.

Department of Homeland Security,

Agency.

July 25, 2011

Larry A. Berger, Esquire, Glen Cove, New York, and Thomas Devine, Esquire, Washington, D.C., for the appellant.

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

Howard Schulman, Esquire, Washington, DC, for *amicus curiae*, the Honorable Dennis Kucinich and Honorable Carolyn Maloney.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant petitions for review of the initial decision that sustained his removal. For the reasons set forth below, we DENY the petition for review and AFFIRM the initial decision AS MODIFIED herein. The appellant's removal is SUSTAINED.

BACKGROUND

¶2 Except where specified otherwise, the following facts are not in dispute. Shortly after the terrorist attacks of September 11, 2001, the appellant was appointed to the position of Civil Aviation Security Specialist, also known as Federal Air Marshal (FAM). He was originally employed in the Department of Transportation, specifically the Federal Aviation Administration (FAA). Initial Appeal File (IAF), Tab 4, Subtabs 4S, 4U. He was transferred to the Transportation Security Administration (TSA) when that agency was created in late 2001 for the purpose of promoting aviation security, among other things. *See* Pub. L. No. 107-71, 115 Stat. 597, § 101. In early 2003 the appellant became an employee of the Department of Homeland Security (DHS) when TSA's workforce and functions were transferred to DHS. *See* Pub. L. No. 107-296, 116 Stat. 2135, 2178, § 403.

¶3 In July 2003, the appellant received a briefing from TSA concerning a "potential plot" to hijack U.S. airliners. Hearing Transcript (Tr.) at 80-82. Soon after the briefing, TSA officials sent a directive to FAMs that all Remain Overnight (RON) missions in early August would be cancelled.[1] At the time of the directive, the pertinent regulations prohibited disclosure of Sensitive Security Information (SSI) to the public. 67 Fed. Reg. 8340, 8351 (2002) (promulgating 49 C.F.R. §§ 1520.3 & 1520.5 as a Final Rule). Under the definition in effect at the time of the directive, SSI consisted of, among other things, "[s]pecific details of aviation security measures," including but not limited to "information concerning specific numbers of Federal Air Marshals, deployments, or missions." 67 Fed. Reg. 8340, 8352 (2002) (promulgating 49 C.F.R. § 1520.7). In July 2003, each FAM was equipped with a Personal Digital Assistant (PDA) on which

[1] The record is not entirely clear as to the precise dates that overnight missions were to be cancelled, but there is no dispute that the directive covered multiple days during the period August 1-9, 2003. Tr. at 52, 112. Pinpointing the exact dates is unnecessary to our analysis.

he could receive encrypted messages from TSA. The appellant received the directive cancelling RONs as an unencrypted text message on his cell phone, however. Tr. at 78-82. The message was not labeled as SSI. *Id*. at 82-83.

¶4 The appellant believed that the suspension of overnight missions during a hijacking alert created a danger to the flying public and was inconsistent with what "the law mandated." Tr. at 84, 88. He raised his concerns with his supervisor and with an employee in the agency's Inspector General's office but was not satisfied with the responses he received. *Id*. at 84-88. The appellant then revealed the contents of the RON directive to a reporter from MSNBC, with the hope that the reporter could create a controversy resulting in rescission of the directive. Tr. at 108-110; IAF, Tab 4, Subtab 4J at 11. On Tuesday, July 29, 2003, MSNBC published an article on its website entitled "Air Marshals Pulled from Key Flights." The article stated that "[d]espite renewed warnings about possible airline hijackings, the Transportation Security Administration has alerted federal air marshals that as of Friday they will no longer be covering cross-country or international flights, MSNBC.com has learned." IAF, Tab 4, Subtab 4J at 17. The appellant was not identified in the article. *See id.* Members of Congress criticized TSA's suspension of overnight missions, and the directive was withdrawn before it went into effect. Tr. at 92.

¶5 After this series of events, the appellant came to believe that FAMs should speak with "a collective voice," so he became active in the Federal Law Enforcement Officers Association (FLEOA). Tr. at 92. About a year later, the appellant appeared on NBC Nightly News, in disguise and identified as Air Marshal "Mike," when he asserted that the agency's dress code allowed would-be terrorists to identify FAMs. IAF, Tab 4, Subtab 4J at 10; Refiled Appeal File (RAF), Tab 45, Ex. TT. Someone from TSA recognized his voice, and TSA ordered an investigation into the appellant's "unauthorized media appearance." During the investigation, the appellant admitted that he was the one who told the

press about the 2003 suspension of overnight missions. IAF, Tab 4, Subtab 4J at 10.

¶6 The agency proposed the appellant's removal on charges of: (1) Unauthorized Media Appearance; (2) Unauthorized Release of Information to the Media; and (3) Unauthorized Disclosure of Sensitive Security Information. IAF, Tab 4, Subtab 4G. The deciding official, Special Agent in Charge Frank Donzati, sustained only the third charge and imposed removal. *Id*., Subtab 4A. Subsequently, TSA issued an August 31, 2006 order finding that the 2003 directive regarding overnight missions was SSI. IAF, Tab 22 (attachment).

¶7 On appeal, and following a dismissal without prejudice to allow the appellant to contest the agency's August 31, 2006 order in the United States Court of Appeals for the Ninth Circuit, IAF, Tab 29, the administrative judge certified several rulings for interlocutory review, RAF, Tab 14. In the resulting decision, the Board held as follows:

- The Board lacks the authority to determine for itself whether the particular information the appellant disclosed in 2003 was SSI. The appellant obtained a dismissal without prejudice for the purpose of instituting an action in federal court seeking a declaration that the information he disclosed was not SSI. The court found that the information he disclosed was SSI.[2] The Board and the parties are bound by the result of that litigation, regardless of the fact that the agency did not expressly deem the 2003 instruction to be SSI until after it removed the appellant.

- The appellant's disclosure of SSI to the media cannot constitute protected whistleblowing because the appellant violated agency regulations when he made the disclosure. The decision in *Kent v. General Services Administration*, 56 M.S.P.R. 536 (1993) -- where the Board had held that the exception to whistleblower coverage for disclosures "specifically prohibited by law," 5 U.S.C. § 2302(b)(8)(A), applies only to disclosures prohibited by statute -- was modified.

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[2] The Court also determined that the TSA order did not constitute an improper, retroactive agency adjudication, but that "the agency applied regulations that were in force in 2003 to determine that information created in 2003 was [SSI]." *MacLean v. Department of Homeland Security*, 543 F.3d 1145, 1152 (9th Cir. 2008).

MacLean v. Department of Homeland Security, 112 M.S.P.R. 4 (2009) (*MacLean I*).

¶8 Upon return of the case to the regional office, the administrative judge held a hearing and issued an initial decision upholding the appellant's removal. RAF, Tab 84. The administrative judge first explained at length why he found not credible the appellant's testimony that he did not think the 2003 directive was SSI when he disclosed it to the reporter. *Id*. at 14-18. The administrative judge then sustained the charge of unauthorized disclosure of SSI. *Id*. at 18-19.

¶9 The administrative judge found unproven the appellant's affirmative defense that the agency violated 5 U.S.C. § 2302(b)(10), which prohibits discrimination because of "conduct which does not adversely affect the performance of the employee or applicant or the performance of others."[3] According to the appellant, the agency targeted him because he became active in FLEOA, and his removal for unauthorized disclosure of SSI was a pretext. The administrative judge weighed the evidence and concluded that this claim was unproven. *Id*. at 20-23. Turning to the appellant's First Amendment claim, the administrative judge found that the appellant's 2003 disclosure to MSNBC addressed a matter of public concern, but that the appellant's right to speak was outweighed by the agency's need to control dissemination of information about aviation security measures. *Id*. at 23-28.

¶10 Finally, the administrative judge found that the penalty was reasonable. In doing so, he concluded that deciding official Donzanti properly considered the relevant factors under *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981). RAF, Tab 84 at 30. The administrative judge specifically found that, among other things, Donzanti considered that the appellant's disclosure of SSI was serious because it created a "vulnerability" as soon as the appellant made the

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[3] The appellant concedes that, as a FAM, he was not covered by the federal labor-relations statute at 5 U.S.C. ch. 71, and thus his activity was not protected by 5 U.S.C. § 2302(b)(9). RAF, Tab 67 at 5.

disclosure. *Id*. at 30-31. The administrative judge further found that the offense was intentional, i.e., the appellant intentionally made a statement including the SSI to a reporter and he was on clear notice that the information should not be publicly revealed. *Id*. at 31-33. He noted the appellant's sworn statement that he had no regrets and felt no remorse for going to the media, and his sworn deposition testimony that it did not matter to him whether or not the information conveyed to the reporter was SSI. *Id*. at 31-32. The administrative judge also distinguished the comparison employees identified by the appellant purporting to evidence inconsistency of penalties. *Id*. at 35-37.

¶11 The appellant has filed a timely petition for review contesting all of the administrative judge's major findings and conclusions, raises affirmative defenses not raised below, and requests to submit evidence not submitted below. Petition for Review (PFR) File, Tabs 1 (original submission), 2 (supplement to PFR) & 4 (corrected PFR). The agency has responded in opposition to the PFR. *Id*., Tab 8. The appellant has filed a reply to the agency's response. *Id*., Tab 9. The agency moves to strike the appellant's reply, *id*., Tab 10, and the appellant opposes the motion to strike, *id*., Tab 11.[4] The appellant also has filed another motion to introduce "new" evidence, which the agency has opposed. *Id*., Tabs 12-13. The Honorable Dennis Kucinich and Honorable Carolyn Maloney, U.S.

[4] The Board's rules do not provide for replies to responses to petitions for review. *See* 5 C.F.R § 1201.114(i); *Santella v. Special Counsel*, 86 M.S.P.R. 48, ¶ 10 (2000), *aff'd on reconsideration*, 90 M.S.P.R. 172 (2001), *aff'd*, 328 F.3d 1374 (Fed. Cir. (2003). We therefore grant the agency's motion to strike the appellant's reply for this reason and because it was filed weeks after the date the record closed on review (as extended), does not purport to be based on previously-unavailable evidence, and is largely repetitive of arguments raised in the petition for review. Nonetheless, while we thus did not consider the reply in deciding this matter, we have directed the Clerk of the Board to retain the appellant's reply in the case file in order to preserve the appellate record.

House of Representatives, have filed a motion with the Board requesting leave to file an amicus curiae brief. *Id.*, Tab 14. We grant the Representatives' motion.[5]

ANALYSIS

The administrative judge correctly sustained the charge.

¶12 The agency removed the appellant based on the charge of "Unauthorized Disclosure of Sensitive Security Information." In support of the charge, the agency specified as follows:

> On July 29, 2003, you disclosed Sensitive Security Information in an unauthorized manner. Specifically, you informed the media that all Las Vegas FAMs were sent a text message to their government issued mobile phones that all RON (Remain Overnight) missions up August 9th would be cancelled, or words to that effect. You admitted and acknowledged the foregoing during an official, administrative inquiry regarding your conduct.
>
> The media person to whom you disclosed this information is not a covered person within the meaning of the SSI regulations, 49 C.F.R. Part 1520. The information you improperly disclosed concerned RON deployments. Such information is protected as SSI pursuant to 49 C.F.R. § 1520.5(b)(8)(ii)[,] which safeguards "Information concerning the deployments, numbers and operations of . . . Federal Air Marshals . . ." The disclosure of this SSI had the potential to reveal vulnerabilities in the aviation security system, and as such, was extremely dangerous to the public we serve.

IAF, Tab 4, Subtab 4G at 2 (punctuation and capitalization in original).[6]

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[5] We accept the Representatives' amicus brief into the record, and we have considered it in deciding the appeal. Because we conclude that the arguments contained in the amicus brief do not affect the outcome of the appeal, we have not requested any response from the agency or the appellant.

[6] The regulation quoted in the charge, 49 C.F.R. § 1520.5(b)(8)(ii), is from the version in effect when the agency issued the proposal notice. *See* 69 Fed. Reg. 28066, 28083 (2004) (promulgating a revised 49 C.F.R. Part 1520 as an interim final rule with request for comments). The version in effect in July 2003 when the appellant divulged the text message to the reporter was codified under a different number but was substantively the same as the regulation quoted in the charge. *See* 67 Fed. Reg. 8340, 8352 (2002) (promulgating a final rule defining SSI at 49 C.F.R. § 1520.7(j) as including "information concerning specific numbers of Federal Air Marshals, deployments, or

¶13 The appellant argues that the administrative judge erred in sustaining the charge without making a finding whether he had a "good faith belief" that he was permitted to disclose the contents of the text message to the reporter. PFR File, Tab 4 at 18. The appellant also argues at length that the administrative judge was wrong to reject, as not credible, his testimony that he did not know the text message was SSI. *Id*. at 19-30. The agency argues that intent is not an element of the charge. PFR File, Tab 8 at 9. We agree with the agency. The charge, as titled and as described in the specification, did not contain a specific intent element; the agency did not allege in its charge that the appellant engaged in intentional misconduct. Some charges, such as falsification, by their very nature require a showing of intent. *See Naekel v. Department of Transportation*, 782 F.2d 975, 978 n.3 (Fed. Cir. 1986); *Baracker v. Department of the Interior*, 70 M.S.P.R. 594, 599 (1996). Because the agency in this case did not bring such a charge, the Board may sustain the charge without a showing of intentionality, willfulness, knowingness, or the like, as long as imposing discipline for the conduct promotes the efficiency of the service. 5 U.S.C. § 7513(a); *see Fernandez v. Department of Agriculture*, 95 M.S.P.R. 63 ¶¶ 6-8 (2003); *Cross v. Department of the Army*, 89 M.S.P.R. 62, ¶¶ 8-9 (2001).

¶14 Under the regulations in effect in July 2003, information relating to the deployment of FAMs was included within the definition of SSI. 67 Fed. Reg. 8352 (2002) (49 C.F.R. § 1520.7(j)). The appellant was not authorized to release SSI to a reporter, 67 Fed. Reg. 8351 (49 C.F.R. §§ 1520.1(a), 1520.3(a)-(b)), nor was the reporter someone with a "need to know" SSI, 67 Fed. Reg. 8352 (49 C.F.R. § 1520.5). Imposing discipline for the appellant's disclosure of the text message to a reporter promotes the efficiency of the service because

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missions"). The appellant does not contend that he was prejudiced by the agency's citation of the later version of the regulation in the charge.

maintaining confidentiality of plans for FAM deployments goes to the heart of one of TSA's missions, that of promoting civil aviation safety and security.

The appellant's disclosure to the MSNBC reporter is not protected whistleblowing because it was "specifically prohibited by law."

¶15 It is a prohibited personnel practice for an agency to impose discipline because of an employee's disclosure of "information . . . which the employee . . . reasonably believes evidences -- (i) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law . . . ." 5 U.S.C. § 2302(b)(8)(A). In *MacLean I*, the Board held that the appellant's disclosure of the 2003 directive concerning overnight missions to a reporter was not protected whistleblowing because it was "specifically prohibited by law." *MacLean*, 112 M.S.P.R. 4, ¶¶ 20-33. The appellant argues that this holding was incorrect and asks that we overrule it. PFR File, Tab 4 at 60-63.

¶16 The law of the case doctrine refers to the practice of courts in refusing to reopen what already has been decided in an appeal, and of following a prior decision in an appeal of the same case. *Hoover v. Department of the Navy*, 57 M.S.P.R. 545, 552 (1993). These rules do not involve preclusion by final judgment, but instead regulate judicial affairs before final judgment. *Peartree v. U.S. Postal Service*, 66 M.S.P.R. 332, 339 (1995). There are three recognized exceptions to the law of the case doctrine: The availability of new and substantially different evidence; a contrary decision of law by controlling authority that is applicable to the question at issue; or a showing that the prior decision in the same appeal was clearly erroneous and would work a manifest injustice. *Hudson v. Principi*, 260 F.3d 1357, 1363-64 (Fed. Cir. 2001); *Peartree*, 66 M.S.P.R. at 337; *Hoover*, 57 M.S.P.R. at 553. We decline the appellant's invitation to overrule the Board's 2009 decision because that decision was not

"clearly erroneous," and he has not alleged any other bases for deviating from the law of the case.

¶17 We recognize that the Board's decision in *MacLean I* could be read broadly to allow any regulation that meets certain conditions to be accorded the full force and effect of law, and thus, a disclosure in violation of such a regulation could be construed as "prohibited by law" under 5 U.S.C. § 2302(b)(8)(A). We find that such a broad ruling is unnecessary to resolve the issues presented by this appeal and is inconsistent with the policies that Congress embodied in the Whistleblower Protection Act ("WPA"). We therefore modify *MacLean I* to the extent it is inconsistent with the decision we issue today. Rather, we find that the appellant's disclosure of SSI was "specifically prohibited by law" because the regulation that he violated when he disclosed information about FAM deployments was promulgated pursuant to an explicit Congressional mandate that required TSA to prohibit such disclosures. Specifically, in enacting Pub. L. No. 103-272, § 101, 108 Stat. 745, 1117 (July 5, 1994), codified at 49 U.S.C. § 40119,[7] Congress expressly required that TSA issue aviation-related regulations "prohibiting disclosure of information obtained or developed in carrying out

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[7] The statute states in pertinent part as follows:

> (b) DISCLOSURE. (1) Notwithstanding section 552 of title 5, the Administrator shall prescribe regulations prohibiting disclosure of information obtained or developed in carrying out security or research and development activities under section 44501(a) or (c), 44502(a)(1) or (3), (b), or (c), 44504, 44505, 44507, 44508, 44511, 44512, 44513, 44901, 44903(a), (b), (c), or (e), 44905, 44912, 44935, 44936, or 44938(a) or (b) of this title if the Administrator decides disclosing the information would -- (A) be an unwarranted invasion of personal privacy; (B) reveal a trade secret or privileged or confidential commercial or financial information; or (C) be detrimental to the safety of passengers in air transportation.
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> (2) Paragraph (1) of this subsection does not authorize information to be withheld from a committee of Congress authorized to have the information.

security" if, in the agency's view, "disclosing the information" would "be detrimental to the safety of passengers in air transportation." 49 U.S.C. § 40119(b)(1)(C). Citing 49 U.S.C. § 40119 (among other authorities), on February 22, 2002, the Under Secretary of TSA[8] issued regulations on February 22, 2002, which identified SSI subject to this statutory nondisclosure as including information relating to FAM deployments. 67 Fed. Reg. 8340, 8351-52 (2002).[9] Furthermore, the Ninth Circuit Court of Appeals has unequivocally declared that the information disclosed by the appellant constituted SSI as defined in those regulations. *See MacLean*, 543 F.3d at 1150.[10] Consequently, because the

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[8] In 2001, Congress enacted the legislation creating the Transportation Security Administration, which was charged with carrying out certain functions previously performed by the Federal Aviation Administration. *See* Pub. L. No. 107-71, 115 Stat.597, 603 (Nov. 19, 2001). Section 101(e)(2) of that statute replaced the word "Administrator" [of the Federal Aviation Administration] in section 40119(b) with "Under Secretary," which refers to the Under Secretary of Transportation Security, *see* 49 U.S. § 1154(b)(1).

[9] The Board's 2009 decision cited 49 U.S.C. § 114(s) as the authority for the SSI regulations at 49 C.F.R. Part 1520. 112 M.S.P.R. 4, ¶ 10. However, section 114(s) (which was later redesignated as subsection (r), *see* Pub. L. No. 110-161, Div. E, § 568(a)), became law on November 25, 2002, *see* Pub. L. No. 107-296, 116 Stat. 2135, 2312, and TSA did not issue regulations under that specific statutory authority until May 18, 2004, *see* 69 Fed. Reg. 28066, 28082 (2004). Nevertheless, as explained above, 49 U.S.C. § 40119 (which is substantively similar to section 114(s)) gave the Under Secretary for Transportation Security the authority to issue regulations prohibiting the disclosure of information if such disclosure would be "detrimental to the safety of passengers in air transportation," the Under Secretary issued such regulations in 2002, *see* 67 Fed. Reg. 8340, 8351-52, and the appellant violated those regulations. The citation to 49 U.S.C. § 114(s) instead of section 40119 in the Board's 2009 decision had no affect on the outcome.

[10] Congress established judicial review of TSA final orders in the federal courts of appeals with exclusive review by the Supreme Court. *See* 49 U.S.C. §§ 46110(a) and (e) ("A decision by a court under this section may be reviewed only by the Supreme Court under section 1254 of title 28.") Thus, this Board has no authority to review the decision of the Ninth Circuit holding that the information that the appellant disclosed constituted SSI because it "contained 'specific details of aviation security measures' regarding 'deployment and missions' of [FAMs]" in violation of 49 C.F.R. § 1520.7(i). *MacLean*, 543 F.3d at 1150.

appellant disclosed information that is specifically prohibited from disclosure by a regulation promulgated pursuant to an express legislative directive from Congress to TSA,[11] we find that his disclosure was "specifically prohibited by law" so as to bring it outside the scope of the whistleblower protection provisions of 5 U.S.C. § 2302(b)(8).

¶18 We would share some of the concerns expressed by Representatives Kucinich and Maloney if *MacLean I* were given the broad sweep that they address in their amicus brief. As we have explained above, however, we limit our holding here and the reach of *MacLean I* in order to give effect to both the WPA and Congress's express intent to prohibit the public disclosure of aviation security information. The appellant's disclosure of FAM deployment information was not protected by the WPA because it was prohibited by SSI regulations issued by TSA in compliance with an express statutory requirement of Congress to issue regulations "prohibiting disclosure of information obtained or developed in carrying out security" if, in TSA's view, "disclosing the information" would "be detrimental to the safety of passengers in air transportation." 49 U.S.C. § 40119(b)(1)(C). To the extent that this statutory mandate encroaches upon the protections afforded by the WPA, it is for Congress, not the Board, to resolve the competing legislative objectives underlying these statutes.

¶19 Although the appellant's disclosure of information relating to FAM deployments to an MSNBC reporter does not constitute protected whistleblowing activity, our holding today does not mean that TSA may rely on its SSI regulations as authority for prohibiting *all* disclosures relating to aviation security and safety. On the contrary, Congress has specified that the regulations

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[11] The Board has no authority to review either the statutory mandate against disclosure, or the legality of the regulation issued pursuant thereto. *See Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985) (the Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule or regulation); 5 U.S.C. § 1204(f).

issued pursuant to its mandate in 49 U.S.C. § 40119 may not prohibit disclosures to "a committee of Congress authorized to have the information." 49 U.S.C. § 40119(b); *see also* 49 U.S.C. § 114(r)(2). Additionally, we note that the "specifically prohibited by law" exclusion from WPA protection does not apply to disclosures made to the Office of Special Counsel. 5 U.S.C. § 2302(b)(8)(B); *see Parikh v. Department of Veterans Affairs*, 110 M.S.P.R. 295. ¶ 23 n.1 (2008). The appellant did not pursue either of these channels.[12]

¶20 Finally, the case of *Chambers v. Department of the Interior*, 602 F.3d 1370 (Fed. Cir. 2010), while appearing to have some similarity to this case, is distinguishable. Ms. Chambers, like the appellant herein, publicly disclosed information about the deployment of law enforcement officers. *Id*. at 1378. Ms. Chambers's disclosure of a substantial and specific danger to public health or safety, *id*. at 1379, was protected under 5 U.S.C. § 2302(b)(8)(A)(ii), however, because it was not "specifically prohibited by law." By contrast, while the appellant was also arguably disclosing a substantial and specific danger to public health or safety, his disclosure cannot similarly be protected under 5 U.S.C. § 2302(b)(8)(A)(ii) because it contained SSI, the disclosure of which was "specifically prohibited by law" under a regulatory nondisclosure scheme mandated by Congress.

The appellant's removal based on his 2003 SSI disclosure did not violate his First Amendment right of free speech.

¶21 The appellant contends that the agency violated his First Amendment right to freedom of speech by removing him for his 2003 disclosure of SSI to the

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[12] Because the appellant did not make his disclosure through either of the two authorized channels described above, we make no finding on whether, if he had, his disclosure would have been protected as evidencing a violation of law, rule, or regulation, a substantial and specific danger to public health or safety, or some other condition described at 5 U.S.C. § 2302(b)(8).

MSNBC reporter.[13] The administrative judge found the appellant's First Amendment claim unproven, finding that under the balancing test outlined in *Pickering v. Board of Education of Township High School District 205, Will Count, Illinois*, 391 U.S. 563, 568 (1968), the appellant's interest in commenting on a matter of public concern, *i.e.*, the 2003 directive regarding overnight missions, was outweighed by the interest of the agency, as employer, in promoting aviation security. The appellant challenges this finding. PFR File, Tab 4 at 56-57. We note, in this regard, courts have recognized that law enforcement duties entail special obligations with regard to public trust that may be considered in the *Pickering* balancing. *See, e.g.*, *United States v. Aguilar*, 515 U.S. 593, 606 (1995); *O'Donnell v. Barry*, 148 F.3d 1126, 1135 (D.C. Cir. 1998); *Cochran v. City of Los Angeles*, 222 F.3d 1195, 1201 (9th Cir. 2000); *Bennett v. City of Holyoke*, 230 F.Supp. 2d 207, 225 (D. Mass. 2002), *aff'd*, 362 F.3d 1 (1st Cir. 2004); *Pierson v. Gondles*, 693 F. Supp. 408, 418 (E.D. Va. 1988).

¶22 Here, the record reflects that the appellant revealed information about FAM deployments that the agency legitimately expected to remain confidential, and which created a vulnerability in the aviation system. We find that disciplining the appellant for releasing details of aviation security measures to a reporter did not violate his First Amendment right of free speech. *Cf. Chambers v. Department of the Interior*, 103 M.S.P.R. 375, ¶¶ 36-42 (2006) (disciplining a Chief of Police for disclosing information about officer patrols and her agency's budget to a reporter did not violate her First Amendment right of free speech),

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[13] In the summary of the prehearing conference, the administrative judge did not list as an affirmative defense a claim by the appellant that that his disclosure to MSNBC in 2003 about the suspension of overnight missions was protected under the First Amendment. RAF, Tab 67. The appellant made that argument in his post-hearing brief, however, RAF, Tab 79 at 16-18, the administrative judge addressed it in the initial decision, RAF, Tab 84 at 23-28, and the agency does not argue on review that the issue should not have been considered, PFR File, Tab 8 at 19-20. Under the circumstances, we deem the appellant's claim that his 2003 disclosure to MSNBC was protected free speech under the First Amendment to be properly before us.

aff'd in part, vacated in part on other grounds, and remanded, 515 F.3d 1362 (Fed. Cir. 2008).

¶23 We also believe the fact that the agency acted in this instance pursuant to, and consistent with, the aforementioned statutory and regulatory nondisclosure scheme mandated by Congress regarding aviation security, undercuts the appellant's constitutional claim. To the extent that the appellant's claim implicitly involves a challenge to the constitutionality of the statute authorizing the agency to issue the nondisclosure regulations, the Board lacks jurisdiction to hear such a claim. *See May v. Office of Personnel Management*, 38 M.S.P.R. 534, 538 (1988) (the Board has authority to adjudicate a constitutional challenge to an agency's application of a statute, but it is without authority to determine the constitutionality of federal statutes).

The appellant did not prove his prohibited personnel practice claim under 5 U.S.C. § 2302(b)(10).

¶24 As discussed above, the appellant also contends that the agency retaliated against him because of his FLEOA activities, thereby committing a prohibited personnel practice in violation of 5 U.S.C. § 2302(b)(10). The relevant statute pertinently provides:

> Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—
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> . . . .
>
> (10) discriminate 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; . . . .

5 U.S.C. § 2302(b)(10).

¶25 The Board has not previously established the precise elements for proving a violation of 5 U.S.C. § 2302(b)(10). Depending on the specific facts and circumstances, the proscription of § 2302(b)(10) may be analogous to either (1) the prohibition against retaliation for exercising appeal rights, filing grievances, etc., found at 5 U.S.C. § 2302(b)(9), or to (2) a traditional claim of discrimination

governed by the principles of Title VII. We find it unnecessary in this case, however, to decide the specific legal framework that the Board will apply to future § 2302(b)(10) claims because the appellant has failed to prove his claim under either standard.

¶26 To establish a prima facie violation of 5 U.S.C. § 2302(b)(10) applying the (b)(9) framework, the appellant must demonstrate that: (1) He engaged in activity that did not adversely affect his performance; (2) he was subsequently treated in an adverse fashion by the agency; (3) the deciding official had actual or constructive knowledge of the appellant's (b)(10) activity; and (4) there is a causal connection between the (b)(10) activity and the adverse action. *See Crump v. Department of Veterans Affairs*, 114 M.S.P.R. 224, ¶ 10 (2010); *Wildeman v. Department of the Air Force*, 23 M.S.P.R. 313, 320 (1984); *see also Warren v. Department of the Army*, 804 F.2d 654 (Fed. Cir. 1986). Where, as here, the agency has already articulated a non-retaliatory reason for its action, i.e., the charged misconduct, it has done everything that would be required of it if the appellant had made a prima facie case. Thus, our inquiry proceeds directly to the ultimate question of whether, weighing all the evidence, the appellant has met his burden of proving illegal retaliation. *Crump*, 114 M.S.P.R. 224, ¶ 10; *see U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983).

¶27 If analyzed under the legal framework for traditional Title VII claims, in order to prevail the appellant had to show by preponderant evidence that he engaged in conduct that did not adversely affect his performance and that the agency intentionally discriminated against him for that conduct. In the absence of direct evidence of intentional discrimination, the appellant could meet this burden by introducing evidence giving rise to an inference of disparate treatment because of his conduct unrelated to his performance. *Davis v. Department of the Interior*, 114 M.S.P.R. 527, ¶ 7 (2010), *citing McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). Assuming that he did so, the burden of production shifts to the agency to articulate a legitimate, nondiscriminatory

reason for its action. *Id.*, ¶ 8. If the agency meets this burden, the appellant then must prove that the agency's stated reason is merely a pretext for discrimination prohibited by (b)(10) and the activity unrelated to his performance was the real reason for the disparate treatment. *Id.* In most adverse action appeals taken pursuant to 5 U.S.C. chapter 75, the agency has already articulated a nondiscriminatory reason for its action, *i.e.*, the charged misconduct; accordingly, the agency has done everything that would be required of it if an appellant had made out a prima facie case, and whether he in fact did so is no longer relevant. *See id.*, ¶ 9 n.3, *citing Marshall v. Department of Veterans Affairs*, 111 M.S.P.R. 5, ¶ 6 (2008). As a result, the inquiry proceeds directly to the ultimate question of whether, upon weighing all of the evidence, the appellant has met his overall burden of proving illegal discrimination. *See id.*

¶28 Because either framework requires us to proceed to the ultimate question of whether the agency intentionally retaliated or discriminated against the appellant for his (b)(10) activities,[14] we have reviewed the record and we conclude that the appellant has failed to meet his burden to establish that the reason articulated by the agency for its decision to remove him was pretextual and that the real reason underlying that decision was his FLEOA activities. Even if we were to accept appellant's contentions that agency managers disapproved of his FLEOA activities, *see, e.g.*, RAF, Tab 45 at 5-8, 19-27, there is no direct evidence that the agency retaliated or discriminated against him for engaging in FLEOA activities when it removed him from employment.

¶29 There is no question that the appellant disclosed SSI in violation of agency regulations prohibiting such disclosure and that this was the agency's stated basis for his removal. The appellant contends, though, that he was treated more

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[14] We assume, without deciding, that the agency would commit a prohibited personnel practice in violation of § 2302(b)(10) if it removed the appellant in retaliation for his FLEOA activities.

harshly than other similarly situated individuals who disclosed SSI and also that he and other FLEOA leaders were singled out for retaliatory treatment. RAF, Tab 45 at 6-8. While the record reflects that the agency treated other employees less harshly for their disclosures of SSI, the circumstances surrounding those disclosures are sufficiently distinct from the instant case as to undercut any inference that the reason for the difference is discrimination based on the appellant's FLEOA activities. For instance, the disclosures attributed to J.S. or J.M. were limited to a small number of individuals (to a few passengers on a plane under exigent circumstances and to some airline personnel for personal reasons, respectively). As for A.R., we note that, in the single specification of the unauthorized disclosure of SSI charge, the agency alleged that A.R. "posted a message on www.delphiforums.com that revealed security measures concerning the deployment of FAMS on international flights from the Atlanta Field Office." RAF, Tab 45, Exhibit F. Unlike the appellant's disclosure, which created a vulnerability in aviation security by revealing to a national news reporter that FAMs were no longer going to be present on *any* RON missions, A.R.'s disclosure appears to have been more limited because: it was disclosed on a single message board; it only identified FAM deployments out of the Atlanta Field Office; and it appeared to leave open the possibility that other offices would be responsible for those flights.

¶30 Further, the appellant's reliance on another individual, Frank Terreri, as similarly situated appears misplaced as the comparison actually undermines his claim that his FLEOA activities resulted in a harsher penalty. Mr. Terreri was the president of the air marshal chapter of FLEOA, engaged in outspoken criticism of agency management and its policies, and was investigated for releasing SSI. But he continues to be employed by TSA after the allegations made against him were deemed to be unfounded. Tr. at 60, 116-17.

¶31 Significantly, the administrative judge correctly found that the appellant demonstrated a lack of regret for disclosing the RON information, reflected, for

example, in his deposition testimony to the effect that it did not matter to him if the information was confidential, law enforcement sensitive, SSI or classified information. RAF, Tab 44, Exhibit 8; Tr. at 113-15, 118-23. The appellant also admitted during the Immigration and Customs Enforcement (ICE) Office of Professional Responsibility (OPR) investigation:

> 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, Brock Meeks. Brock Meeks reporting these gross mismanagement issues has resulted in immediate and positive change in deadly FAMS policies.

IAF, Tab 4, Subtab 4J, Exhibit 2 (emphasis in original).

¶32 In the face of a clear Congressional directive for nondisclosure and a regulatory provision promulgated pursuant to that directive, which explicitly prohibits the type of public disclosure made by the appellant, the agency could and did reasonably infer a risk from the appellant's lack of remorse that he would continue to make disclosures that were prohibited by law. Thus, under the circumstances, we find that the appellant's lack of remorse to be a significant distinction justifying the agency's decision to remove him rather than imposing a lesser penalty. *Cf.* RAF, Tab 45, Exhibit F (the deciding official in A.R.'s case stated that he "plac[ed] a great deal of weight" on the fact that A.R. "demonstrated sincere remorse over this current incident" and "assured" the deciding official that he would "demonstrate the utmost diligence when handling SSI information.").

¶33 Considering the record as a whole, we find that the appellant has not proven by a preponderance of the evidence that the agency intentionally discriminated or

retaliated against him on the basis of his FLEOA activities in violation of 5 U.S.C. § 2302(b)(10).[15]

The Board will not consider the appellant's claim raised for the first time on petition for review that the agency initiated its investigation in retaliation for his engaging in protected whistleblowing and First Amendment speech.

¶34 For the first time on petition for review, the appellant argues that his 2004 appearance on NBC Nightly News was protected free speech under the First Amendment and protected whistleblowing under 5 U.S.C. § 2302(b)(8), and that the agency's investigation in response to his appearance was unlawful retaliation in violation of the First Amendment and the WPA. PFR File, Tab 4 at 53-60.

¶35 In the summary of the prehearing conference, the administrative judge stated as follows with respect to the appellant's affirmative defenses:

> Here, the appellant alleges that the agency discriminated and retaliated against him based on his membership and leadership status with the FLEOA for other than merit reasons in violation of 5 U.S.C. § 2302(b)(10); and that this discrimination and retaliation violated his First Amendment right of free association and his right to free speech. No other affirmative defenses are alleged in this appeal.

RAF, Tab 67 at 6. The administrative judge advised the parties that additional issues were precluded absent a timely meritorious objection. *Id*. at 5-6. The appellant did not make any objection, and the issues he now attempts to raise were not mentioned in the summary of the prehearing conference. The general rule under such circumstances is that the issues raised for the first time on review will not be considered. *See Henson v. U.S. Postal Service*, 110 M.S.P.R. 624, ¶ 10 (2009); *Wilson v. Department of Justice*, 58 M.S.P.R. 96, 101 n.4 (1993).

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[15] To the extent the appellant contends that the agency violated his First Amendment rights based on his involvement with FLEOA, we find, for all of the reasons explained by the administrative judge and in our discussion of the appellant's § 2302(b)(10) claim, that the agency took its actions based on the charged misconduct and not for his association with or activities on behalf of the FLEOA.

¶36 The appellant argues that we should make an exception to this general rule. He cites Board and federal appeals decisions for the principle that a new claim may be raised on review when the administrative judge confused or misled a party with respect to the claim, or when the party raising the claim has newly-discovered evidence. PFR File, Tab 4 at 58-60. While we do not quarrel with the appellant's reading of the cases, the appellant makes no attempt to explain how the decisions he cites apply here. He does not allege, nor is there any evidence, that the administrative judge confused or misled him with respect to his claim regarding his 2004 appearance on NBC Nightly News. Rather, the appellant contends that by rejecting his FLEOA defense, in part, on the grounds of the appellant's own testimony that the 2004 television appearance was the catalyst for the agency's investigation, the administrative judge somehow "converted [his FLEOA defense] to a dispositive First Amendment violation" and "created a violation of the [WPA]." *Id*. at 54, 57-58. Even assuming the administrative judge found that the appellant's television appearance was the impetus for the investigation, we disagree with the appellant that this conclusion somehow "created" new claims that were not previously known to him.

¶37 Indeed, the appellant does not allege that he only discovered that his appearance on NBC Nightly News spurred the investigation after the record closed below. In fact, the appellant testified before the administrative judge that his 2004 appearance on NBC Nightly News is what caused the agency to initiate the investigation in which he admitted revealing the 2003 RON directive to MSNBC. Tr. at 93. In other words, the appellant knew before the record closed below what caused the agency to begin its investigation. Thus, this is not a case in which a party attempts to raise a new claim on review based on evidence discovered after the record closed below. For these reasons, we will not consider the issues the appellant raises for the first time in his petition for review.

The Board also will not consider the new evidence submitted by the appellant on petition for review.

¶38 The Board does not accept the evidence that the appellant attempts to submit for the first time on review. The appellant requests to supplement the record with a transcript of a statement he gave to agency investigators on May 4, 2005. According to the appellant, the transcript undercuts the administrative judge's credibility determination on the question of whether the appellant was revealing SSI when he shared the July 2003 RON directive with MSNBC. *See* RAF, Tab 84 at 14-18; PFR File, Tab 1 at 73-89; *id*., Tab 4 at 14. We deny the appellant's request to supplement the record for two reasons. First, the Board will not consider evidence submitted for the first time with the petition for review absent a showing that it was unavailable before the record was closed despite the party's due diligence. *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980). The appellant's own submission shows that he was provided with the transcript more than 3 years before the hearing. PFR File, Tab 1 at 71. Second, as we discuss in our analysis of the charge and penalty, the outcome of this case does not turn on whether the appellant credibly testified that he did not know the RON directive was SSI when he disclosed it to the MSNBC reporter. Thus, the transcript is immaterial to the outcome in the appeal.

The penalty of removal is within the bounds of reasonableness.

¶39 We affirm the administrative judge's thorough analysis of the penalty and we need not repeat all of it here. RAF, Tab 84 at 28-40. Some factors warrant further discussion, however. When the Board sustains all the charges, it reviews the agency's choice of penalty only to determine whether the agency considered all of the relevant factors and exercised management discretion within the parameters of reasonableness. *Ellis v. Department of Defense*, 114 M.S.P.R. 407, ¶ 11 (2010). The Board's function is not to displace management's responsibility, but to ensure that managerial judgment has been properly exercised. *Id*.; *see also Douglas*, 5 M.S.P.R. at 305-06. Here, as the

administrative judge found, there is ample evidence that the agency considered all of the relevant factors. Tr. at 12-22; RAF, Tab 84 at 30.

¶40 The most important factor in an agency's penalty determination is the nature and seriousness of the misconduct and its relation to the appellant's duties, including whether the offense was intentional. *Jinks v. Department of Veterans Affairs*, 106 M.S.P.R. 627, ¶ 17 (2007). The appellant revealed information about FAM deployments in violation of regulations requiring that it remain confidential. His actions caused the agency to lose trust in him, and divulging security measures to the media created an immediate vulnerability in the aviation system. Tr. at 15, 21-22. The appellant's revelation of confidential information to a reporter was intentional, by his own admission. Tr. at 108-110. Also significant to rehabilitative potential and the agency's penalty determination is that the appellant lacked remorse for disclosing the RON information, as reflected in his deposition. RAF, Tab 44, Exhibit 8; Tr. at 113-15, 118-23. The agency could and did reasonably infer a risk from the appellant's lack of remorse that he would continue to make disclosures that were specifically prohibited by law.

¶41 After thoughtfully considering the entire record, we also are not persuaded that the appellant believed in "good faith" that he was permitted to share plans for the deployment of FAMs with the MSNBC reporter. PFR File, Tab 4 at 29-30. At the time of his appointment in 2001, the appellant was presented with a single-page form captioned "Conditions of Employment for Federal Air Marshals." The appellant signed the form at the bottom, and initialed the form next to the following words: "I accept the position of Federal Air Marshal. I have read and I accept the Conditions of Employment." One of those conditions was that a FAM "may be removed" for "[u]nauthorized release of security-sensitive or classified information." IAF, Tab 4, Subtab 4T. Apart from this written acknowledgment of the seriousness of unauthorized disclosure of SSI in general, the appellant testified that in his training it was made "very, very clear" that FAMs should not tell anyone, not even their spouses, which flights they would be on because the

information could be repeated to "the wrong people." Tr. at 106-07. The appellant further testified that telling someone a flight would not have a FAM on it would endanger the flight. *Id.* at 108. Based on the foregoing, we find that the appellant knew that he was not permitted to share information about FAM coverage with a reporter, regardless of the fact that he received the information as a text message on his cell phone instead of on his encrypted PDA, and even if he was unsure of its SSI classification.

¶42 It makes no difference to our penalty analysis whether the appellant knew that the message suspending overnight missions fell within the regulatory definition of SSI. As explained immediately above, the appellant admittedly knew that he was not permitted to tell anyone about FAM scheduling, yet he did so anyway, and it could have created a significant security risk. As a law enforcement officer, the appellant can be held to a high standard of conduct. *Mahan v. Department of the Treasury*, 89 M.S.P.R. 140, ¶ 11 (2001); *Crawford v. Department of Justice*, 45 M.S.P.R. 234, 237 (1990). The appellant's actions in July 2003 did not exhibit the good judgment that the agency can legitimately expect of its law enforcement personnel. *Mahan*, 89 M.S.P.R. 140, ¶ 11.

¶43 The appellant contends that he was treated more harshly than other similarly situated individuals who disclosed SSI and also that he and other FLEOA leaders were singled out for retaliatory treatment. RAF, Tab 45 at 6-8. As we explained when addressing the appellant's claim under 5 U.S.C. § 2302(b)(10), although the record reflects that the agency treated other employees less harshly for their disclosures of SSI, the circumstances surrounding those disclosures are plainly distinguishable and do no suggest that the agency subjected him to a disparate penalty.

¶44 We also accept, without finding, that the appellant believed he did the right thing in disclosing the information. We have specifically considered the appellant's testimony regarding his belief that TSA's plan to eliminate FAMs from overnight flights was "serious" and "dangerous to the … public," and that

his disclosure was motivated by his desire to protect the flying public. Tr. at 88, 90; *see id*. at 122 ("All I wanted to do was protect lives and . . . uphold the law."). The appellant also testified: "If I saved – if I saved a plane from falling out of the sky or saved a life, I believe I did my job, and I shouldn't regret it." Tr. at 115. Further, as the administrative judge concluded, we also have no reason to doubt that the appellant's motivation was sincere. RAF, Tab 84 at 28 (the administrative judge, when discussing the appellant's First Amendment claim, stated that he had "no reason to doubt the appellant's assertion that he took these actions to benefit the nation . . . ."). However, even if the appellant could have established the classic elements of whistleblowing, i.e., that he disclosed a substantial and specific danger to public safety and that his disclosure was a contributing factor in his removal,[16] he cannot invoke WPA protection because his disclosure was specifically prohibited by law.

¶45 For all of the above reasons as well as those explained by the administrative judge, we find that the agency's removal penalty did not exceed the bounds of reasonableness. The appellant's removal is SUSTAINED.

ORDER

¶46 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

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[16] As we noted earlier, we do not determine whether the appellant's disclosure would be protected under the WPA because he did not make it through authorized channels. *Infra*, n.12.

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

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

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.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.