UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

ROBERT J. MACLEAN,
Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,
Agency.

DOCKET NUMBER
SF-0752-06-0611-I-1

DATE: August 21, 2006

ORDER ON DISCOVERY MOTIONS

The parties have made various motions related to discovery, and have filed subsequent pleadings related thereto. All of their pending motions are addressed in this order.[1]

Deposition of Thomas Quinn; Subpoena Duces Tecum. In this regard, I have considered the Appellant's Motion For Issuance of a Subpoena Duces Tecum for Former FAMS Director Thomas D. Quinn, dated and filed July 21, 2006, *see* Initial Appeal File (IAF), Tab 8;[2] the appellant's amended motion by the same title, dated July 31, 2006 and received August 1, 2006, *id.*, Tab 12; and the agency's opposition thereto, dated and received July 31, 2006. *Id.*, Tab 13.

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[1] On August 16, 2006, I received from the appellant a request to hold a telephonic status conference on the issues presented in these motions. After reviewing the pleadings I find that this would not advance the proceeding. The request is denied.

[2] These references to the Board's appeal file are included for the convenience of the Board.

I find that Mr. Quinn may have personal knowledge or documents that are reasonably calculated to lead to the discovery of admissible evidence pertaining to the issues presented in this appeal, *see* 5 C.F.R. § 1201.73(a) (scope of discovery); e.g., whether there was undue pressure to remove the appellant for reasons other those stated in the decision letter, and whether the appellant's allegedly protected disclosures influenced that decision in any way. The motion is therefore GRANTED, and a subpoena will issue. See below for instructions pertaining to this motion.

Appellant's Motion To Compel. In this regard, I have considered the Appellant's Motion To Compel, dated and filed July 21, 2006, IAF, Tab 9, and the agency's opposition thereto, dated and received July 31, 2006. *Id.*, Tab 14.

Interrogatory 2. The agency states that it has supplemented its response, but it does not say how it did so. *Id.*, Tab 14, at 1. As to this interrogatory the motion is GRANTED, with regard to a specific description of this witnesses' proposed testimony. The motion is DENIED as to the additional information requested under "Appellant's Argument," insofar as this information was not specifically requested from the agency before the motion was filed.

Request for Production 12. The motion is GRANTED as to this request. It is well-settled that a party asserting an evidentiary privilege has the burden of establishing it. *See Danko v. Department of Defense*, 5 M.S.P.R. 426, 428-29 (1981). To bear that burden the agency must identify any documents responsive to this request, for which privilege is claimed; identify the privilege being asserted, and describe each document with enough specificity to allow me to rule whether the privilege applies, if a further motion to compel is filed. It is so ORDERED. Please see below for implementing orders regarding the agency's response.

Interrogatories 9, 10; Request for Production 17. The motion is DENIED as to these items. The reasons for the agency's decision to cancel RON missions

are not relevant either to the charge or the choice of penalty. The appellant's defense of whistleblowing may be precluded on other grounds with respect to his disclosure of this decision;[3] but in any event, the protected status of this disclosure depends solely on information that was already known by, or available to him when he made this disclosure.[4] Thus, I find that the information that he seeks would not be relevant to any issue presented in this appeal.

Interrogatory 13, 20, 26; Request For Production 27. The agency states that it has supplemented its responses to Interrogatories 20 and 26, and Request 27. IAF, Tab 14, at 4, 6. The motion is DENIED as to these items. I find that the agency's responses are adequate.

Request For Production 25; Interrogatory 27. The agency states that it has supplemented its response as to both of these items. *Id.*, Tab 14, at 4-5, 7. In any event, I find that these items are overbroad. The motion is DENIED as to these items.

Interrogatory 25. Again the agency states that it has supplemented its response. *Id.*, Tab 14, at 5-6. I find that the appellant has failed to show that the information sought therein is relevant to any issue presented in this appeal. The motion is DENIED as to this item.

Protective Order. In this regard, I have considered the Agency's Motion For Protective Order And To Quash Notice of Depositions dated and received July 31, 2006, *id.*, Tab 15; the agency's supporting Exhibit 3, received on August

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[3] *See* 5 U.S.C. § 2302(b)(8) (excludes from protection any disclosure "specifically prohibited by law… ").

[4] *See LaChance v. White*, 174 F.3d 1378, 1381 (Fed.Cir. 1999), *cert. denied,* 120 S. Ct. 1157 (Feb. 22, 2000) (to determine whether a protected disclosure occurred, "the proper test is... Could a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee reasonably conclude that the actions of the government evidence" one of the types of wrongdoing described in 5 U.S.C. § 2302(b)(8), e.g., a violation of law, rule or regulation?)

1, 2006, *id.*, Tab 16; the appellant's opposition dated August 10, 2006, and received August 11, 2006. *Id.*, Tab 17; and the agency's reply dated and received August 15, 2006. *Id.*, Tab 18.

Deposition of Graceson. The agency's motion is DENIED as to this witness, and the deposition may proceed. The question presented in this appeal is not whether the applicable SSI order, or any portion thereof, is valid; rather, the question is whether a certain text message falls within the scope of the order. I am not convinced that this issue is reviewable in any forum other than the Board at this juncture; moreover, it is an element of the agency's burden of proof on the charge proper. Thus, it is a proper subject for discovery.

Deposition of Adams. The motion is DENIED with respect this witness, because it may be that he can shed some light on the appellant's claim that he was removed in retaliation for his anonymous television appearance, which he characterizes as whistleblowing protected under 5 U.S.C. § 2302(b)(8). The deposition may proceed.

Deposition of Schofield. The motion is DENIED in part. This witness allegedly had conversations with the appellant about the agency's reasons for canceling RON missions, prior to the appellant's allegedly protected disclosure regarding this issue. Again, protection may be precluded on other grounds, *see* 5 U.S.C. § 2302(b)(8); but if not, the substance of these conversations could be relevant to whether his subsequent disclosure was protected. Thus, the witness may be deposed regarding those conversations.

In all other respects the motion is GRANTED. The reasons for the agency's decision to cancel RON missions are not relevant to any question presented in this appeal, as explained earlier in this order. The witness shall not be deposed as to the reasons for that decision, except insofar as they were discussed with the appellant prior to his allegedly protected disclosure relating thereto. So ORDERED.

Further Orders. I further ORDER as follows:

(1) The parties shall promptly meet and confer, preferably with input from Mr. Quinn and his counsel, if any, to determine a convenient date, time and location for Mr. Quinn's deposition and procedures applicable thereto. *See* 5 C.F.R. § 1201.75. If, after a good faith effort, the parties cannot reach agreement on these matters I will make an order resolving them.[5] Once they are resolved the appellant shall immediately let me know the date, time and location of the deposition, so that I may issue the subpoena duces tecum that he requests. The appellant shall be responsible for service of the subpoena with payment of applicable fees and expenses, per Board regulations.

(2) The agency shall provide further discovery responses as ordered above, to be received in the office of the agency's representative no later than September 8, 2006. If the appellant seeks to compel a further response he may do so by filing a motion to that effect.

(3) Deadlines established in my "Order Re Discovery" dated May 22, 2006, at paragraphs entitled "Discovery Cutoff" and "Motions to Compel," and extended by my "Order Suspending Case Processing" dated June 21, 2006, are further extended as follows:

Discovery in this matter shall be completed within the time limits set forth in 5 C.F.R. § 1201.73(d), but in any event, no later than September 29, 2006. 5 C.F.R. § 1201.73(d)(5). All responses to discovery shall be received by the requesting party, and all depositions completed on or before that date. Any motion to compel discovery shall be filed within the time limits set forth at 5

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[5] Please note that I will be absent from the office, and therefore unavailable for this purpose from September 11-22, 2006. The parties should therefore expedite their discussions on these matters. They should also be aware that I will not respond to telephone calls during this, or any other deposition, seeking a ruling on any disagreements that may arise. Thus, they should make their best effort to raise and resolve them before the deposition begins.

C.F.R. § 1201.73(d)(4); except that I will not consider any such motion that is received in this office and the office of the opposing representative after October 6, 2006. Any opposition to a motion to compel discovery shall be filed within the time limits set forth in the same regulation; except that I will not consider any opposition that is received in this office after October 13, 2006.

All other orders and deadlines remain in effect.

FOR THE BOARD: ______________________________
Philip D. Reed
Administrative Judge

CERTIFICATE OF SERVICE

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

Appellant

U.S. Mail — Robert J. MacLean
11 Knotty Oak Circle
Coto de Caza, CA 92679

Appellant Representative

Electronic Mail — Peter H. Noone, Esq.
Avery, Dooley, Post & Avery, L.L.P.
90 Concord Avenue
Belmont, MA 02478

Agency Representative

Facsimile — Eileen Dizon Calaguas, Esq.
Department of Homeland Security
Transportation Security Administration
San Francisco Mission Support Center
1001 Bayhill Drive
Second Floor
San Bruno, CA 94066-3061

August 21, 2006
(Date)

Rebecca Huey
Legal Assistant