

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

Appeal of) Docket Number
ROBERT J. MACLEAN,) SF-0752-06-0611-I-2
)
)
Appellant,)
)
v.)
)
DEPARTMENT of HOMELAND SECURITY,)
)
Agency.)
_____)

TRANSCRIPT
of the
VIDEO-TELECONFERENCE HEARING

Thursday, November 5, 2009

BEFORE: ADMINISTRATIVE JUDGE FRANKLIN M. KANG
U.S. Merit Systems Protection Board
Western Regional Office
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1 Thursday, November 5, 2009

8:21 o'clock a.m. PST

2 P R O C E E D I N G S

3 JUDGE KANG: Good morning. I am Administrative Judge
4 Kang with the U. S. Merit Systems Protection Board. Today is
5 Thursday, November 5th, 2009. We are here for the hearing in
6 the matter of MacLean, M-a-c-L-e-a-n, versus the Department of
7 Homeland Security, Docket Number SF-0752-06-0611-I-2.

8 For this hearing today, it is convened partly by
9 videoconference. The Appellant opted to travel to Washington,
10 D.C. from California to join his counsel and now appears with
11 his counsel, Larry Berger and Thomas Devine.

12 Prior to going on the record I did ask everyone in
13 the room to introduce themselves, and I'm just repeating it
14 for the record.

15 The Agency is represented by its counsel, Ms.
16 Calaguas, who has been the attorney of record.

17 As of yesterday evening, based on the submission from
18 the Agency, the Agency has also designated two additional
19 cocounsel, Heather Book and Jeffrey Velasco.

20 Is that the correct pronunciation?

21 MR. VELASCO: That's correct, Your Honor.

22 JUDGE KANG: Pursuant to the parties' respective
23 requests and the agreement of the parties memorialized in the
24 record prior to today's proceedings, the Appellant and his
25 attorneys are appearing from the Board's Washington Regional

1 Office, while Ms. Calaguas and Mr. Velasco and the Agency
2 employee witnesses are appearing from the Board's Western
3 Regional Office here in California. Ms. Book appears from the
4 Board's Washington Regional Office. And I'm utilizing
5 videoconferencing equipment, too, for this proceeding to view
6 the – to connect in the Washington Regional Office.

7 Prior to going on the record I did inform the
8 parties –

9 (Paper shuffling.)

10 JUDGE KANG: Mr. Devine, please try to keep the paper
11 shuffling to a minimum.

12 MR. DEVINE: I'm sorry, Judge.

13 JUDGE KANG: Perhaps we can move the microphone over
14 to Ms. Book's table. I should be able to hear you just fine.
15 It's a very sensitive microphone.

16 MR. DEVINE: We can hear you just fine, Judge.

17 JUDGE KANG: Possibly away from you as well, just
18 forward.

19 (Microphone moved as instructed.)

20 JUDGE KANG: Yeah, I think that will work. All
21 right.

22 Mr. Devine, can you say hello to me again so I can
23 test the mic?

24 MR. DEVINE: Hi, Your Honor.

25 JUDGE KANG: All right. I can hear you just fine.

1 As I was saying, prior to going on the record I did
2 inform the parties as well as the members of the media, and I
3 guess in attendance for this proceeding, that no two-way
4 communication devices may be used and/or powered on in either
5 of the hearing rooms by any individual or group. Cell phones,
6 texting devices, and all other two-way communication devices
7 must be powered off and shall be powered off in the hearing
8 rooms. Similarly, no cameras or recording devices may be
9 powered on or otherwise operated in the hearing rooms.

10 To the extent any current SSI is discussed, I will
11 consider any Agency objections to the audience or any
12 objections that you – that the Agency has as they are raised.

13 MS. CALAGUAS: Thank you, Your Honor. We will, if
14 necessary, need to make certain objections. And we can
15 discuss it at that time. Thank you.

16 JUDGE KANG: All right. Prior to the hearing today
17 extensive prehearing conferences were convened and are
18 memorialized in the record. Currently there are no
19 outstanding motions. This hearing is convened following the
20 issuance of the Ninth Circuit opinion as well as the Board's
21 opinions that were discussed extensively and are documented in
22 the files. Based on these rulings, the issues in these
23 proceedings were limited pursuant to those prehearing
24 proceedings.

25 Is there anything else before we call in the first

1 witness?

2 Ms. Calaguas?

3 MS. CALAGUAS: Not from the Agency, Your Honor.

4 JUDGE KANG: Okay. Who is serving as lead, Mr.
5 Berger, Mr. Devine?

6 MR. BERGER: Yes, yes. Nothing further from the
7 Appellant. This is Mr. Berger. Can you see me, Your Honor?

8 JUDGE KANG: I can see you very well, Mr. Berger.

9 MR. BERGER: Okay. Thank you.

10 JUDGE KANG: All right, then. Let's go off the
11 record – well, actually stand by a minute. Let me just
12 officially get the pronouncement from the Agency.

13 Who are you calling as your first witness, Agency?

14 MS. CALAGUAS: That would be Frank Donzanti.

15 JUDGE KANG: All right. We're going to go off the
16 record while we retrieve Mr. Donzanti from the holding area.
17 Off the record.

18 (Off the record from 8:26 a.m. to 8:31 a.m.)

19 JUDGE KANG: Agency, please announce your first
20 witness, who has now taken the stand.

21 MS. CALAGUAS: The Agency calls Frank Donzanti.

22 Whereupon,

23 FRANK JOSEPH DONZANTI,

24 called as a witness by the Agency, was first duly sworn by
25 Administrative Judge Kang, and was examined and testified as

1 follows:

2 THE WITNESS: I do.

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

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

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

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

11 JUDGE KANG: Thank you.

12 Agency, the witness is yours.

13 MS. CALAGUAS: Thank you.

14 DIRECT EXAMINATION

15 BY MS. CALAGUAS:

16 Q. The Los Angeles Field Office, is that part of the
17 Transportation Security Administration?

18 A. Yes, it is.

19 Q. Thank you.

20 We're going to start off with a couple of exhibits.

21 A. Okay.

22 Q. So I'm going to show you first Agency Hearing Exhibit 1.

23 MS. CALAGUAS: Your Honor, if I may approach the
24 witness?

25 JUDGE KANG: Yes.

1 BY MS. CALAGUAS:

2 Q. Mr. Donzanti, if you could review that exhibit and let me
3 know when you're done reviewing it.

4 A. (Perusing document.) I'm done with it.

5 Q. Do you recognize Agency Hearing Exhibit 1?

6 A. Yes, I do.

7 Q. What is it?

8 A. It's a Delegation of Authority to TSA Human Resources that
9 enables them to create policies and procedures to be filed by
10 all the different divisions within TSA, to include the Federal
11 Air Marshal Service.

12 Q. Thank you.

13 I'm now going to show you Agency Hearing Exhibit 2.

14 MS. CALAGUAS: Your Honor, if I may approach the
15 witness?

16 JUDGE KANG: Yes, you may.

17 BY MS. CALAGUAS:

18 Q. If you could take a moment, Mr. Donzanti, to review Agency
19 Hearing Exhibit 2, and let me know once you've had a chance to
20 complete reviewing it?

21 A. (Perusing document.) Okay.

22 Q. Do you recognize this exhibit?

23 A. Yes, I do.

24 Q. And what is it?

25 A. It's a - it's a document that establishes some items,

1 enumerated items, that are classified information and also SSI
2 information.

3 Q. Is this exhibit complete?

4 A. (Perusing document.) It appears to be complete.

5 Q. Does this particular exhibit have a name?

6 A. The Federal Air Marshal Division Standard Operating
7 Procedures.

8 Q. Thank you.

9 I'd like to show you now Agency Hearing Exhibit 3.

10 MS. CALAGUAS: Your Honor, if I may approach the
11 witness?

12 JUDGE KANG: You may.

13 BY MS. CALAGUAS:

14 Q. Again, Mr. Donzanti, if you can review this exhibit and
15 let me know once you've had a chance to review it?

16 A. (Perusing document.) I have.

17 Q. Do you recognize this exhibit?

18 A. Yes, I do.

19 Q. And what is it?

20 A. It's a Federal Air Marshal Service Directive that
21 describes employees' responsibilities and conduct. And on the
22 last page it goes into the unauthorized release of sensitive
23 information.

24 Q. Thank you.

25 Let's have you take a look at one more exhibit. I'm

1 going to present you Agency Hearing Exhibit 4.

2 MS. CALAGUAS: Your Honor, may I present this to the
3 witness?

4 JUDGE KANG: Yes. This is the final one that you'll
5 be...

6 MS. CALAGUAS: Yes, Your Honor.

7 JUDGE KANG: Okay. I was just going to allow you to
8 leave them as a group up there. But go ahead.

9 BY MS. CALAGUAS:

10 Q. Have you had a chance to review Agency Hearing Exhibit 4?

11 A. Yes, I did.

12 Q. Do you recognize it?

13 A. Yes. It's the Department of Transportation, Federal
14 Aviation Promotional or Career Opportunity Vacancy
15 Announcement.

16 Q. Is it for -

17 A. It's for a Federal Air Marshal Service position.

18 Q. Okay.

19 A. And Number 5 at the bottom states, "Release of sensitive
20 or classified information may be the basis for removal from
21 this position."

22 Q. Thank you.

23 MS. CALAGUAS: At this time, Your Honor, we'd like -
24 the Agency would like to move Exhibits 1 through 4 into the
25 record.

1 JUDGE KANG: Yes. All the prehearing exhibits, Ms.
2 Calaguas, as well as Mr. Berger, are already in the record.
3 That's what we covered at the Prehearing -

4 MS. CALAGUAS: Thank you for that clarification.

5 JUDGE KANG: - at the Prehearing Conference.

6 Yes. So there's no need to separately move it.

7 MS. CALAGUAS: Thank you, Your Honor.

8 BY MS. CALAGUAS:

9 Q. I'll go ahead and take that exhibit from you.

10 So, Mr. Donzanti, did you make any disciplinary
11 decisions as to Mr. Robert MacLean?

12 A. Yes, I did.

13 Q. And what was that decision?

14 A. The decision to remove him from his position as a Federal
15 Air Marshal.

16 Q. Were you in his supervisory chain at the time that you
17 made that decision to remove him?

18 A. Yes, I was. I was his Special Agent in Charge.

19 Q. On what basis did you remove him from his position?

20 A. Well, I reviewed the ICE Investigative Report regarding an
21 incident he was involved in. I -

22 Q. Let me just interrupt you for a second.

23 When you say "ICE," could you be more specific? What
24 does that stand for?

25 A. Immigrations and Customs Enforcement.

1 Q. Okay. Thank you for that clar- -

2 A. We were under that - we were under that agency at the
3 time.

4 Q. Okay. Sorry for interrupting.

5 A. I reviewed the proposal to remove, and I applied the
6 *Douglas* Factors when considering the final punishment.

7 Q. Before we go into -

8 A. And also the response from his counsel.

9 Q. Are you done with your response?

10 A. Yes, ma'am.

11 Q. So I don't interrupt you. I apologize for that.

12 Before we go into the *Douglas* Factors, can you state
13 for the record what were the disciplinary charges against Mr.
14 MacLean?

15 A. Releasing unauthorized SSI to the media, un- - yeah.

16 Q. And, for - and, for the record, what does "SSI" stand for?

17 A. Sensitive security information.

18 Q. Were there any other charges that you upheld?

19 A. No.

20 Q. So to what extent, if any, did you - did you consider the
21 *Douglas* Factors?

22 A. The first *Douglas* Factor I considered was the
23 egregiousness of the offense and the fact that the individual
24 had a fiduciary responsibility to safeguard SSI information.

25 Another factor I considered was his length of

1 service, which was considerable, 14 years. Of course, the
2 first – the first *Douglas* Factor I felt was egregious, and
3 that was probably the most important of all the *Douglas*
4 Factors. It lent to the egregiousness of the offense.

5 His time in service was mitigating to some extent,
6 but then his time in the Federal Government along with his two
7 years' service in Air Marshal Service at that time, I also
8 counted that as exacerbating the – the offense because he
9 should have known better. He should have known the
10 information was SSI.

11 THE REPORTER: Could you pull the microphone closer?

12 THE WITNESS: Sure.

13 BY MS. CALAGUAS:

14 Q. Did you consider any other *Douglas* Factors?

15 A. Yes. He had a clean record, no disciplinary issues. He
16 got a – he – besides – in spite of our – besides releasing the
17 SSI information, he was a – he was FAM in good standing.

18 MR. DEVINE: I'm sorry. Could you speak louder, sir?

19 THE WITNESS: Sure. He was a FAM in good standing –

20 MR. DEVINE: Could you repeat that and speak louder?

21 THE WITNESS: Disregarding the release of SSI
22 information, he was a FAM in good standing. He got along well
23 with his other FAMs.

24 BY MS. CALAGUAS:

25 Q. Just a couple of follow-up questions about that.

1 You testified that he had no disciplinary record. So
2 to what extent – to what extent did that make any difference
3 in your decision to remove him?

4 A. Very little.

5 Q. And you also indicated that he was a FAM in good standing.

6 To what extent did that have any – make any
7 difference in your decision to remove him?

8 A. Very little.

9 Q. You talked earlier about the egregiousness of the offense.

10 Could you explain that a little bit more? What do
11 you mean, that the offense was egregious?

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

18 Q. How so?

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

25 Q. Did you look to see if Mr. MacLean made this disclosure of

1 sensitive security information intentionally?

2 A. He made a statement during an investigation that he
3 appeared on his own volition and gave the information a broad
4 release, so the information that he provided was intentional.

5 Q. To what extent, if any, did that make a difference in your
6 decision to remove him?

7 A. A little.

8 Q. I'm sorry. I didn't hear that.

9 A. I'm sorry. Just a little bit. A little bit.

10 Q. So on the flip side, did you make any determination
11 whether he made the disclosure inadvertently?

12 A. I have nothing to indicate that he made it inadvertently.

13 MR. DEVINE: Excuse me. Could you repeat that
14 answer, sir, and speak into the microphone?

15 THE WITNESS: I'm sorry. I had no indication that he
16 made that release of information to the media other than
17 inadvertently. I'm sorry. Intentionally.

18 MR. DEVINE: Oh.

19 THE WITNESS: He made the statement intentionally.

20 BY MS. CALAGUAS:

21 Q. And, just to clarify, that was your belief, that he made
22 the disclosure intentionally?

23 A. Yes.

24 Q. Did you consider whether Mr. MacLean made that
25 unauthorized disclosures of SSI maliciously or for some type

1 of personal gain?

2 A. No, I don't believe he did. I just think he was
3 misguided. I don't think there's any maliciousness involved
4 in this whatsoever.

5 Q. So to what extent, if any, did that affect your decision
6 to remove him?

7 A. There's some mitigation there, but – but not enough to
8 change my decision.

9 Q. Did you consider whether or not this was a first-time
10 offense in terms of disclosing SSI without authorization?

11 A. Yes, I did.

12 Q. And to what extent did you consider that?

13 A. I gave some – some consideration to it, but not enough to
14 change my final decision.

15 Q. So it made no difference to you that it was a first-time
16 offense?

17 A. That's correct.

18 Q. You talked earlier about his – Mr. MacLean's fiduciary
19 duty.

20 A. Yes.

21 Q. From – from where does that fiduciary duty arise?

22 A. As a Federal Air Marshal he's held to a high standard of
23 public trust. And he's a – and he's in a public safety
24 position. And his responsibility is to safeguard information,
25 such as SSI.

1 Q. In terms of – you talked earlier about his good standing.

2 Did you specifically look at his performance on the
3 job?

4 A. No, I didn't. I am – I'm familiar – there's very few
5 people in the Field Office that – that are working
6 unsatisfactorily. And he wasn't one of them, so I didn't have
7 to actually look at his evaluations. I knew he was in good
8 standing at the time.

9 Q. And to what extent, if any, did you consider that in
10 making your decision to remove him?

11 A. There was consideration given to it but, once again, not
12 enough to change my final analysis.

13 Q. How about his ability to get along with his fellow
14 workers. Did you place any consideration to that in making
15 your decision?

16 A. That was considered also but, once again, not enough to
17 change my final decision on removal.

18 Q. Did you consider his dependability as a Federal Air
19 Marshal?

20 A. Yes, I did.

21 Q. And how so?

22 A. He showed up to work on time. And he did his job, and he
23 did it in an exemplary manner. Minus the incident that he had
24 in Las Vegas, he performed his duties well. And I did – I
25 gave him consideration for that. But, once again, not enough

1 to change the final decision of removal.

2 Q. You testified earlier that at the time of your decision
3 you were the Special Agent in Charge of the Los Angeles Field
4 Office; is that correct?

5 A. Yes, that's correct.

6 Q. So in that position did you have any other opportunities
7 to make any disciplinary decisions of others who may have
8 disclosed sensitive security information without
9 authorization?

10 A. I would be in the position, but we didn't have any
11 incidents when I was there.

12 Q. We talked earlier about the egregiousness of Mr. MacLean's
13 offense. How about its notoriety? Was there any notoriety to
14 him having disclosed the sensitive security information?

15 A. Yes, there was.

16 Q. And to what extent did you consider that?

17 A. Well, the notoriety, unfortunately, brought some discredit
18 to the Federal Air Marshal Service. I think it goes a little
19 bit beyond just the embarrassment factor. I think people
20 would tend to have less confidence in the ability of the
21 Federal Air Marshal Service to protect the skies.

22 And that's our main function, is to have the public
23 realize that the security's in place and they can fly unabated
24 without another 9/11 incident. And I think this kind of
25 undermined what we're all about.

1 Q. So was that a mitigating or aggravating factor in making –

2 A. That would be an aggravating factor.

3 Q. Did you consider to what extent, if any, Mr. MacLean was
4 aware of the Agency's policies against disclosing sensitive
5 security information?

6 A. Well, he should have been aware of it. He had – the two
7 years he had in the FAM Service when this occurred, he had
8 ample opportunity to understand that policy through the
9 Academy, through our extensive legal training that we have in
10 the field offices. So many hours of legal training that –
11 that's provided.

12 When you first come on the job, you're given a
13 briefing. And it's very common knowledge and very basic. If
14 nothing else, a Federal Air Marshal did not divulge schedules
15 or anything that has to do with flight schedules. It's common
16 knowledge for every FAM, FAM wide.

17 It wouldn't be some obscure security regulation that
18 you would really have to study up on it to understand it.
19 This is – this is just very basic, very common.

20 Q. Did you consider whether or not Mr. MacLean had any
21 potential to be rehabilitated?

22 A. I did, but he expressed no remorse throughout the
23 proceedings. Even – even to this date here, he has no remorse
24 whatsoever. So I did consider that in my decision.

25 Q. And how did it affect your decision, if any?

1 A. It – it didn't change my decision any. It might have
2 added to it. It made it more solid, but it stayed with
3 removal.

4 Q. Were you aware of any mitigating circumstances in terms of
5 Mr. MacLean making that disclosure?

6 A. No. No.

7 Q. Did he explain to you at any time why he made the
8 disclosure?

9 A. He thought there was a vulnerability created in the system
10 when there was – when those types of missions were dropped,
11 when they were not covered. But he is not in a position – he
12 does not have all information. He's not in a position to make
13 that kind of decision.

14 There are other factors that go into that decision he
15 would be unaware of. As he may have good intentions, but he
16 was – he was misguided and didn't have all the information.

17 Q. So did that make any difference in terms of you making the
18 decision to remove him?

19 A. It didn't change my – my opinion I had developed to remove
20 him.

21 Q. Did you consider imposing any discipline short of removal?

22 A. I – I just considered it for a moment. And I thought
23 about if we did that what would we do with him. I lost
24 confidence in the fact that he could be trusted with SSI in
25 any FAM position or, actually, any administrative position in

1 TSA. You have access to SSI almost on a daily basis.

2 I – I found nothing at all that could accommodate
3 him, should I decide to give him some kind of lesser
4 punishment. In a practicality sense, there was nowhere to put
5 him. And I – and I think we all lost confidence in his
6 ability at that point.

7 MS. CALAGUAS: If I could have a moment, Your Honor?

8 JUDGE KANG: Sure.

9 MS. CALAGUAS: Thank you.

10 (Pause in the proceedings at 8:51 a.m.)

11 MS. CALAGUAS: Okay. Thank you, Your Honor. I have
12 no further questions for Mr. Donzanti at this time.

13 JUDGE KANG: Mr. Berger, are you ready for your
14 cross-examination, or do you need a quick break?

15 MR. BERGER: Mr. Devine will handle the cross of this
16 witness.

17 JUDGE KANG: Okay. Are you ready to go, Mr. Devine?

18 MR. DEVINE: I'll take a – I'll take a two-minute
19 break, Your Honor.

20 JUDGE KANG: All right. We'll go off the record for
21 two minutes and then we'll come back.

22 (Recess taken from 8:52 a.m. to 8:56 a.m.)

23 JUDGE KANG: We are back on the record after a brief
24 break at the request of the Appellant. And the Appellant has
25 – I mean the witness on the stand is reminded that he remains

1 under oath. He's nodding that he's ready to go.

2 Go ahead, Mr. Devine. The witness is yours.

3 CROSS-EXAMINATION

4 BY MR. DEVINE:

5 Q. Good morning, Mr. Donzanti. I'd like you to review a
6 document that's Appellant's Exhibit 4Q in the record. It's
7 TSA's Policy Manual on Addressing Performance and Conduct
8 Problems.

9 MR. DEVINE: If counsel has a copy of that?

10 MS. CALAGUAS: You're referring to the Agency File?

11 MR. DEVINE: Oh, it's from the Agency File. I'm
12 sorry, Ms. Calaguas.

13 MS. CALAGUAS: Yes. I'll - I'll share my copy.

14 MR. DEVINE: Yes.

15 MS. CALAGUAS: May I approach the witness, Your
16 Honor?

17 JUDGE KANG: Yes, you may.

18 Mr. Devine, what - what are the other exhibits that
19 you intend to reference, just so that Ms. Calaguas can have
20 them ready?

21 MR. DEVINE: Thank you.

22 I'll be using portions of Mr. Donzanti's deposition
23 and then Exhibit - Appellant's Exhibit 5 and Appellant's
24 Exhibit QQ.

25 JUDGE KANG: Okay. And then right now you're asking

1 Ms. Calaguas to pull up Agency Exhibit 4Q. And that's from
2 the Agency File?

3 MR. DEVINE: No. It's - yeah, 4Q is from the Agency
4 File, Your Honor.

5 JUDGE KANG: All right. Let's - Ms. Calaguas is
6 right now going through an extremely large stack of documents.
7 I'm going to go off the record again, just take another quick
8 break so that the Agency can organize those documents, since
9 we don't have them ready to go on our end.

10 (Off the record from 8:58 a.m. to 9:05 a.m.)

11 JUDGE KANG: Okay. We went off the record briefly
12 just to organize some exhibits. During the break I did - I
13 went ahead and informed Ms. Calaguas that she may place those
14 requested exhibits that were referred to by Mr. Devine, 4- - 4
15 Quebec of the Agency's - Agency File as well as the
16 Appellant's Exhibit 5 and QQ, Quebec Quebec, in front of the
17 witness, who is on the stand.

18 Go ahead, Mr. Devine. Please resume your
19 examination.

20 MR. DEVINE: Thank you, Your Honor.

21 BY MR. DEVINE:

22 Q. Mr. Donzanti, if you could look to the document that was
23 just retrieved, Exhibit - Agency Exhibit 4Q.

24 Can you describe what that document is to us?

25 A. (Perusing document.) It's the Interim Policy for

1 Addressing Performance and Conduct Problems, dated July 29,
2 '02.

3 Q. Okay. And as an Agency official did you consider it part
4 of your duty to faithfully implement this policy?

5 A. Yes, I did.

6 Q. Okay. Could you turn to page 5 of the policy in Section
7 7, Progressive Corrective Action?

8 A. (Complies.) I'm at that location at this time.

9 Q. Could you please read to me the text in Section 7A?

10 A. "It is the TSA policy to take the least severe action that
11 is likely to correct a problem and is consistent with
12 effective security operations. The TSA will take progressive,
13 more severe action until the problem is corrected or the
14 employee is removed."

15 Q. And your earlier statement that it's part of your duty to
16 implement the policy applies to this provision?

17 A. Yes, it is.

18 Q. Is that right?

19 A. Yes, it is.

20 Q. Now could you please read to me the first sentence of
21 Section 8A?

22 A. "It's the TSA policy that, to the extent practical, there
23 will be like penalties for like offenses. However, except for
24 offenses listed in Attachment 1, each proposed penalty will be
25 reviewed by a deciding official who will determine the penalty

1 based on the circumstances of that case."

2 Q. And then you agree also that that was part of the – your
3 responsibility to implement that provision?

4 A. Yes.

5 Q. Is that right?

6 A. Yes.

7 Q. Okay. Let's go to some of the explanations you gave, sir,
8 on the *Douglas* Factors. You said that one of the things that
9 concerned you is that Mr. MacLean released information about
10 cancellation of flights before it was imminently to occur.

11 Could you please define "imminently" for me?

12 MS. CALAGUAS: I believe that misstates his
13 testimony. Objection.

14 BY MR. DEVINE:

15 Q. In your discussion of vulnerabilities, you stated that he
16 disclosed –

17 JUDGE KANG: Hold – hold on a second, Mr. Devine.
18 I'm not sure if I recall that particular word being used as
19 well. Can you rephrase the question, Mr. Devine?

20 MR. DEVINE: I'll just withdraw that question, Your
21 Honor.

22 BY MR. DEVINE:

23 Q. Mr. Donzanti, you discussed the criteria of whether there
24 was an intentional misconduct in the case as part of your
25 *Douglas* considerations; is that correct?

1 Did I understand right?

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 Q. Okay. And did you make any finding that, in fact, Mr.
15 MacLean knew the -

16 (Appellant counsel confer off the record.)

17 MR. DEVINE: Well, okay. Okay.

18 BY MR. DEVINE:

19 Q. On the question of consistent penalties, Mr. Donzanti,
20 what has been the Agency's practice for imposing penalties for
21 unauthorized release of SSI information?

22 MS. CALAGUAS: Objection, -

23 BY MR. DEVINE:

24 Q. What is - what has the range of penalties been?

25 MS. CALAGUAS: Objection. That question is vague as

1 to time.

2 BY MR. DEVINE:

3 Q. From the time period of discipline imposed during 2004 and
4 2006, what has been the range of penalties imposed by the
5 Agency for unauthorized release of SSI information?

6 A. I don't have that information.

7 Q. Okay. Thank you.

8 Now on the clarity of whether Mr. MacLean engaged in
9 any misconduct, you said he should have been aware.

10 Did you – that he was making unauthorized release of
11 SSI information; is that right?

12 A. Can you repeat that question?

13 Q. Yes, sir.

14 With respect to whether there was clarity or
15 confusion about the alleged misconduct, you just testified
16 that Mr. MacLean should have been aware he was engaging in an
17 unauthorized disclosure of SSI; is that correct?

18 A. That's correct.

19 Q. Did you ever ask him whether he knew that he was making an
20 unauthorized disclosure of SSI?

21 A. I never did, personally.

22 Q. You stated that he had extensive legal training so he
23 should have known. What was his legal training, Mr. Donzanti?

24 A. They go over the policies and procedures in the Academy.

25 And he also is given a security briefing when he first comes

1 on the job. And then he's - he's given legal training
2 throughout his career incrementally. It's done every quarter
3 in every field office. It's mandated training.

4 Q. So do you know what training Mr. MacLean received?

5 When you're speaking of generalities of the Agency's
6 process, do you know what training he received?

7 A. No, not - not - not directly.

8 Q. Okay. You stated that it's common knowledge that the type
9 of information he released, this SSI, that's very, very basic;
10 is that correct?

11 A. It's common knowledge? Yes, it's common knowledge within
12 - within the Federal Air Marshals -

13 Q. And so is it your opinion that - is it your opinion that
14 virtually any Agency employee would - would or should be
15 sharing your assessment that this was obviously SSI?

16 A. Yes. The Federal Air Marshals should have that
17 information.

18 Q. Okay. I'd like to direct you to Appellant's Exhibit 5.

19 A. I have it in front of me.

20 Q. Can you tell us what the - I'm sorry.

21 What was that, sir?

22 A. I just - I made a statement I have it in front of me.

23 Q. Okay. And can you tell us what that exhibit is?

24 MS. CALAGUAS: Could you give him an opportunity to
25 review it, please?

1 MR. DEVINE: Sure.

2 BY MR. DEVINE:

3 Q. Take your time, sir.

4 A. (Perusing document.) I've - I've read most of the
5 article.

6 Q. Thank you, sir.

7 Can you tell us what this document is?

8 A. It looks like a - a letter to Congress referring to some
9 Air Marshals that are displeased the way the Federal Air
10 Marshal Service is being managed. And it goes into more
11 detail that - as in Director Quinn stating that he was trying
12 - he's trying to circumvent maybe the system, the
13 investigative system by pulling some Federal Air Marshals'
14 clearances. And it - it goes on and on -

15 Q. Sir, I didn't ask you to summarize the letter. The letter
16 - just if you could tell us what the document was.

17 And do you know who - can you tell us who signed it
18 on page 3?

19 A. Matthew Eastman.

20 Q. Are you familiar with whom Mr. Eastman is?

21 A. No, I'm not.

22 Q. Okay. Can you - are you familiar with the staff of the
23 Office of Professional Responsibility?

24 A. I've heard of that entity, but I'm not familiar with the
25 staff members themselves.

1 Q. Do you understand that it's the Office of Professional
2 Responsibility that conducted the investigation that produced
3 the facts that you based your termination on?

4 A. Well, I do now.

5 Q. Okay. And from reading the document, you can tell that
6 the author is an official at the Office of Professional
7 Responsibility, can't you?

8 A. It – it appears that way, although it just says his name
9 and Washington, D.C. I don't see any other markings on it, so
10 I...

11 Q. Well, maybe you can read the third sentence of the first –
12 I'm sorry, sir. No. You can read the first sentence of the
13 third paragraph on page 1 for us just so we'll clear it up.

14 A. I see it.

15 MS. CALAGUAS: Your Honor, if I can interrupt for a
16 second? Since I don't have a copy, could I – could I see
17 exactly what that reference is, because I'm not following this
18 particular testimony at this point?

19 JUDGE KANG: Yes. Yes, you may approach the witness
20 and view the document.

21 MS. CALAGUAS: Thank you. (Perusing document.)
22 Thank you, Your Honor.

23 JUDGE KANG: Mr. Devine, please proceed.

24 MR. DEVINE: Yes, sir.

25 BY MR. DEVINE:

1 Q. Mr. Donzanti, you can – from your review of the letter,
2 you can see that the letter concerns Mr. MacLean and other
3 self-described whistleblowers or Air Marshals who are critics
4 of Agency policy, can't you?

5 A. Yes.

6 Q. And could you read the last sentence on the end of page 2
7 for me?

8 A. "I can also state that at no time did they disclose
9 classified or critical, sensitive information."

10 Q. Thank you.

11 So it appears that Mr. Eastman from OPR at least
12 didn't agree with your assessment; is that correct?

13 A. I'm not – by reading that one sentence, I'm not really
14 sure that he's referring to the incident that we're here for
15 today.

16 Q. Okay. Thank you, sir.

17 Did you talk to Mr. Eastman about the – the findings
18 of the investigation?

19 A. No, I didn't.

20 MS. CALAGUAS: That question is vague as –

21 BY MR. DEVINE:

22 Q. Did you ask –

23 MS. CALAGUAS: – to which investigation. Objection.

24 MR. DEVINE: I'm glad to amplify.

25 BY MR. DEVINE:

1 Q. The investigation upon which you've based your decision to
2 fire Mr. MacLean.

3 A. No, I didn't speak to him -

4 Q. The same answer?

5 A. No - yeah, the same answer.

6 Q. Did you talk to anyone who was connected - who
7 participated in conducting that investigation or made findings
8 about the issue of unauthorized release of SSI?

9 MS. CALAGUAS: Objection. That question is vague as
10 to time.

11 MR. DEVINE: Excuse me?

12 MS. CALAGUAS: Objection. The question is vague as
13 to time.

14 BY MR. DEVINE:

15 Q. Did you during the period between Mr. MacLean's proposed
16 removal and the time that you made a decision speak with
17 anyone at OPR who participated in the investigation about
18 their SSI findings?

19 A. No, I didn't.

20 Q. Okay. Thank you.

21 I'd like to direct you then to Exhibit QQ, Mr.
22 Donzanti. Can you - do you have it in front of you?

23 A. Yes, I do.

24 Q. Have you had a chance to read it yet, sir?

25 A. No, I didn't.

1 Q. I'll give you - I'll give you a chance now.

2 A. (Perusing document.) I've - I've had an opportunity to
3 read it.

4 Q. Thank you, sir.

5 And could you read the paragraph that's on page
6 000171? It's basically your letter that starts with "Had."

7 MS. CALAGUAS: The document speaks for itself. Is
8 there a particular question, Your Honor? Objection.

9 JUDGE KANG: Are you asking the witness to read it
10 out loud?

11 MR. DEVINE: I'm asking the witness just - just for
12 clarity to read the third, fourth, and fifth sentences.

13 JUDGE KANG: The witness can read it to himself. The
14 Judge can read it as well. The document speaks for itself.

15 Let us know when you're done reading those sentences,
16 Mr. Donzanti.

17 MR. DEVINE: Thank you.

18 BY MR. DEVINE:

19 Q. Have you had a chance to finish reading it, Mr. Donzanti?

20 A. Yes.

21 Q. Do you disagree with her statement that she wasn't sure
22 that the only specifications sustainable is strong enough for
23 a removal?

24 A. I don't agree with that.

25 Q. Okay. And did you disagree with her sentence that, "We

1 needed to find out if they determined if he notified the press
2 ahead of time that Air Marshals were not going to be flying
3 missions on a specific date"?

4 MS. CALAGUAS: Objection. That question is vague as
5 to time. Are you asking about whether he presently agrees or
6 at the time that he made his decision? I couldn't tell by the
7 way you phrased the question.

8 BY MR. DEVINE:

9 Q. At the time you made your decision, sir, were you aware of
10 this document when you made the decision – your decision?

11 A. No, I wasn't.

12 [REDACTED]

16 Q. And did anyone – anyone contact you to try to get an
17 answer to the – to that query?

18 MS. CALAGUAS: Objection. The question is vague as
19 to time.

20 BY MR. DEVINE:

21 Q. At the time that you were considering his removal, did you
22 – did anyone contact you with this question?

23 A. No, they didn't.

24 Q. And can you tell me who the author of the letter is? It's
25 right after the word "thanks."

1 A. Maria Carmen, Maria Del Carmen Perez.

2 Q. And keep going. What's her job?

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 Just going on to this – continuing on the *Douglas*
9 Factors whether there is – whether this was an aberration or
10 kind of a pattern of misconduct, did you check with any other
11 people who supervised Mr. MacLean for any history of
12 unauthorized disclosures of SSI or other secret information?

13 MS. CALAGUAS: The same objection. The question is
14 vague as to time.

15 JUDGE KANG: You know, for –

16 MR. DEVINE: With respect to the period – maybe I
17 can –

18 JUDGE KANG: Stand by, Mr. – Mr. Devine. Let me see
19 if I can cut to the chase here.

20 Unless otherwise stated, Mr. Devine, I'm going to
21 assume that the period of time that you are – that you're
22 asking about is between the time that the Notice of Proposed
23 Removal was issued up until the decision is issued.

24 Is that correct, Mr. Devine?

25 MR. DEVINE: That's correct, Your Honor. Thank you.

1 JUDGE KANG: Okay. So unless otherwise stated I'll
2 assume that that is the time period at issue and hopefully
3 that will take care of some of the objections about the
4 vagueness.

5 Please repeat your question, Mr. Devine.

6 MS. CALAGUAS: Thank you, Your Honor.

7 MR. DEVINE: Yes, sir.

8 BY MR. DEVINE:

9 Q. Did you check with any of Mr. MacLean's supervisors in
10 other postings to determine whether there was a history of
11 unauthorized disclosures for SSI or other secret information?

12 A. No, I didn't.

13 Q. Okay. Now let's go to this question of rehabilitation,
14 rehabilitation potential.

15 Were there any incidents involving unauthorized
16 disclosures of SSI or other confidential information by Mr.
17 MacLean when he was working at your unit?

18 A. No, there wasn't. None -

19 Q. How long did he work there?

20 A. - none that I'm aware of.

21 Q. Thank you.

22 How long did he work there, sir?

23 A. His entire period of time?

24 Q. Yeah.

25 A. I would say about two and a half years.

1 Q. Two and a half years.

2 And during that time, since there was concern about
3 him, did you exercise your authority to instruct him against
4 any future unauthorized releases of SSI?

5 A. Not to my recollection.

6 Q. Okay. And did you review the rules of the game for
7 releases of SSI information with Mr. MacLean? Did you try to
8 give him any counseling to find out – to prevent this from
9 returning in the future, so that he would understand properly?

10 Did you go into that at all?

11 A. I didn't do it. I'm – I'm not one of the trainers in the
12 office.

13 Q. But –

14 A. It could have been done by our training staff.

15 Q. Did you instruct anyone to engage in any training with
16 him, once you knew he had made this unauthorized release?

17 A. Not him personally.

18 Q. Okay. Let's see. You said there was no consideration of
19 punishment less than discipline [sic] except for – because you
20 couldn't figure out where to put Mr. MacLean.

21 What other jobs did you consider?

22 A. Any job in the Federal Air Marshal Service has access to
23 SSI on a daily basis, so I didn't particularly look at any
24 individual job. It was just a broad thought of where he could
25 possibly go that he wouldn't have access to SSI, and I could

1 not think of a job.

2 Q. Okay. Let's continue on this course of whether he was –
3 this issue of whether there was potential for rehabilitation.

4 When did you learn that Mr. MacLean had made an
5 unauthorized release of SSI?

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

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

9 A. It was October that same year.

[REDACTED]

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

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

1 Q. Well, he was one of the employees that you're responsible
2 for, though, wasn't he?

3 A. Yes, he was.

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

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

9 Q. Did you –

10 A. – involved in it. I –

11 Q. Did you suggest to the Policy – excuse me.

12 Did you communicate with the Policy Compliance Unit
13 that it might be appropriate for them to consider this?

14 A. I don't recall.

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 Q. Okay. Let's turn then now to whether or not there was any
19 basis for him to be confused about the status of the
20 information as SSI information. You stated that the Agency
21 engages in SSI training.

22 Do you think that the extent of the Agency's training
23 is adequate?

24 A. I think it's adequate.

25 Q. I'd like to direct you to your deposition, Mr. Donzanti,

1 August 2nd, 2006. If you can turn to page 94 of the
2 deposition, line 10, lines 10 through 16, and review them.

3 MS. CALAGUAS: Objection, in terms of referring to
4 his deposition transcript. It hasn't been established that he
5 needs to be impeached for any particular reason at this point.

6 JUDGE KANG: The objection is sustained.

7 Mr. Devine, go ahead and ask your question. And if
8 you wish to use the deposition transcripts to impeach the
9 witness, I will permit you to read the pertinent portions into
10 the record.

11 MR. DEVINE: Thank you, Your Honor.

12 BY MR. DEVINE:

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 Now hasn't the SSI policy always been that the
19 information needs to be marked?

20 A. Yes.

21 Q. Okay. And isn't the SSI policy that SSI information can
22 only be sent electronically on a password-protected, encoded
23 transmission?

24 A. I'm not sure at the time both – what timeframe are we
25 talking about? We're back to –

1 Q. The timeframe between – the timeframe when Mr. MacLean
2 made his disclosure.

3 A. I believe that SS- – the letters "SSI" need to appear on
4 the top and bottom of the – of the document. But I'm not sure
5 about whether it has to be password-protected. I know at this
6 time it does. I'm not sure it was in effect at that time.

7 Q. Was the document – was the information that he disclosed
8 marked "SSI," sir?

9 A. I've never seen a document. I've only read about
10 references to the document. And it – I think it's – it was
11 clear there that it was not marked.

12 Q. You didn't receive the message yourself about canceling
13 coverage in 2003?

14 A. No, I did not.

15 Q. Okay. And has anyone – is it your understanding whether
16 the information that was in the message Mr. MacLean disclosed
17 was sent in a secure manner with password and encoding
18 protection?

19 A. To the best of my knowledge, it wasn't.

20 Q. Okay. And isn't it your understanding also that any SSI
21 information must be kept in a secure, restricted-access area
22 and – is that your understanding of the rules?

23 MS. CALAGUAS: Your Honor, at this point I'm going to
24 raise an objection as to relevancy. We're going into
25 relitigating the issue of whether or not it's been – the

1 information disclosed was SSI. And that's already been
2 determined and adjudicated. And so any further questioning on
3 this point is irrelevant.

4 JUDGE KANG: I disagree. Whether or not this is SSI
5 has been litigated. I just – but I don't agree with your
6 objection that that's the sole purpose of this line of
7 questioning. I'm going to permit Mr. Devine some latitude.
8 You can renew your objection.

9 I'm aware, as I stated previously on the record, of
10 the Ninth Circuit ruling. I'm aware of the Board's final
11 order on the matter pertaining to the SSI issue. Those are
12 all a matter of record, you know, as we've discussed
13 extensively prior to the hearing today.

14 But I'm going to grant Mr. Devine some latitude on
15 this. But feel free to renew your objection, and I'll
16 consider it if you decide to renew it.

17 MS. CALAGUAS: Thank you, Your Honor.

18 JUDGE KANG: Go ahead, Mr. Devine.

19 BY MR. DEVINE:

20 Q. Do I need to repeat the question, Mr. Donzanti?

21 A. Please. Please.

22 Q. Okay. Is it your understanding that the rules on SSI back
23 at the time required that information be kept in a secure,
24 restricted-access area?

25 A. Yes.

1 Q. What steps did the Agency take to protect this particular
2 SSI information, or are you – if you're aware?

3 A. I'm not aware of precisely what was done in this case.

4 Q. And none of this would have raised a question in your mind
5 then whether the Agency was treating the information as SSI?

6 MS. CALAGUAS: Objection, that question is vague and
7 confusing.

8 JUDGE KANG: Please restate, Mr. Devine.

9 BY MR. DEVINE:

10 Q. Is it correct that none of this information would have
11 raised a question in your mind whether the Agency was treating
12 the information as SSI?

13 MS. CALAGUAS: That question is vague as to use of
14 the term "information."

15 BY MR. DEVINE:

16 Q. Whether – let's go back, and we can spell everything out
17 in every question.

18 Did these – did the answers that you just gave me
19 create any confusion for you whether the Agency was treating
20 the information in a July 2003 text message about canceling
21 RON missions, whether the Agency was treating that information
22 as SSI?

23 A. Well, I never read the – the text message myself. I found
24 out about it later. I don't think it was confusing. The –
25 the SSI banner should have been on it, if that's what you're

1 referring to.

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 Q. Thank you.

7 Before you made your decision about Mr. MacLean's

8 inexcusable mistake or misconduct, did you consult the

9 Agency's experts on sensitive security information?

10 A. I did not personally.

11 Q. Okay. Mr. Donzanti, have you ever seen any information

12 that you believe was SSI but wasn't marked that way?

13 MS. CALAGUAS: The question is vague as to time.

14 JUDGE KANG: Response – the objection was that – the

15 objection was based on whether or not you're intending to

16 specify a time period.

17 MR. DEVINE: I'm not. The relevant timeframe was

18 ever in your – but I'll give a timeframe.

19 BY MR. DEVINE:

20 Q. During employment with the Federal Air Marshal Service.

21 A. I believe on one occasion I did see a schedule that wasn't

22 marked SSI.

23 Q. What did you do about it?

24 A. I can't recall at this time.

25 Q. Okay. Let's then switch to this question about the impact

1 of Mr. MacLean's disclosure.

2 Would canceling the flights that he protested have
3 created any vulnerability to the flying public?

4 A. I think it would.

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

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

9 Q. Now "vulnerability" is kind of a speculative concept.

10 Was there any direct harm that actually occurred from
11 his disclosure?

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

14 JUDGE KANG: The motion to strike is denied. You
15 know, I'm the Judge here. You don't have to worry about me
16 taking things out of context here.

17 Please repeat your question, Mr. Devine, for clarity.

18 MR. DEVINE: Yes, sir.

19 BY MR. DEVINE:

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

21 A. There could have been. From my perspective, I – I know
22 that the division that –

23 Q. Excuse me, sir. I didn't say "could have."

24 Was there any actual harm? Do you know of any?

25 A. Well, I'm going to explain that in a minute. We have a

1 division that schedules flights. And in light of that
2 disclosure that Mr. MacLean made, now they would have to do
3 excessive work to either correct that or make some decisions.

4 It would be conversations, and it would be work lost.
5 And ultimately some kind of risk associated with the fact that
6 the people that are scheduling flights and – and looking at
7 intelligence are now busy rescheduling flights or doing
8 whatever they had to do to kind of make a correction here with
9 this vulnerability that now existed.

[REDACTED]

16 And your explanation of that actual harm then means
17 that it's because of Mr. MacLean's disclosure that the order
18 was reversed and the Air Marshals continued coverage of
19 long-haul flights; –

20 MS. CALAGUAS: Objec- –

21 BY MR. DEVINE:

22 Q. – doesn't it? Isn't that what you just told us?

23 MS. CALAGUAS: Objection, Your Honor. There's
24 already been a ruling in the record from the prior judge that
25 discussion about the policy behind the cancellation of RON

1 missions is irrelevant to this proceeding.

2 And I can cite the specific order if you'd like me
3 to. But Judge Reed did speak to that as part of his discovery
4 order. So I'm going to object as to relevancy and it's beyond
5 the scope of the issues at this point.

6 JUDGE KANG: Mr. Devine, response?

7 MR. DEVINE: I - I couldn't understand what she said,
8 so I'm going to get a summary.

9 MR. BERGER: Mrs. Calaguas, why don't you just
10 reiterate what - this is Berger - what you just said? Just so
11 he can understand. It was hard to hear.

12 MS. CALAGUAS: There's been a prior ruling, as part
13 of the discovery process from Judge Reed, that the Agency's
14 reasons and policy decisionmaking with regard to the
15 cancellation of RON missions is irrelevant and outside the
16 scope of this proceeding.

17 So I'm objecting on the grounds of relevancy and that
18 it's outside the scope of this proceeding to any further
19 questions about the policy decisions behind the cancellation
20 of RON missions.

21 MR. DEVINE: Your Honor, we think this is important
22 to have an opportunity to prove Mr. MacLean's First Amendment
23 defense, that his efforts on behalf of the Federal Law
24 Enforcement Officers Association to protect the flying public
25 actually had a positive impact and that there wasn't any

1 negative impact to compare that to.

2 So the – I'm not sure what the issues were in terms
3 of the discovery dispute previously going into the case. But
4 it's highly relevant to his First Amendment defense.

5 JUDGE KANG: Well, on the direct examination by the
6 Agency there were questions and answers relating to the actual
7 harm that may or may not have occurred, based on the charge
8 that was – based on the charge that's before the Board. At
9 minimum I see it relevant to that.

10 I'm going to overrule the Agency's objection. The
11 Agency may renew it, and I will reconsider it at that time.
12 The objection's overruled at this point. Go ahead, Mr.
13 Devine.

14 BY MR. DEVINE:

15 Q. Now, Mr. Donzanti, didn't you tell Mr. MacLean, when you
16 informed him of the firing, that you were just a messenger;
17 this wasn't your decision?

18 A. I don't recall that at all.

19 Q. Okay. Mr. Donzanti, did you draft the removal letter that
20 you signed?

21 A. No, I did not.

22 Q. And did you work on this removal letter with anyone from –
23 from Headquarters?

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

1 drafted by Headquarters personnel. And that would be in HR,
2 Human Resources.

3 Q. During – thank you.

4 And during the entire process of deciding what to do
5 about Mr. MacLean, did you work with the Policy Compliance
6 Unit at Headquarters?

7 A. Yes, I did.

8 Q. And who were the – who was the supervisory official there
9 that you worked with?

10 A. I believe it was – Bob Bond was the SAC at the time and
11 Mike Mita was one of the ASACs.

12 Q. And who did Mr. Bond report to?

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

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

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

18 Q. So it would have been either Director Quinn or Director
19 Quinn's Assistant?

20 A. No, what –

21 Q. Is that correct?

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

1 MR. DEVINE: No further questions, Your Honor.

2 JUDGE KANG: Ms. Calaguas, redirect?

3 MS. CALAGUAS: Yes, Your Honor.

4 REDIRECT EXAMINATION

5 BY MS. CALAGUAS:

6 Q. In terms of a Federal Air Marshal's responsibilities to be
7 aware of regulations, can you explain if there are any
8 responsibilities that a Federal Air Marshal would have?

9 A. They are ultimately responsible for all the regulations
10 that pertain to the Federal Air Marshal Service. And they're
11 given ample opportunity to review those policies and
12 procedures on a continuing basis throughout the year.

13 We have training that occurs one day a week, every
14 week. And during that time they are given opportunity to
15 review RSOPs and policies.

16 Q. And were the regulations in effect at the time of Mr.
17 MacLean's disclosure in 2003 that pertain to sensitive
18 security information?

19 A. Yes, there was.

20 Q. You spoke earlier about the elements of the charge that
21 you sustained in this case.

22 Again, specifically, is there a requirement for this
23 charge of unauthorized disclosure of sensitive security
24 information to intentionally do so?

25 A. No.

1 Q. You also gave an example of one time when you had noticed
2 yourself that a schedule was not marked, a FAM schedule was
3 not marked as sensitive security information.

4 Do you recall that testimony?

5 A. Yes, I do.

6 Q. At the time that you made this observation, that the
7 schedule was not marked as SSI, were you aware that it was
8 SSI?

9 A. Yes, I was.

10 Q. You described earlier that you didn't actually read the
11 text message that Mr. MacLean disclosed to the news reporter.

12 What is your understanding of the text message that
13 he disclosed?

14 A. It roughly talked about a – all RON missions, which is
15 main overnight missions, would be discontinued until – for
16 roughly a ten-day period. I think it was August 9th.

17 Q. So did the substance of that text message – as you've just
18 described it, is it your understanding that it speaks to
19 schedules that a Federal Air Marshal would have?

20 A. Yes, it does. It speaks directly to schedules.

21 Q. How so?

22 A. Well, it's telling you the – the flights they would be on,
23 and flights are scheduled. And it's all about mission tempo.
24 So I wouldn't say they're synonymous, but they're – they're
25 close enough. They're talking about a broad range of flights,

1 RONS. There are certain flights, so it's a category of
2 flights. So it is flights.

3 Q. At the time that you first learned that Mr. MacLean made
4 this disclosure to a news reporter, had there already been a
5 proposal to remove Mr. MacLean?

6 A. No.

7 Q. So we talked earlier about there being some type of three-
8 to five-month period after you had learned that Mr. MacLean
9 had made the disclosure; is that correct?

10 A. It's about a three-month period.

11 Q. A three-month period. And do you recall within - in
12 reference to that three-month period about when the proposal
13 to remove Mr. MacLean was made?

14 A. It was made right around that same time, about three
15 months, roughly three months. Maybe two months.

16 Q. Did you consider that to be a significant delay in terms
17 of responding to the investigative findings that you learned
18 about him disclosing the SSI to the news reporter?

19 A. It's - it's probably customary. Things don't happen that
20 fast. We had a very small staff back then. We were still a
21 nascent organization. And it wasn't unusual to take that
22 long.

23 Q. So why didn't you take any other action during that three-
24 to five-month period with respect to Mr. MacLean, after
25 learning that he made this disclosure of SSI to a news

1 reporter?

2 A. Well, there's procedures that have to be followed. And
3 part of the procedure to put someone in administrative leave,
4 there's a process that has to take place. I just can't do
5 that on my own. I let the process work itself through.

6 Q. Did that process include also giving Mr. MacLean an
7 opportunity to respond?

8 A. Yes.

9 Q. So in making your decision did you consider it to be
10 mitigating that the information that Mr. MacLean disclosed was
11 not marked as SSI?

12 A. No.

13 Q. Why not?

14 A. It didn't have to be marked. It was SSI. And even though
15 it wasn't marked, it's still considered SSI.

16 Q. Can you just generally describe the role of the Policy
17 Compliance Unit in terms of how disciplinary decisions are
18 made?

19 A. Well, they coordinate cases. They're not actually
20 involved in any decisionmaking. They will coordinate cases.
21 They will make sure certain entities get information that's
22 needed. They categorize everything. It's the – it's the
23 place that keeps the records.

24 They will have discussions with the SACs and ASACs in
25 the field and with HR. And they sort of like move – move the

1 information around. They also keep all the statistics on – on
2 what punishment was given out for certain offenses.

3 Q. And you testified earlier that you yourself did not draft
4 the decision letter that you signed?

5 A. That's correct.

6 Q. Prior to signing it, did you review the letter?

7 A. Yes, I did.

8 Q. And did you adopt it as your own?

9 A. Yes.

10 MS. CALAGUAS: If I could have a second, Your Honor,
11 please?

12 JUDGE KANG: Sure, go ahead, Ms. Calaguas.

13 (Agency counsel in San Francisco confer off the record.)

14 BY MS. CALAGUAS:

15 Q. If I could just quickly draw your attention to Appellant's
16 Exhibit QQ. And that's a series of emails, correct?

17 A. That's correct.

18 Q. I just wanted to make sure I'm referring to the right
19 exhibit.

20 Were you copied or a recipient of the emails that are
21 set forth in Exhibit QQ?

22 A. I don't see my name on this anywhere.

23 MS. CALAGUAS: Your Honor, if I could just borrow the
24 exhibit for a second?

25 JUDGE KANG: Yes, go ahead. Approach the witness.

1 BY MS. CALAGUAS:

2 Q. You reviewed an Investigative Report prepared by the
3 Office of Professional Responsibility; is that correct?

4 A. That's correct.

5 Q. Did the report, after reading it, speak to whether Mr.
6 MacLean made this disclosure to a news reporter either before
7 or after the cancellation of RON missions?

8 A. It was before – to the best of my recollection, it was
9 before.

10 MS. CALAGUAS: I have no further questions at this
11 time, Your Honor.

12 THE WITNESS: I'm sorry. Can you repeat that
13 question? I may have misspoke on that, please.

14 BY MS. CALAGUAS:

15 Q. Did you want to clarify your response?

16 A. Yes. Can you ask the question again?

17 MS. CALAGUAS: May I, Your Honor?

18 JUDGE KANG: Yes. Yes.

19 BY MS. CALAGUAS:

20 Q. Okay. So the – the Investigative Report that you
21 reviewed, –

22 A. Yes.

23 Q. – do you recall it speaking to whether or not Mr. MacLean
24 made his disclosure to a news reporter before the cancellation
25 of any missions out of the Las Vegas office?

1 A. That's correct.

2 MS. CALAGUAS: Okay. Thank you, Your Honor. I have
3 no further questions at this time.

4 JUDGE KANG: Mr. Devine?

5 MR. DEVINE: Yes, sir.

6 RECROSS EXAMINATION

7 BY MR. DEVINE:

8 Q. Mr. Donzanti, you summarized the weekly training that
9 reinforces all the information agents are responsible for.

10 Can you tell us what were the contents in any of the
11 weekly trainings you referenced about how to recognize SSI
12 information in an unmarked document?

13 A. I didn't attend the classes myself for the Federal Air
14 Marshals to attend, so I can't speak directly to that. I – I
15 don't recall the exact syllabus on the courses, but they go
16 into classified and unclassified information. And in general
17 – and in general terms they speak about safeguarding schedules
18 and anything related to schedules.

19 Q. Now during that interim three-month period, sir, couldn't
20 you have placed Mr. MacLean on restricted duty?

21 A. I could have gone through a process and – and possibly had
22 done that.

23 Q. How long does this process take?

24 MS. CALAGUAS: Objection, the question is vague.

25 JUDGE KANG: Do you understand the question, Mr.

1 Donzanti?

2 THE WITNESS: How long that process takes to put
3 someone on restricted duty?

4 JUDGE KANG: Okay. Because the witness -

5 MR. DEVINE: Yes, sir.

6 JUDGE KANG: Because the witness understands the
7 question, it seems relatively clear to me. I'm going to
8 overrule the objection and allow the witness to answer.

9 THE WITNESS: It could take a day or two.

10 BY MR. DEVINE:

11 Q. Okay. And you said there is another process to put
12 someone on administrative leave at home. How long does that
13 take?

14 A. In this case I believe it took a couple weeks.

15 Q. A couple weeks? In this case, you're referring to Mr.
16 MacLean during the three-month period between the proposed and
17 final termination?

18 MS. CALAGUAS: Objection, that misstates the record.

19 THE WITNESS: Between the -

20 JUDGE KANG: Stand by, sir.

21 Explain your objection, Agency, so that Mr. Devine
22 can respond.

23 MS. CALAGUAS: It misstates the record. He's talking
24 - he's describing the period of time between the proposal and
25 the removal as a three-month period and that's - that's

1 inaccurate. So the question assumes facts not in evidence.

2 JUDGE KANG: Mr. Devine?

3 MR. DEVINE: Yes.

4 BY MR. DEVINE:

5 Q. During the time period, Mr. Donzanti, between when you
6 became aware of the disclosure and when Mr. MacLean's
7 termination was proposed, how long would it have taken to put
8 him on administrative leave at home?

9 A. In this case I - I think it was roughly a month, if I
10 recall.

11 Q. It would have taken a month to do that?

12 A. I believe - I believe that's what it took in this case.

13 Q. And isn't it true that you sent Mr. Terreri home, another
14 one of your employees, on administrative leave immediately,
15 the same day that you perceived an offense?

16 A. I -

17 MS. CALAGUAS: Objection, Your Honor. This is
18 irrelevant. It hasn't been established that Mr. Terreri is
19 any - similarly situated to Mr. MacLean. Irrelevant.

20 JUDGE KANG: Overruled.

21 THE WITNESS: I don't -

22 MR. DEVINE: I can back up, Your Honor, and -

23 MR. BERGER: He overruled it.

24 MR. DEVINE: Oh, okay.

25 JUDGE KANG: Overruled. Repeat the question.

1 BY MR. DEVINE:

2 Q. Didn't you send another agent that you supervised, Frank
3 Terreri, home immediately when you perceived misconduct on his
4 part?

5 A. I don't – I did not direct that to take place, and I don't
6 recall exactly how many days were in between a decision to do
7 that and the actual occurrence of it.

8 Q. Was it much less than a month?

9 A. I don't recall.

10 Q. And isn't Mr. Terreri the president of the Air Marshals
11 Chapter for the Federal Law Enforcement Officers Association?

12 A. Yes, he is.

13 Q. Isn't Mr. MacLean – wasn't Mr. MacLean at the time that
14 you were supervising him an executive vice president of the
15 Federal Law Enforcement Officers Association?

16 A. I believe he was.

17 Q. You stated that it didn't change your opinion about Mr.
18 MacLean's liability that the information he disclosed wasn't
19 marked SSI because he should have known it.

20 Why should we even bother to mark information like
21 this "SSI" then?

22 MS. CALAGUAS: Objection, that's argumentative.

23 JUDGE KANG: It's overruled.

24 THE WITNESS: I would say it's a – it's a good
25 practice to put it on there.

1 BY MR. DEVINE:

2 Q. Do you think it's superfluous, the markings are
3 superfluous, or do they actually communicate information that
4 people need to know?

5 A. I think it's important, especially if you – if you don't
6 read the information and you see the markings on it, you would
7 know from a distance without even reading the information and
8 have to make a determination that it's SSI – that it's SSI.

9 Q. Now on this Final Letter of Removal, you said you reviewed
10 it. Did you edit it as well?

11 MS. CALAGUAS: I'm sorry. I didn't hear that – I
12 didn't hear your question entirely.

13 JUDGE KANG: Will you repeat the last –

14 MR. DEVINE: Yes, ma'am.

15 JUDGE KANG: – question, Mr. Devine?

16 BY MR. DEVINE:

17 Q. On the Final Letter of Removal, you stated that you
18 reviewed it. Did you edit or change any contents in the
19 letter?

20 A. I don't recall.

21 Q. And on this question of rehabilitation, did it even matter
22 to you whether Mr. MacLean was acting legally or not?

23 MS. CALAGUAS: Objection, Your Honor. At this point
24 it's going beyond the scope of my redirect.

25 MR. DEVINE: Well, Your Honor, the whole point of the

1 redirect was on training people the difference between right
2 and wrong, on whether or not there was responsibility to
3 protect the Agency, whether Mr. MacLean was a trustworthy
4 agent. And there was specific kind of the skeleton, the
5 infrastructure, for that conclusion.

6 And I'm wondering whether it's a relevant factor for
7 Mr. Donzanti whether Mr. MacLean was acting lawfully. I think
8 that that's an important premise for assessing -

9 JUDGE KANG: Mr. Devine, -

10 MS. CALAGUAS: - all the answers.

11 JUDGE KANG: - I've heard enough. The objection is
12 overruled. Please repeat the question.

13 MR. DEVINE: Yes, sir.

14 BY MR. DEVINE:

15 Q. Mr. Donzanti, did that matter to you in making your
16 removal decision whether Mr. MacLean was acting lawfully or
17 not?

18 A. I'm not sure I understand the - the question when it -
19 when you say "lawfully," and exactly what -

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 [REDACTED]

[REDACTED]

9 Q. Isn't that what you testified in your deposition?

10 A. If it's in the deposition, I – I suspect I did.

11 MR. DEVINE: Okay. No further questions.

12 JUDGE KANG: Ms. Calaguas, anything else before I –

13 MS. CALAGUAS: Yes, Your Honor, one last question.

14 FURTHER REDIRECT EXAMINATION

15 BY MS. CALAGUAS:

16 Q. Mr. Donzanti, at the time that you made your decision to
17 remove Mr. MacLean were you a member of FLEOA yourself?

18 A. I – I may have been. I'm not sure. I've been a member
19 for – for 25 years. I'm not sure on that exact date if I was
20 a member.

21 Q. Okay. And, just for the record, what does "FLEOA" stand
22 for?

23 A. Federal Law Enforcement Officers Association.

24 MS. CALAGUAS: Thank you, Your Honor. No further
25 questions.

1 JUDGE KANG: Mr. Devine, anything else before I
2 release this witness?

3 MR. DEVINE: No, Your Honor.

4 JUDGE KANG: Okay. Then since the parties are done
5 examining this witness I will release him from the stand.

6 Mr. Donzanti, as you are a member of management I'm
7 sure you're aware that this is an ongoing proceeding, and I do
8 ask you to refrain from discussing what took place here with
9 anyone else outside of these proceedings, with the exception
10 of course, of counsel, counsel's office, and Labor Relations.
11 You can check with them as to the status of the case.

12 THE WITNESS: Okay.

13 JUDGE KANG: Thank you, sir. You're released from
14 the stand.

15 THE WITNESS: Thank you.

16 (Witness excused.)

17 JUDGE KANG: All right. The Appellant was approved
18 as a mutually-requested and mutually-approved witness. So
19 I'll ask you, Ms. Calaguas, do you wish to call him now or do
20 you - do you wish to allow the Agency to call - or the
21 Appellant to call Mr. Ortman before examining the Appellant?

22 MS. CALAGUAS: I have no objections to taking Mr.
23 MacLean out of order, just so long as there's an understanding
24 that the Agency is not resting until after having had an
25 opportunity -

1 JUDGE KANG: There is -

2 MS. CALAGUAS: - to examine Mr. MacLean.

3 JUDGE KANG: There is no - the only one to confuse
4 here potentially would be me and, trust me, I am well aware
5 that he is a mutually-requested and mutually-approved witness.

6 MS. CALAGUAS: Well, thank you. I could always use
7 the clarification myself. Thank you.

8 JUDGE KANG: Mr. Devine, will you be conducting the
9 examination, or Mr. Berger, of Mr. Ortman?

10 MR. BERGER: Well, could we have a few minutes, Your
11 Honor, - this is Mr. Berger speaking - to decide whether we're
12 going to call him?

13 JUDGE KANG: Sure. Let's -

14 MR. BERGER: In light of the testimony - in the light
15 of the testimony of the deciding official, we - I just want to
16 consult with Mr. Devine.

17 JUDGE KANG: Okay. Let's go off the record. We'll
18 take a five-minute break. And when we return we'll take your
19 answer and decide on the next witness. We're in recess, five
20 minutes. Off the record.

21 MR. BERGER: Thank you.

22 (Recess taken from 10:10 a.m. to 10:27 a.m.)

23 JUDGE KANG: We took approximately a 15-minute break.
24 That's longer than I had anticipated. However, we did discuss
25 a few matters, which I will now summarize, while we were off

1 the record.

2 During the break the Appellant informed me that he no
3 longer wishes to call Mr. Ortman to the stand. Mr. Ortman was
4 requested and approved solely as a witness for the Appellant
5 and, therefore, he is being released.

6 The only remaining witness is, as I indicated before,
7 is a mutually-requested and mutually-approved witness, who is
8 the Appellant who has now taken the stand. And I have full
9 view of his upper body as well as his face, of course. And he
10 is seated at the judge's bench over in our Washington, D.C.
11 office hearing room.

12 Another matter that we discussed while we were on
13 break is that we did have another member of the public join us
14 here in the audience in San Francisco. And that's - and so I
15 will repeat, simply repeat what I stated before on the record
16 for his benefit.

17 And that is that no two-way communication devices may
18 be used or powered on in either of these hearing rooms by any
19 individual or group. Cell phones, text devices, and all other
20 two-way communications devices shall be powered off in the
21 hearing rooms. And, similarly, no cameras, recording devices,
22 or transmitting devices may be powered on or otherwise
23 operated in either of the hearing rooms.

24 And if it comes to my attention that anyone is
25 violating that rule, they will - I will act on that, to start

1 with their expulsion from the hearing rooms.

2 To the extent that any SSI may be discussed, I
3 informed – I informed the parties previously that I would
4 consider any Agency objections to this effect as such
5 objections are raised. So that may include, at minimum, the
6 clearing of the hearing room, as I determine at that time.

7 Anything else before we swear in the witness?

8 Ms. Calaguas?

9 MR. BERGER: Not from Appellant.

10 MS. CALAGUAS: Not from the Agency, Your Honor.

11 JUDGE KANG: All right.

12 MR. BERGER: And not from the Appellant.

13 JUDGE KANG: Thank you.

14 Mr. MacLean, do you have any objections to swearing
15 an oath before testifying before me?

16 MR. MACLEAN: No, Your Honor.

17 JUDGE KANG: I'll turn your sound up a bit.

18 Have a seat, Mr. MacLean.

19 Ms. Book, would you mind moving? There may be some
20 papers near the microphone. Just if you could keep any papers
21 away from there. We can hear a lot of shuffling on our end.

22 All right. Thank you. That's much better.

23 Whereupon,

24 ROBERT JAMES MACLEAN,

25 Appellant, witness for himself and called by the Agency, was

1 first duly sworn by Administrative Judge Kang, and was
2 examined and testified as follows:

3 THE WITNESS: Yes, Your Honor.

4 JUDGE KANG: Okay. Please state your and, spelling
5 your last name for the record.

6 THE WITNESS: Robert James MacLean, M-a-c-L-e-a-n.

7 JUDGE KANG: All right. Did you wish to allow Mr.
8 Berger to question him first, Agency, or did you want to start
9 with the questioning? He is a mutually-approved witness, and
10 I have the discretion to when either of you starts.

11 MS. CALAGUAS: Yes. I have no objections to the
12 Appellant's representative questioning him first.

13 JUDGE KANG: Okay. Mr. Berger, the witness is yours.

14 MR. BERGER: All right. Thank you very much, Your
15 Honor.

16 DIRECT EXAMINATION

17 BY MR. BERGER:

18 Q. Mr. MacLean, did there come a time when you were appointed
19 to the position of a Federal Air Marshal?

20 A. Yes. It was October 14th of 2001.

21 Q. And is that a position that you had applied for?

22 A. Yes, sir.

23 Q. And why did you apply to become a Federal Air Marshal?

24 A. It was immediately after the 9/11 attacks. I wanted to -
25 I wanted to serve. I was definitely moved by what happened

1 after the attacks. And I immediately applied and the FAA
2 wanted to put me in their first class of Federal Air Marshals
3 to graduate after the 9/11 attacks.

4 Q. So you were a trainee in the first class of Air Marshals
5 after the 9/11 attacks?

6 A. Yes, sir, to graduate after the attacks.

7 Q. And when did you commence this training?

8 A. It began October 14th of 2001.

9 Q. And when did the training end?

10 A. The middle of November of 2001. I believe it was perhaps
11 the – the first part of the second week of November of '01.

12 Q. The training was for approximately a month?

13 A. Yes, sir.

14 Q. And can you just tell us, to the best of your
15 recollection, what the training consisted of?

16 A. It was a lot of firearms. It was – we were supposed to
17 get – they wanted us – they wanted to get the most experienced
18 applicants in this class because we were going to develop a
19 syllabus for all future classes.

20 So most of the time – we were already very firearms
21 proficient. We were – we were – I was an instructor with the
22 – with the INS, formerly the INS as a Border Patrol Agent. So
23 our job was – we did a lot of sitting around and brainstorming
24 of how we could develop a training syllabus for the Agency.

25 So then there was some – there was – there wasn't

1 even physical training. All it was was just firearms
2 proficiency and – and brainstorming to develop a training
3 syllabus for the Agency.

4 Q. How soon after you graduated from that training were you
5 actually put into the field in airplanes?

6 A. Almost immediately.

7 Q. During the course of the training was there any discussion
8 or training regarding SSI material or information that you've
9 since learned is characterized as SSI?

10 A. There was – there was never – right – right when we were
11 put into that class, there wasn't even a – there was nothing –
12 nothing discussed about sensitive security information.

13 But there was a term used a lot, which was "sensitive
14 information." It just missed – it just didn't have
15 "security."

16 But there was – so we didn't even call it SSI. There
17 was a discussion of your flight numbers and – and flight times
18 and the airlines that you were flying was sensitive
19 information. It wasn't till months later where there was a –
20 I remember reviewing a very thick pamphlet of a policy going
21 into – into detail of – of what was SSI.

22 Q. Okay. So during the course of your training, before you
23 were placed into the field, you have no recollection of
24 actually receiving any type of formal training regarding SSI?

25 A. No, sir.

1 Q. Did there come a time after you graduated from your
2 training and you were in the field that you became familiar
3 with the concept of sensitive security information, or SSI?

4 A. Yes.

5 Q. And approximately when was that?

6 A. Several months after graduation, so I believe it – it
7 would have probably been in the first quarter of 2002.

8 Q. And you may have alluded to this earlier, but to the best
9 of your recollection can you describe how you became familiar
10 with the SSI policy of the Agency?

11 A. We sort of had on a – it was an administrative day, very
12 informal. We were – we were distributed a list of – of issues
13 that you just didn't – you didn't discuss, such as we were –
14 we were given scenarios saying that some Air Marshals in the
15 past had gotten in trouble for telling their significant
16 others where to pick them up exactly, which gate, and which
17 airline they were flying. It said a lot of guys have been –
18 gotten in trouble and were fired for that, so you want to
19 completely avoid it.

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

24 Q. All right. Now other than this sort of anecdotal type of
25 training, was there any formal training on SSI material,

1 anything like that? Structured, formal, coherent training.

2 A. Well, there were - there were a lot of publications that
3 we were - that we were given. I - I don't remember exactly,
4 but I believe there was a - there was a master - there was a
5 master folder that had probably a quarter-inch thick of - of
6 SSI policies, just very wordy.

7 And you had to - you had to sign a acknowledgement
8 that you - you - you read the policy and understood it.

9 Q. Okay. And after - did you look at that policy? Do you
10 have any recollection of looking at the policy, or the manual,
11 or the pamphlet?

12 A. No. I - I did not read it line for line, because there
13 was a - the - eventually he was - became the Special Agent in
14 Charge - he summarized, you know, what - what was SSI and what
15 was not.

16 Q. And who was the "he"?

17 A. His name is - at the time he was the Acting Special Agent
18 in Charge, Douglas Hlavka, and I believe now he is the - the -
19 appointed Special Agent in Charge.

20 Q. Okay. And at that time did you - did there come a time
21 when you formed some opinion or conclusion as to what SSI
22 information was?

23 A. Yes, I did.

24 Q. And what was your understanding of what SSI information
25 was?

1 A. Air- – airlines and their flight numbers.

2 Q. Anything else?

3 A. There was – there was also the exact seating assignments
4 on an aircraft. We – you didn't – you did everything you
5 could to try to not expose your identity so that –

6 Q. Okay.

7 A. – passengers didn't know where you were exactly sitting.

8 Q. And was there any discussion as to the mode of
9 communicating SSI information?

10 A. Yes.

11 Q. Tell us what you understood the mode of communicating was.

12 A. It had to be in some form of secure manner. If it – if it
13 was done electronically, it had to be – it had to be done on
14 government email. They were very – they were very adamant
15 about they didn't want people sending – receiving their
16 schedules on their personal email accounts. That was – that
17 was an issue. It had to be through the government –
18 government email system or your encrypted, password-protected
19 PDAs, personal data assistant. Sorry.

20 Q. So when you were sent out into the field, what kind of
21 devices were you given for the purpose of communicating with
22 management?

23 A. Early – early in the program we were given these – they
24 were sort of like a – they were these little PDAs. And I'm
25 trying to think of the brand it was, but it was a – it had an

1 - it had an alphanumeric keyboard on it. It was black, and it
2 folded into kind of like a small shell.

3 And all it did - it wasn't a phone, but it was
4 cellular. It was - it was a pager that had an alphanumeric -
5 you could send - it was a two-way pager with an alphanumeric
6 keyboard. And that was issued to us by the - the FAA.

7 Q. And what is your understanding of the reason why the FAA
8 issued that to you?

9 A. So they can communicate to us information that was
10 sensitive.

11 Q. Okay. And what was it about the PDA that, in your mind,
12 allowed it to be used for sensitive information?

13 A. Let me correct you. I probably confused you. I wouldn't
14 characterize it as a PDA. It was - it was - it was simply a
15 two-way pager. You couldn't interact. All you could do was
16 receive the message and then type out a message.

17 We got a more complex PDA later in the program.

18 Q. When did you get the more complex PDA?

19 A. I believe it happened in early - it happened either late
20 2002 or early 2003.

21 Q. Okay. However, let's start with the initial, less-complex
22 PDA.

23 A. Yes.

24 Q. What was it about that PDA that - that - why did you - why
25 did you conclude that that was for sensitive information? On

1 what basis do you say that?

2 A. I believe you needed a – it – it didn't have a password-
3 protection device on it. And I – if you opened it or lost it,
4 somebody would have had to have a – a combination for it. I'm
5 not sure exactly what was the – what you had to do in order to
6 read messages.

7 Q. Okay. And when you received that less-complex PDA device,
8 did the Agency give you any other devices to effect
9 communication?

10 A. Yes. They recalled the – the – the two-way pager with the
11 keyboard on it.

12 Q. Well, I understand that. But during the period of time
13 that you used that less-complex PDA device, was there any
14 other device that the Agency gave you to effect communication?

15 A. No. They made us – they made us either use our personal
16 cell phones, or we had to call a – a toll-free number on pay
17 phones.

18 Q. Okay. Now there came a time when you received a more
19 complex PDA?

20 A. But in between – when they took away the black one, –

21 Q. Yes.

22 A. – that's when they gave us the really plain – I believe it
23 had about 12 – it just had a numeric 1, 2, 3. It was just a
24 plain old Nokia cell phone. I think at one time everybody had
25 one of these. I mean even the world.

1 Q. Oh, okay.

2 A. It was just a very common, because – it was just a sleek,
3 plain old cell phone. And that's what they gave us after the
4 – after the – the first one the FAA gave us.

5 Q. Okay. So at the time that you received the more complex
6 PDA, you also had an Agency-issued cell phone?

7 A. Yes.

8 Q. Now was the more complex PDA also encrypted, to your
9 knowledge, for sensitive information?

10 A. Yes. It had not – only did – you had to – in order to use
11 it or read messages on it, there was sort of like the home
12 screen. If you pushed any button, what you would get was –
13 was a blank screen with a – with a line where you had to type
14 in an alphanumeric password.

15 And they – and the Agency assigned us those
16 passwords. And I believe it was – it was a combination of our
17 – of our first name and our – I'm sorry – of our full name,
18 different letters, and numbers from our Social Security
19 number. And you – you punched it in. It opened it up so you
20 could use it, but the encryption software that it had in the –
21 it had encryption software inside the – the PDA.

22 Q. Okay. And in opening up a PDA like that and looking at
23 information, to your knowledge were there any markings
24 associated with sensitive information, any markings at all, or
25 labels or...?

1 A. I don't ever remember a – a message sent to – a text
2 message sent to the PDA that had markings.

3 Q. Okay. But did you understand that messages sent to the
4 PDA were sensitive?

5 A. It had that potential. I figured if – if they weren't
6 going to send – if they didn't send text messages to the plain
7 Nokias, if it was sent to the PDA, I assumed that it is more
8 sensitive – it has some sensibility [sic] to it.

9 Q. Okay. Now what about – at the time that you had this PDA
10 you also were issued a – you say a cell phone?

11 A. Yes, the Nokia cell phone.

12 Q. Did the cell phone have any of the encryption protections
13 or any other protections that – for – set for information the
14 PDA had?

15 A. No. You just turned it on and used it. But to check your
16 voicemail, you had to punch in a password. When you got the
17 prompt, and then you typed in your – your – your PIN.

18 Q. Okay. Now in – tell us in your own words what happened in
19 July of 2003 when you received a certain text message on your
20 cell phone concerning overnight flights?

21 A. Yeah. I could tell you there – there was a build-up
22 between when I got hired, probably in the mid- – the summer of
23 2002 up until July of '03 there were – there were policies
24 that the Agency put in place where we had to have a very
25 strict business dress code.

1 We had – it was a military-grooming standard where
2 you couldn't only – if you had facial hair, it had to be only
3 a mustache. The – your – you could not grow your hair past
4 your ears on your collars. It was no issue with me because,
5 you know, I – I'm balding so I like short hair and I can't
6 really grow that much facial hair, so.

7 But the – the requirement of wearing suits and ties
8 was just – it – it was very restrictive, and it was exposing
9 us to the general public, just – not all the time because
10 sometimes we would be in – we would be in first class on a
11 Monday morning on a – on a flight from one coast to the other,
12 and it was common sense to be in some from of – of business
13 attire.

14 But when things got ridiculous, such as making us
15 wear suits and ties on a Southwest Airlines flight, which is –
16 it didn't have any classes on a weekend and everybody's
17 boarding the plane in jeans and polos, and we were boarded in
18 – we were dressed and exposing ourselves.

19 And also the check point – the check point bypassing
20 procedures at the airports, we had to walk up the exit lanes.
21 We were constantly being – being flagged. If any – if anybody
22 with any common sense wanted to figure out who we were, just
23 some elementary surveillance would have figured us out.

24 Q. So what is the connection between when you say this –
25 these types of issues and what happened in July of 2003

1 concerning this disclosure?

2 A. Well, the Agency said they believed that we were a high
3 deterrent. If everybody – if people knew that – if the
4 terrorists, potential terrorists, knew we were going to be on
5 a flight, they would remove themselves from the flight and not
6 – and not carry out their operation.

7 So in July – sometime between July 26th and – of '03
8 and July 28th, we received a message that we had to come into
9 the office immediately. It didn't matter what our duty status
10 was. There was an emergency one-on-one briefing that we had
11 to get.

12 And we could not – they could not transmit the
13 briefing to us via email or discuss it with – with us over our
14 – over the phone.

15 So we had to physically walk into the field office
16 and receive a – this one-on-one mandatory suicide hijacking
17 briefing. And I remember I received mine from a gentleman by
18 the name of Nathan Salazar. He was the – he was one of the
19 several people that were assigned to the office.

20 And there was a master – there was another master
21 folder where you – you reviewed what the threat was. Then you
22 signed off on the roster.

23 And we brought the exhibit today. It's –

24 Q. I understand that. But what – what was the purpose of the
25 meeting?

1 A. They told us that there was a serious potential of a plot
2 for hijackers to avoid immigration visa screening, fly into
3 the United States from a foreign country into an airport that
4 didn't require them to be screened. And that way they were
5 going to smuggle weapons in camera equipment or children's
6 toys through foreign security and get it into – into an
7 airport where you didn't have security.

8 For instance, you have – you have Dulles Airport,
9 which just has one giant central screen. If you – at one
10 point, if you flew in from a foreign country and you had been
11 screened already, you did not go through U.S. screen. And
12 that was something they were going to exploit.

13 That wouldn't be the case, for – for instance, at an
14 airport such as Dallas-Fort Worth where there is zillions of
15 checkpoints – not zillions – but dozens of checkpoints between
16 each terminal.

17 So, you know, better – but for the ones that had one
18 central screening area, they were going to bypass that. They
19 were going to get the weapons on the plane and overpower the
20 crew or the Air Marshals and fly, fly the – fly the planes
21 into East Coast targets –

22 Q. Okay.

23 A. – and then there were other European targets.

24 Q. And you understand that was some sort of an alert to
25 heighten the vigilance of the Air Marshals or...?

1 A. It was an emergency. It was unprecedented, and it never
2 happened afterwards. We never were mandated a one-on-one
3 security briefing.

4 Q. Okay. And, by the way, this briefing was not – there was
5 no – none of the content of this briefing was provided to you
6 on your cell phone, right?

7 A. No. The – the – the written warning was marked as
8 sensitive security information. I attempted to FOIA it for
9 several years. And the old administration had it completely
10 blank.

11 And then recently the – I reFOIAed – if there's such
12 a term. They gave me the – the threat briefing in its
13 entirety.

14 Q. So what happened after you received this threat brief?

15 A. That – about – within sometime between when we got the
16 briefing, which was the 26th and the 28th, everybody in the
17 country had received a text message to the Nokia phones, not
18 to the – not to the – and the brand was – I'm sorry – it was a
19 Palm Tungsten W PDA. We got this message on our Nokia phones.

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

24 Q. Okay. Now do you have any recollection as to whether the
25 text had any associated markings labeling the information as

1 sensitive, or anything like that?

2 A. No. There was no SSI markings on the – on the message
3 sent to the Nokias.

4 Q. And when you received this message on the cell phone, did
5 you understand the information to be SSI information?

6 A. No.

7 Q. Why not?

8 A. It – not only – it was – not only it didn't have any
9 markings, SSI markings, not even a warning that this – don't
10 disseminate this or – it had – it had nothing on there. It
11 was just a – it was just a plain message. That and the fact
12 that it was sent to the Nokias and not to the – to the Palm
13 PDAs.

14 Q. Why was it significant to you that it's sent to the Nokias
15 and not to Palm PDA?

16 A. The PDA had – had encryption software and a – and a
17 password to – to open up to operate it.

18 Q. So what happened next, after you got this text message?

19 A. I called some Air Marshals around the country that I knew
20 and asked them, "Did you get – did you get some message?"

21 And pretty much got something that I did: Cancel
22 your hotel reservations to avoid cancellation fees and – and
23 call the office for new schedules.

24 And I – after that I had made – I made a phone call
25 to the office and spoke with a supervisor and asked him what –

1 what is going on.

2 And he said pretty plainly that there was a
3 Headquarters' decision to save money on hotel costs because
4 there was no more money in the budget.

5 Q. Okay. And did you have a concern with that?

6 A. Yeah. Right after – we had just gotten the – this suicide
7 hijacking alert that was issued. And we were getting these
8 one-on-one emergency briefings, and the Agency was – was
9 pretty much advertising which planes that we were – we were
10 on.

11 I thought it was – I thought the – everything – I
12 thought it was a mistake. I didn't believe it was – could
13 possibly make such a decision to – to be removing Air Marshals
14 from the flights that the law mandated.

15 Q. When you say the Agency was basically advertising which
16 flights you were on, what do you mean by that?

17 A. When the – when they gave us the – the dress code policy
18 and grooming standards and not – just not – at one time we
19 were covertly boarding aircraft.

20 And – but the airlines said that they just – they
21 didn't want to – they didn't have the manpower to help us to
22 get on the plane without having all of the passengers know who
23 we were.

24 So it was – it was becoming – we were – and people
25 were trying – submitting memos suggesting ways that Air

1 Marshals could board without letting everybody know their
2 identities.

3 Q. So what happened next?

4 A. I - after speaking with the supervisor, I - I don't
5 remember exactly what our conversation was. I - I know we
6 didn't - he didn't tell me if it was - this information was
7 SSI or had any classification. But he said, he goes, "There's
8 nothing we could do here at the field - this is not a field-
9 office-level decision. This is a Headquarters' decision
10 that's affecting all - every field office in the country."

11 And I - I hung up. Pretty much - I just struggled
12 with it. You know, I was just - we were constantly - it just
13 got to the point, you know, I - I follow orders, and I don't
14 make the rules. In my - I've always been a journeyman
15 employee.

16 One day I'm told to pick up the green rocks; the
17 other day I'm told to pick up the red rocks. On this day it
18 seemed like they wanted us to take the rocks and throw them at
19 the kids. It just seemed that the - the Agency had - had
20 either lost control or was just making a grave mistake. And I
21 decided, well, I'll try the OIG.

22 I always thought - I mean every telephone I ever
23 picked up while in government service had the OIG sticker and
24 every wall said if there's - if there is a violation of law,
25 you call - you call the OIG. So I did that.

1 I called the Department of Homeland Security Office
2 of Inspector General Hotline and spoke to a operator. And
3 they asked me where I was located.

4 And I was kind of vague. I said I'm in southern
5 Nevada. And said she, "Okay, call - here's the phone number
6 for the San Diego office."

7 So I made a phone call to the San Diego Field Office.
8 And they said, "We just do - we just do audits here. You need
9 to speak to a Criminal - Criminal Investigative Division and
10 the closest one here is the Oakland Field Office."

11 And I called the Oakland Field Office. And that's
12 when I spoke to a Special Agent about - I don't know if I - I
13 didn't immediately speak to a Special Agent. I probably spoke
14 to a receptionist first, and I said, "I'd like to speak to a
15 criminal investigator."

16 I spoke to him. I told him what's going on. He said
17 he was very aware of all the problems at the Air Marshals. He
18 said, he goes, "I fly, and it's pretty obvious who you guys
19 are. Some people like to play who's the Air Marshal on their
20 flight." He was kind of making a big joke out of it.

21 And he's just - and he - I said, "Well, what - what
22 could be done here? Can there" -

23 And he goes, "Uh, this is - this is - there's nothing
24 that could be done. Just - just walk away from it, don't -
25 don't bother. You know, you got a lot of years left in your

1 career." I think we had a discussion. Even – we even talked
2 about his old agency. He was – he had just recently become an
3 OIG agent with the DHS, because he was an OIG agent with the –
4 with FEMA. So he was really new to a lot of that.

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

10 I – I remember I liked – a lot of even – even the
11 field office people liked this guy because the way he wrote
12 his articles he was not trying to endanger the public but
13 trying to – trying to make people aware. And that – so I
14 spoke to him. And I told him what happened. And –

15 Q. What did you do – okay. What did you tell him?

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

19 Q. Okay.

20 A. And he was aware – he was aware of the – the briefings.

21 Q. Now when you made that statement to him, did you
22 understand that what you were telling him was SSI-protected?

23 A. No.

24 Q. Why not?

25 A. Well, the message, once again, was sent to me without any

1 marking to the Nokia instead of the – the Palm PDA. And the –
2 you know, when I spoke to the supervisor, he said this was a –
3 he just said this thing was kind of crazy, nuts. He – he was
4 even – the supervisor, he – he seemed kind of like a – he knew
5 that the Agency was just kind of running things into the
6 ground, too. So he kind of saw it as a joke.

7 It seemed like everybody – we had – it seemed like
8 nobody was – the guys who were – were most concerned with –
9 with what was going on with Air Marshal operations were the
10 guys that were flying the flights.

11 But the officials, the supervisors that were inside
12 the field offices and not flying missions, such as my
13 supervisor and the OIG agent, they just kind of thought it was
14 funny. You know, it was just – because it was – it was always
15 in the paper. And it was just – it – and it was just obvious
16 to anybody who traveled who the Air Marshals were. I didn't
17 think it was that funny. I thought – I thought it was very
18 serious.

19 And one thing they did teach us in the – in the
20 Academy: This was a law. Well, this law – the law was passed
21 for Air Marshals to be on these – these flights such as were
22 targeted on 9/11.

23 Q. Okay. Now did you understand the communications on your
24 Nokia cell phone, whether by voice or by text, to be protected
25 information?

1 A. Well, it - I - I know the system that they used. I
2 remember operations, when they sent these text messages. And
3 what it was, was it was the phone number, it was the nine-
4 digit phone number, then the server. So what they did was
5 collected everybody's phone number and blasted it out. So -
6 Q. Blasted out there to the world -

7 A. Yeah. It was sort of like somebody running into a plaza
8 and taking a bullhorn and blasting it out. And even - even
9 the recipient, you couldn't even guarantee - let's say an Air
10 Marshal had changed his phone number, or he had left and that
11 phone number was reassigned to somebody in the AT&T network
12 who wasn't an Air Marshal. They were getting that message,
13 too.

14 So anybody could have gotten this message, given the
15 - the system. I believe now because of - you get charged for
16 text messages and everything else, you just can't email a text
17 message like the Agency did with - with the nine-digit number
18 or the server. I think it was - for instance, if my phone
19 number in Nevada was 702-212-5555, it would be
20 "@Mobile.AT&T.net."

21 Q. So anybody who happened to be in possession or in custody
22 of that Nokia phone would have been able to consume or read
23 the message?

24 A. Yes.

25 MR. BERGER: Now, Your Honor, can we hold for just

1 one moment so I can just confer with my cocounsel?

2 JUDGE KANG: Yes. Go ahead, Mr. Berger.

3 (Appellant counsel confer off the record.)

4 BY MR. BERGER:

5 Q. Now at the time that you spoke to the reporter did you
6 believe that you were violating some law?

7 A. No, I did not.

8 Q. Why not?

9 A. Because there was - I believe there was a - there was -
10 there was danger going on, not just to Air Marshals but the
11 general public. And the information, I believe, was - may
12 have been potentially harmful had this plan ever gone into
13 effect. I didn't think it was illegal, but I thought that
14 what was happening was illegal and dangerous to the - to the
15 public.

16 Q. Now prior to this disclosure or at any time after this
17 disclosure had you ever disclosed any information to an
18 unauthorized recipient that was marked as SSI?

19 A. No, absolutely not.

20 Q. And has anyone ever accused you of disclosing any
21 information to an unauthorized recipient that was marked SSI?

22 A. Not until this proposal to have me fired.

23 Q. And in this case there was no marking for SSI, correct?

24 A. That's correct.

25 Q. Now after you spoke to the reporter, do you have any

1 recollection of what the Agency's response was to this?

2 A. Yeah. It was – it was pretty surreal, what was
3 happening –

4 MS. CALAGUAS: Objection, that question is vague.

5 JUDGE KANG: Stand by.

6 MS. CALAGUAS: I'm sorry. Objection, that question
7 is vague. Use of the word "this," I'm not sure what that's
8 referring to.

9 MR. BERGER: That's referring to the disclosure.

10 JUDGE KANG: Okay. Mr. Berger, please just go ahead
11 and restate your question again –

12 MR. BERGER: Yeah.

13 JUDGE KANG: – for clarity.

14 MR. BERGER: Yeah.

15 BY MR. BERGER:

16 Q. Yeah. After you made the disclosure did you become aware
17 of an Agency response?

18 A. Yes. It was –

19 Q. What happened?

20 A. It was – it was just – oh, it was all over the TV. I was
21 – I was watching the Secretary. He was going on to explain
22 what – what it was. He said it was a mistake, and it – I'll
23 never forget seeing the president on – in the – in the front
24 of the White House when he was – he was asked about it by
25 reporters.

1 Q. Now you said the Secretary said it was a mistake?

2 A. Yes.

3 Q. And was the mistake corrected by the Agency?

4 A. Yes. The plan never went into effect. I also remember
5 the – the press conference with Senator Hillary Clinton,
6 Senator Barbara Boxer, Senator Frank Lautenberg, and Senator
7 John Kerry were just ripping our Agency for it. And it was –
8 it was on – it was very uncomfortable because I had a lot of
9 pride in the Agency and I – it looked like that – being the
10 source of that disclosure was having my Agency getting –
11 getting severely criticized.

12 And I didn't – I had a lot of pride and I didn't like
13 watching that unfold all over television.

14 Q. All right. Now after the disclosure of this information,
15 did there come a time when you became the subject of an
16 investigation by the Agency?

17 A. Yes.

18 Q. And how – how much time lapsed between the disclosure and
19 the time you became aware that you were under investigation?

20 A. Well, I pretty – I felt pretty ashamed of having to do
21 this anonymously. And I figured – I figured the best way to
22 start addressing these problems was in a collective voice.
23 And that's when I formed – I was the cofounder for the Federal
24 Law Enforcement Officers Association. And that's where things
25 started getting very hectic. I –

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

4 A. Yes.

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

6 A. Approximately 13 - 13 months.

7 Q. Okay. And -

8 A. I'm sorry. That's - that's incorrect. I had no - it
9 would have been - it would have been approximately 23 months,
10 22 months when I knew there - I was under investigation for
11 the - for the SSI disclosure.

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

15 A. Well, the investigation initially was started because of
16 my appearance on "NBC Nightly News with Tom Brokaw."

17 And I was told by a supervisor in the field office
18 that the Special Agent in Charge has begun an investigation to
19 find out who was the Air Marshal on that program.

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

23 A. Within days.

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

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

4 Q. With Mr. Brokaw?

5 A. That's correct.

6 Q. Okay.

7 A. It was just who find - just to find out who was - who was
8 on the program.

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

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

18 Q. Um-hum.

19 A. - "because we will find out. So you need to tell us
20 everything."

21 Q. And they asked you about that?

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

23 Q. Um-hum.

24 A. And they go, "Well, why - why - why did he approach you
25 and what other information did he [sic] give to them" and -

1 Q. Okay. And prior to the investigation you said that you
2 were involved in helping to organize a local chapter of FLEOA?

3 A. Yes. That was -

4 Q. Just - just describe what your activity was.

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

10 And we started communicating with Special Agents on
11 the National Board. And they all concurred. They already -
12 they already knew what we knew. And they were onboard with us
13 immediately and started trying - attempting to correspond with
14 Director Thomas Quinn.

15 And he re- - he ignored us and started referring to
16 us in pretty disparaging terms. And that's when the Federal -
17 the FLEOA and National Board started communicating to the
18 media. And it - it just got - it just - it became a real - it
19 got really feisty.

20 And we - the National Board went so far as to issue a
21 no-confidence vote in Director Thomas Quinn. And eventually a
22 week - less - a few days after that no-confidence vote
23 happened, that's when Frank Donzanti sent the - his
24 supervisors to the house of Frank Terreri and striped him of
25 his weapon and his badge in front of his - his neighbors and

1 his - his family.

2 And when he - when they exonerated him, they left him
3 - the ICE OPR exonerated him. And for six weeks he was still
4 left at home, wondering if he was going to be arrested or - or
5 fired. That was kind of what was going on. And we just - all
6 we wanted was to make a collective voice so we were heard.
7 And eventually things eventually started to change, get - get
8 better.

9 Let me expand. There was also - we had also other
10 vice presidents that were targeted to -

11 MS. CALAGUAS: Objection, there's no -

12 JUDGE KANG: That's fine -

13 MR. BERGER: That's okay.

14 MS. CALAGUAS: There's no question pending.

15 THE WITNESS: I'm sorry. I couldn't -

16 BY MR. BERGER:

17 Q. Yeah. Did you - did you have a subjective belief that you
18 were targeted by your management because of your FLEOA
19 activities?

20 A. Yes.

21 Q. Why?

22 A. After - after what - after what was happ- - happened to
23 Frank, there was so much media exposure on Frank, that he - he
24 be- - Frank Terreri, that after he was exonerated, pretty much
25 after they went after the number - number-two guy. And I

1 believe that's when I was – I became a hot target for – by
2 Headquarters.

3 (Appellant's counsel confer off the record.)

4 BY MR. BERGER:

5 Q. Did you – at the time that you spoke to the reporter, did
6 you believe that you were a whistleblower?

7 A. I – to be honest with you, –

8 MS. CALAGUAS: Objection, this –

9 THE WITNESS: – I never really understood the –

10 MS. CALAGUAS: Objection. This question is
11 irrelevant and outside the scope of this proceeding at this
12 point.

13 JUDGE KANG: Overruled. Repeat the question.

14 MR. BERGER: Yeah.

15 BY MR. BERGER:

16 Q. Did you believe that you were a whistleblower?

17 You were answering the question.

18 A. At the time I didn't even understand the term, never did.

19 Q. Okay.

20 A. Never – I never read the whistleblower law, didn't
21 understand the role. This is some – everything I eventually
22 learned, the role of the Office of Special Counsel, I was – I
23 was just a grunt, you know. You do the right – got a badge
24 and gun, and I took an oath, and I just did what was right and
25 what was legal and prevented things that were illegal.

1 MR. BERGER: Okay. I don't have any further
2 questions.

3 JUDGE KANG: Mr. MacLean, are you okay to continue on
4 with the cross, or do you need a break?

5 THE WITNESS: I'm fine.

6 MR. BERGER: You're fine? Okay.

7 Well, can we take a two-minute -

8 THE WITNESS: It's up to - if -

9 MR. BERGER: Can we take a two-minute -

10 THE WITNESS: I - I don't mind if other people break.
11 I'm fine now.

12 MS. CALAGUAS: I need at least a quick five-minute
13 break.

14 JUDGE KANG: Ms. Calaguas is requesting a five-minute
15 break, so let's go on break. We'll reconvene in five. We're
16 off the record.

17 (Recess taken from 11:19 a.m. to 11:31 a.m.)

18 JUDGE KANG: Okay. We took somewhat of a longer
19 break than I had anticipated. While we were off the record
20 the Agency expressed an interest and requested to press on
21 with their combined cross- and direct examination of the
22 Appellant rather than taking a break at this point, and Mr.
23 Berger concurred with that request. So we're going to
24 continue on.

25 Because the Appellant is a mutually-requested and

1 approved witness, please – I'm going to give you broader
2 latitude, Ms. Calaguas, in terms of having a combined direct
3 and cross-examination. You don't have to break it up in to
4 doing your cross and then coming back on direct. I am asking
5 you to do both right now. Okay.

6 MS. CALAGUAS: Thank you, Your Honor.

7 JUDGE KANG: And, Mr. MacLean, you are reminded that
8 you remain under oath.

9 THE WITNESS: Yes, sir.

10 JUDGE KANG: Okay. The witness is yours, Agency.

11 CROSS-EXAMINATION/DIRECT EXAMINATION

12 BY MS. CALAGUAS:

13 Q. Good afternoon, Mr. MacLean. We meet again. Again my
14 name is Eileen Calaguas, and I'm the Agency representative.
15 It's been a couple years since we last saw each other, but I
16 have a couple of – maybe more than a couple of questions for
17 you this afternoon, just to clarify your testimony earlier
18 when your counsel was asking you questions.

19 Can you hear me all right, Mr. MacLean?

20 A. Perfectly.

21 Q. Okay. Great.

22 Really quickly, I'm just going to have you take a
23 look at a couple of Agency hearing exhibits. And that would
24 be 5, 6, and 7. If you could take a look at them and just
25 verify that that's your signature that appears on each of

1 those exhibits?

2 MS. BOOK: Did you want to look at the -

3 MR. BERGER: Yes.

4 MS. BOOK: - exhibits that were mentioned?

5 MR. BERGER: Yes. Thank you.

6 5, you said 5, 6, and 7?

7 MS. CALAGUAS: 5, 6, and 7.

8 MS. BOOK: (Indecipherable) come down here.

9 MR. BERGER: Oh, oh. Should I bring them up there?

10 MS. BOOK: I thought you wanted to preview them.

11 I'll take them up.

12 MR. BERGER: Okay. Hold on.

13 MS. BOOK: Okay?

14 MR. BERGER: Yeah. Okay.

15 MS. BOOK: Your Honor, may I approach the bench?

16 JUDGE KANG: Yes. Yes.

17 MS. BOOK: Thank you.

18 JUDGE KANG: And thank you for helping, Ms. Book,

19 with this.

20 MS. BOOK: Sure. No problem.

21 (Counsel in Washington, D.C. conferring off the record.)

22 MS. BOOK: Just 5, 6, and 7; is that correct?

23 MS. CALAGUAS: Yes.

24 MS. BOOK: Okay.

25 BY MS. CALAGUAS:

1 Q. Mr. MacLean, do you have those exhibits in front of you?

2 A. Yes, ma'am.

3 Q. And if you could verify on each of the exhibits that it's
4 your signature that appears, probably towards the end of each
5 exhibit?

6 A. Yes. Those are all my signatures.

7 Q. Okay. Thank you for that, Mr. MacLean.

8 So you've been a Federal Air Marshal since October of
9 2001, correct?

10 A. October - which -

11 Q. October of 2001.

12 A. - what was it again?

13 Q. Approximate- -

14 A. Yes, ma'am.

15 Q. Approximately. And you testified that you - you applied
16 to become a Federal Air Marshal; isn't that right?

17 A. Yes, ma'am.

18 Q. Okay. And the vacancy announcement that you responded to,
19 there was a specific provision in that vacancy announcement
20 that put you on notice that you could be removed for releasing
21 sensitive security information; isn't that right?

22 A. I'm not s- - is the announcement here?

23 MR. BERGER: She's just asking -

24 MS. CALAGUAS: You were -

25 MR. BERGER: - you a question. Do you know -

1 THE WITNESS: I don't remember if it was - I don't
2 remember exactly who was - if it said "SSI" or "sensitive
3 information."

4 BY MS. CALAGUAS:

5 Q. But you recall that the vacancy announcement did speak to
6 the disclosure of some type of sensitive information, that
7 that could be a basis for your removal as a Federal Air
8 Marshal; isn't that right?

9 A. Yes, ma'am.

10 Q. And you recall -

11 A. Yes, ma'am.

12 Q. - you recall reading that at the time that you applied for
13 the Federal Air Marshal position?

14 A. I don't really recall, but I'm sure I read it.

15 Q. The Federal Air Marshal position, that's a law enforcement
16 one; isn't that right?

17 A. Yes, ma'am.

18 Q. But it's not the first law enforcement position that
19 you've held; isn't that right?

20 A. That's correct.

21 Q. Okay. At the time that you became a Federal Air Marshal
22 you also signed an acknowledgement about the conditions of
23 your employment as a FAM; isn't that right?

24 A. Yes, ma'am.

25 Q. And one of those conditions, again, was that you could be

1 removed for disclosing the unauthorized release of sensitive
2 security information; isn't that right?

3 A. Yes, ma'am.

4 Q. You testified earlier about the training that you've
5 received regarding sensitive security information. You – you
6 actually received a copy of the Agency's policy on sensitive
7 security information prior to the time that you made your
8 disclosure to Mr. Meeks; isn't that right?

9 A. I'm sure I did.

10 Q. But you decided not to read that policy line for line; is
11 that your testimony?

12 A. Yes, ma'am.

13 Q. Okay. You had an obligation to review the entire contents
14 of that policy; isn't that right?

15 A. Yes, ma'am.

16 Q. But you chose not to even read the policy line by line;
17 isn't that right?

18 MR. BERGER: Well, you're assuming – Your Honor, it's
19 been – it's been asked and answer – answered, but I don't even
20 know what policy the counsel's referring to.

21 MS. CALAGUAS: Well, Mr. MacLean seems to understand
22 the policy that I'm referring to.

23 JUDGE KANG: Let's back up, Ms. Calaguas. And why
24 don't you go ahead and clarify what – you know, back up with
25 your questioning. I understand you and Mr. MacLean realize

1 what policy you folks are discussing, but I think it's a valid
2 objection to back up a bit and identify the policy for the
3 record.

4 BY MS. CALAGUAS:

5 Q. Okay. So that we're clear, I'm asking you questions about
6 the Agency's policy regarding sensitive security information.

7 Do you – you recall that policy; isn't that right,
8 Mr. MacLean?

9 A. I signed a statement acknowledging that I – I attended a
10 SSI training and read the – read the policy.

11 Q. But, in fact, you didn't actually read that policy in it's
12 entirety; isn't that your testimony today?

13 A. I'd rather say I didn't read and commit to memory every
14 single line on – throughout the policy, –

15 Q. But you had –

16 A. – but –

17 Q. I'm sorry to interrupt.

18 A. But the training, the summar- – it was summarized to us,
19 the points of it, but not every single point was – was – did I
20 read every single line and commit it to memory. And it was –
21 it was summarized. It was – common-sense issues were told to
22 us what is SSI. And our – our job was – our mission was very
23 – was very one dimensional: We flew planes. So flight
24 numbers was SSI. Seating assignments.

25 Q. Just to carry that thought then, FAM scheduling, that was

1 SSI. You had that understanding; isn't that right?

2 A. If it had the flight numbers and times, yes, ma'am.

3 Q. So is your testimony today that - well, let me ask you
4 this.

5 In terms of scheduling, if a Federal Air Marshal
6 wasn't on a plane and wasn't scheduled to be on the plane, you
7 would agree that the Federal Air Marshal's absence on the
8 plane is part of scheduling; isn't that right?

9 A. If - if a FAM is not scheduled to be on a plane, that's
10 scheduling?

11 Q. Yes. Do you agree with that?

12 A. It's - it's really unclear to me. Do you mean that if I
13 told people that there were no Air Marshals -

14 JUDGE KANG: Mr. MacLean, -

15 THE WITNESS: - on a flight -

16 JUDGE KANG: Mr. MacLean, please refrain from asking
17 questions of counsel. If you -

18 MS. CALAGUAS: It's probably a very poorly-worded
19 question, so I apologize for that. Let me withdraw that
20 question and ask another question.

21 JUDGE KANG: Okay. Go ahead, Ms. Calaguas.

22 And I'm not asking you not to ask questions. Just
23 perhaps reword it since the witness doesn't understand it.

24 MS. CALAGUAS: Yes, I understand. Thank you, Your
25 Honor.

1 BY MS. CALAGUAS:

2 Q. Let's go back to what you were talking about in terms of
3 the SSI training that you received.

4 You recall that it was a common-sense approach to the
5 discussion of SSI; isn't that right?

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

15 Q. And you would agree that the reason that that type of
16 information needed to be safeguarded was as a Federal Air
17 Marshal you didn't want to broadcast whether or not you were
18 on a particular flight; isn't that right?

19 A. Yeah. If you told your - your wife or your significant
20 other that you were going to be on a specific flight, you ran
21 the risk of him or her gossiping and telling the wrong people
22 that you and your fellow Air Marshals are going to be on that
23 - on that flight.

24 Q. And so you understood that that type of information was
25 not something that you could share even - even with your wife,

1 or your girlfriend, or someone -

2 A. Yeah. The flight -

3 Q. - or someone -

4 A. - number that you're going to be - the arriving flight
5 that you're going to be on, that's correct, or even the
6 departing flight, because some - some wives even wanted to -
7 and spouses, I should say, because there's females FAMs too,
8 I'm sorry - some wanted to monitor the flights on the internet
9 as to their arrival times. So it was very, very clear that
10 you did not tell flight numbers and times of the flights you
11 flew missions on.

12 Q. Because you were not supposed to disclose if you were on a
13 particular flight; isn't that right?

14 A. Yes. The - the flight number that you're on or -

15 Q. Okay. I heard your answer. Thank you for that, Mr.
16 MacLean.

17 And you talked earlier in your testimony about how it
18 was a deterrent that if it was known that a particular - that
19 a Federal Air Marshal was present on a flight, that that
20 served as a deterrent to the terrorist; isn't that right?

21 A. That was the - that was the Director's unwritten policy.

22 Q. But you would - you with on agree that if a terrorist was
23 aware that a particular flight had a Federal Air Marshal on
24 it, that that would be a deterrent for that terrorist to
25 attack at that time; isn't that right?

1 A. I disagree.

2 Q. You don't agree with that?

3 A. That's correct.

4 Q. You would agree, though, that if a terrorist was aware
5 that that particular flight didn't have a Federal Air Marshal
6 that that would actually be an invitation to strike at that
7 moment; isn't that right?

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

11 Q. Let's talk about the text message then that you shared
12 with Brock Meeks. You purposely sought out this news reporter
13 when you disclosed the information to him; isn't that right?

14 A. Yes, ma'am.

15 Q. Okay. And you did so because you knew that he would – he
16 would broadcast the information that you were giving him;
17 isn't that right?

18 A. He said he was in communication with key members of
19 Congress. They were going to have the – the plan reversed
20 before it went into effect six days later.

21 Q. Well, you knew he worked for MSNBC; isn't that right?

22 A. Yes, ma'am.

23 Q. So you knew that his job was to report to the public;
24 isn't that right?

25 A. Yes, ma'am.

1 Q. And not just to members of -

2 A. Yes.

3 Q. - Congress?

4 A. Yes, ma'am.

5 Q. And, in fact, by -

6 A. I -

7 Q. In fact, by disclosing the information to that particular
8 journalist, it was your intent that he disseminate the
9 information that you gave him; isn't that right?

10 A. I had no idea what he was going to - his intention. I
11 knew his intention, what he was - what he was going to
12 actually do with the story, if it was going to become a story,
13 or if Congress was going to move before even a story was
14 published.

15 So he never made any promising, definitive actual
16 statement stating that this was going to be headline news
17 tomorrow.

18 Q. But you - you didn't expect Mr. Meeks to keep the
19 information that you gave him confidential; isn't that right?

20 A. He was communicating - he was communicating it with his -
21 with the members of Congress that protested the following
22 morning.

23 Q. But you knew he was going to keep the information
24 confidential?

25 A. There was - yeah, I believe there was - there was a very

1 good possibility that he would have made it public.

2 Q. In fact, -

3 A. But we had an agreement -

4 Q. I'm sorry. I'm cutting you off.

5 A. We had an agreement - I had an agreement with the reporter
6 that he was going to do this as responsible as possible.

7 Q. And that would mean that he was going to publicize the
8 information that you gave him; isn't that right?

9 A. He was communicating first with - with members of
10 Congress. Before he would - before he issued the - the
11 report, he was in communication with offices of Congress.

12 And he told me that this was going to be immediately
13 - be addressed in the morning. Whether it was a public press
14 conference, which eventually it was, I - I didn't even know
15 that. I didn't know the story was going to be as big as it
16 was.

17 Q. But it was your intent and expectation that he - that Mr.
18 Meeks, as a news reporter, was going to publicize the
19 information that you gave him; isn't that right?

20 A. Yes, so that the plan would never go into effect.

21 Q. And when you gave this information to Mr. Meeks you were
22 aware that he wasn't - he wasn't authorized to receive this
23 information; isn't that right?

24 A. No. I don't - I didn't know what - what was the
25 sensitivity of the information. All I knew is that the plan

1 had a potential of being – of being dangerous and was illegal.

2 Q. And the information that you gave Mr. Meeks was that you
3 told him that RON missions up to August 9th would be canceled;
4 isn't that right?

5 A. I'm not sure of the exact dates. What I'm sure of is that
6 a message was sent to me, to my – to my Nokia phone that RON
7 missions would – RON missions were being canceled and that we
8 needed to cancel our hotel reservations and call the
9 operations desk to get new schedules.

10 Q. Can you tell –

11 A. The exact dates –

12 MR. BERGER: Oh, he's not finished yet, Ms. Calaguas.

13 MS. CALAGUAS: Yeah. I'm sorry.

14 THE WITNESS: But exact dates – exact dates, I'm not
15 – I don't know if I was – if in my testimony I used the
16 article as a reference.

17 BY MS. CALAGUAS:

18 Q. When you say "testimony," you're referring to the
19 information that you provided to the investigator?

20 A. That and probably in the deposition with you in 2006.

21 Q. But –

22 A. I'm not certain, though.

23 Q. It – it –

24 A. I'm not certain.

25 Q. That's fine.

1 But it's clear in your mind today that when you
2 informed Mr. Meeks that RON missions would be canceled, that
3 that was prior to any cancellation of missions; isn't that
4 right?

5 A. Could you please – can you please rephrase it?

6 Q. You didn't understand my question?

7 A. No, ma'am. I'm sorry.

8 Q. Okay. So at the time that you told Mr. Meeks that RON
9 missions would be canceled, that was prior to the cancellation
10 of any missions; isn't that right?

11 A. Yes. No missions were being canceled imminently. It was
12 – it was supposed to happen days later. The – the Instructor
13 General Report stated that the Director said it was to begin
14 on August 3rd. But I believe the article said August 1st.

15 Q. Just give me a second to look at my notes, Mr. MacLean.

16 A. Yes, ma'am.

17 Q. You testified earlier that you spoke to a supervisor at
18 some point after receiving this text message on your cell
19 phone; isn't that right?

20 A. Yes, after speaking to other FAMS that I knew around the
21 country.

22 Q. Okay. And in speaking with that supervisor you never
23 asked him if the information on the text message was, in fact,
24 sensitive secured information, did you?

25 A. I – I don't – that was a long time ago. I don't remember,

1 but I'm pretty certain that I would not have such a
2 conversation with him. That was not even the topic. The -
3 the dialogue that we had was pretty jovial. He was just kind
4 of - it was - he made it a joke about what was happening.

5 Q. And you didn't ask that supervisor or any other supervisor
6 if you could disclose this information to a news reporter;
7 isn't that right?

8 A. No, I didn't ask to have permission.

9 Q. At the time that you disclosed the information to the news
10 reporter, it didn't matter to you what the nature of the
11 information that you were disclosing was, did it? It didn't
12 matter to you that it was -

13 A. I believe -

14 Q. - sensitive security information or any other type of
15 protected information; isn't that right?

16 A. That's what I said - that's what I said in my deposition,
17 but I was speculating with - with the - with the scenarios
18 that you were giving me. I'm just speculating that - when you
19 asked me that question.

20 It matters to me that - I don't believe that breaking
21 - breaking the law to prevent law being broken is - is
22 justified. I didn't believe I was breaking the law at the
23 time.

24 Q. You had an opportunity to respond to the proposal to
25 remove you as a Federal Air Marshal; isn't that right?

1 A. Yes, ma'am.

2 Q. And it was important to you to have that opportunity to
3 respond; isn't that right?

4 A. Yes, ma'am.

5 Q. You wouldn't have wanted the Agency to take any actions
6 against you without giving you an opportunity to respond;
7 isn't that right?

8 A. Yes, ma'am. But they already had taken -

9 Q. And - and in responding or - in responding to the proposed
10 removal, you didn't express any regret or remorse for having
11 made the disclosure that you did, did you?

12 A. That's what I said in my testimony, but it doesn't mean I
13 have remorse for this day.

14 Q. Are you saying today that you're remorseful?

15 A. I have a lot of regret and remorse of what I put my - of
16 what this has put my family through. I didn't realize my
17 actions were going - were going to have these consequences
18 years later.

19 Q. But at the time -

20 A. So -

21 Q. But that's today, and it wasn't at that time that you -
22 when you had the opportunity to respond directly to Mr.
23 Donzanti; isn't that right?

24 A. I believed there was - there was a violation of law and a
25 danger to - to public safety and national security at the

1 time.

2 Q. So at the time you didn't have any regrets?

3 A. No, ma'am, I didn't have any regrets when you – when –
4 when you deposed me or the investigators spoke to me about my
5 disclosure.

6 Q. And you didn't have any regrets even when you were being
7 interviewed by other newspaper agencies on whether you would
8 have made the disclosure again; isn't that right?

9 A. If I saved – if I saved a plane from falling out of the
10 sky or saved a life, I believe I did my job, and I shouldn't
11 regret it. But I do regret of – what this has happened to me
12 personally and also the Agency.

13 I believe the Agency lost a lot of credibility and
14 had its reputation tarnished. And no matter what, I still
15 identify myself as a Federal Air Marshal. So I take a lot of
16 pride in that. So I do regret that the Agency was – did – was
17 tarnished for – for the – for the plan and how it got exposed.

18 Q. Okay. So you say that the Agency's reputation has been
19 tarnished by your disclosure. Do you recognize, however, that
20 in disclosing that information that you caused a harm to the
21 public by broadcasting to the terrorists exactly when to do
22 their attacks? Do you see that?

23 A. No, that's not possible because it's pretty – it's pretty
24 – it's disingenuous to say that, that for two entire months
25 this information would not have gotten out there.

1 Just like in the Anthony Ryan case in July – in
2 August of '06, the – the Agency was not able to deploy Air
3 Marshals for eight days or longer on – on the flights after
4 the liquid IED plots in the United Kingdom.

5 So afterwards I believe that eventually this – this
6 information would have been recklessly released. And while
7 the plan had gone in operation, there would have been a
8 danger. But since the plan got reversed six days in advance,
9 there was no danger to those flights.

10 Q. Well, in fact, we didn't have to wait two months because
11 you recklessly released it; isn't that right?

12 A. No, ma'am.

13 Q. Isn't – isn't it, in fact, true that at one point you were
14 dis- – you were accusing FAMS' management of disclosing SSI
15 themselves?

16 A. Yes, ma'am.

17 Q. In – in – so you had an understanding of what SSI was;
18 isn't that right?

19 A. Yes, ma'am.

20 Q. You testified earlier about Frank Terreri. As far as you
21 know he never disclosed sensitive security information to an
22 authorized – an unauthorized person; isn't that right?

23 A. I believe he was brought up on charges of release of
24 sensitive information also.

25 Q. Did you – you never saw any proposal to discipline him for

1 disclosing SSI; isn't that right?

2 A. Can I correct to say that I didn't mean charges. I meant
3 he was investigated for releasing sensitive security
4 information. And he provided me a copy of his ICE OPR Report
5 of Investigation, the one where I referenced the – the
6 supervisors were sent to his house –

7 Q. Okay.

8 A. – to take his gun away.

9 Q. So you talked about an investigation and you – an
10 investigation on Mr. Terreri. And your testimony is that that
11 investigation determined the charges were unfounded; isn't
12 that right?

13 A. Yes, ma'am.

14 Q. So as far as you know Mr. Terreri never disclosed
15 sensitive security information to an unauthorized person;
16 isn't that right?

17 A. That's correct.

18 Q. And he still works for the Agency today; isn't that right?

19 A. Yes, ma'am.

20 MS. CALAGUAS: Just give me a second, Your Honor.

21 JUDGE KANG: Okay.

22 (Agency counsel confer off the record.)

23 BY MS. CALAGUAS:

24 Q. You recall the deposition that you took in this case;
25 isn't that right?

1 A. Yes, ma'am.

2 Q. And it was during that deposition that you explained to me
3 that you would have made this disclosure even if the
4 information was classified; isn't that right?

5 A. I believe I answered that earlier. And my answer was I
6 don't believe I was breaking the law. And I would never break
7 the law to enforce the law.

8 Q. But you believed -

9 A. I -

10 Q. Am I interrupting you?

11 A. I was speculating - I was speculating, ma'am.

12 Q. But you believed that even if the information was
13 classified, that that would be something you would still
14 disclose; isn't that right?

15 A. Releasing classified information would have been illegal,
16 and it would have - it - making just - just to enforce the
17 law, you should not be breaking the law and disclosing
18 classified information is breaking the law. I don't believe I
19 broke the law.

20 I believe that I - I think that was still a
21 hypothetical scenario and a speculative question you gave me.

22 Q. Well, do you recall me asking you the question - let me
23 ask you this.

24 When you were discussing with your supervisor the
25 cancellation of the RON missions, you - your testimony is that

1 you didn't understand the nature of that – of that
2 information; you didn't understand that it was SSI; isn't that
3 right?

4 A. No, I didn't perceive it to be SSI.

5 Q. And, in fact, it didn't matter to you, did it, that it was
6 SSI?

7 A. It would matter to me because disclosing SSI is – would
8 endanger my life or other people's life. It would matter.
9 But the message came to me without a label and in an unsecure
10 means. If the information was SSI, it – it should have come
11 to our PDA and not our Nokias. So I never believed that the
12 information was SSI.

13 Q. Okay. When I asked you the question, "In discussing the
14 cancellation of RON missions with Mr. Schofield" – Mr.
15 Schofield is your supervisor at the time, right?

16 A. I don't believe he ever was my rating supervisor, but I'm
17 not sure of that. At the time he was not my rating
18 supervisor.

19 Q. I asked you, "Did you know whether or not you were
20 discussing sensitive security information?"

21 And you answered –

22 A. That's correct.

23 Q. And you answered, "It did not matter." Isn't that right?

24 A. In my deposition, ma'am?

25 Q. Yes.

1 A. If that's - that's what - that's what I said in my
2 deposition, I - that's what I said, but I - I believe it was
3 taken out of context.

4 Q. Okay. And then after that I asked you -

5 A. I do -

6 Q. Then after that I asked you the following question, "Why
7 didn't it matter?" Do you recall that question?

8 A. Yes.

9 Q. And in response to that question -

10 A. Did your - you -

11 Q. And in -

12 A. Well, can you - can you -

13 MR. BERGER: Let her ask the question, please.

14 MS. BOOK: Judge, - Judge, I just need to note for
15 the record that counsel is talking to the witness.

16 I'd rather that you didn't say stop or go or make any
17 motions with your hand, please. Thanks.

18 JUDGE KANG: Okay. I can hear it on my end. The
19 objection's noted. But for the record what I heard was just
20 Mr. MacLean's counsel trying to get him to stop talking so
21 that he could hear the question. But the objection's still
22 valid.

23 Mr. MacLean, please allow Agency counsel to ask the
24 question before responding. And then wait for the next
25 question.

1 If there is something that you need to be
2 rehabilitated on or clarify, your attorneys will have a chance
3 to redirect their questions to you, and you'll have a chance
4 to explain it further.

5 Ms. Calaguas, please repeat your last question.

6 MS. CALAGUAS: Okay. I might have to go back a
7 question or two just to get us all on the same page, Your
8 Honor.

9 BY MS. CALAGUAS:

10 Q. Okay. When – again, when I asked you the question, "If –
11 when you were asking with your supervisor, if in discussing
12 the cancellation of RON missions, did you know whether or not
13 you were discussing sensitive security information."

14 Do you recall –

15 A. No, I did not.

16 Q. Okay. And, in fact, you answered, "It didn't matter";
17 isn't that right?

18 A. In my deposition, that's what I answered.

19 Q. Yeah. It didn't matter to you whether or not you were
20 discussing sensitive security information; isn't that right?

21 A. But it really did matter to me. That – I got caught up in
22 that line of questioning, and that is not what my intention
23 was. I never intended to break the law.

24 Q. So at the time that you answered the question during your
25 deposition, your testimony is that you were confused, but

1 you're not -

2 A. That's a possibility.

3 Q. - but you're not confused today?

4 A. I - I probably was trying - this was my first deposition -
5 probably trying to be all knowing and a little arrogant in my
6 line of questioning [sic], but that was not my intent. When I
7 - when I released that message, -

8 Q. Okay.

9 A. - I never intended to break the law or release information
10 that would put - put people in danger.

11 Q. Okay. Well, do you recall then after giving your answer
12 that it doesn't matter, I asked you why?

13 A. Yes, I do recall that. And that's not what I meant.

14 Q. Well, what did you say in response to my question why?
15 Why didn't it matter?

16 A. You told me - you said I - I believed at the time that a
17 law was being broken in my deposition. And my - when we were
18 talking I believed that breaking the law or putting people's
19 lives in danger or national security, that there was an issue
20 of whether that information was being disclosed or not.

21 I don't - I don't believe I disclosed information
22 that was illegal, or I was breaking the law, or did I have an
23 intent to. All I wanted to do was protect lives and - and
24 uphold the law.

25 Q. But you told me under oath during your deposition that day

1 that it did not matter to you whether it was confidential, law
2 enforcement sensitive, SSI, or classified information; isn't
3 that right?

4 A. Yes, ma'am.

5 MS. CALAGUAS: Just one second, Your Honor.

6 JUDGE KANG: Okay.

7 (Pause in the proceedings.)

8 MS. CALAGUAS: I have no further questions at this
9 time.

10 JUDGE KANG: Okay. Mr. Berger, the witness passes
11 back to you.

12 MR. BERGER: Yes, Your Honor. Yes, I'm going to go
13 forward.

14 JUDGE KANG: Okay. Please go ahead.

15 MR. BERGER: Thank you.

16 REDIRECT EXAMINATION

17 BY MR. BERGER:

18 Q. Did you ever tell Mr. Meeks any flight numbers?

19 A. No.

20 Q. Did you ever tell Mr. Meeks any seat assignments?

21 A. No.

22 Q. Is it your understanding of the concept of regret that
23 regret means to demonstrate contrition for doing something
24 wrong?

25 A. Yes, sir.

1 Q. And did you understand at the time when you disclosed this
2 information to Meeks that you were doing something wrong?

3 A. No.

4 Q. When you saw the text message on your cell phone and not
5 the PDA, did you think the Agency was concerned with
6 protecting the information in that text message?

7 A. No.

8 Q. If the Agency takes the position now that they believed
9 that that information should have been protected, do you
10 consider what the Agency did to have been reckless in the way
11 they communicated that information to you on that cell phone?

12 A. If they – if they're saying that my actions were –

13 Q. Now – if they're saying now they believe that information
14 was protected, do you believe that it was reckless of them to
15 send you that message on that cell phone?

16 A. Yes, I do.

17 Q. With no labels, right? No encryption, correct?

18 A. And – and sent to nonencrypted Nokia phones.

19 Q. In your mind was that any less a "broadcast" that Ms.
20 Calaguas uses in her questions than speaking in a public
21 space, broadcasting on a cell phone like that?

22 A. Yeah. It was – it went out anywhere in the world where
23 that – where that could have gotten into a cell phone
24 reception, not like if you were in a closed room in a field
25 office.

1 MR. BERGER: I don't have any further questions.

2 JUDGE KANG: Ms. Calaguas?

3 RE CROSS/REDIRECT EXAMINATION

4 BY MS. CALAGUAS:

5 Q. When you spoke to Brock Meeks and disclosed the
6 information to him, you told him that RON missions out of
7 Vegas were being canceled; isn't that right?

8 A. No, I did not.

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

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

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

14 A. Can I see the exhibit?

15 I don't remember if I was identified as a Las Vegas
16 Federal Air Marshal.

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

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

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

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

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

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

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

7 A. Can I -- can I re- -- I don't know that verbatim. If that's
8 the -- if that's what the affidavit states, I -- I need to read
9 it. I don't know specific -- I do not know from memory if I
10 told anybody -- if I stated that I -- I identified to Brock
11 Meeks that it was Las Vegas Air Marshals.

12 MS. CALAGUAS: That's fine. I think your affidavit
13 can speak for itself.

14 Give me one second, Your Honor.

15 (Agency counsel in San Francisco confer off the record.)

16 MS. CALAGUAS: I have no further questions.

17 JUDGE KANG: Ms. Calaguas, since this was the final
18 witness approved for the Agency, does the Agency have anything
19 else with respect to the evidentiary portion of this appeal?

20 MS. CALAGUAS: Just to clarify, Your Honor, that all
21 exhibits from the Agency have been moved into evidence.

22 JUDGE KANG: Yes. Those issues were addressed in the
23 Prehearing Conference Summary. There were a number of
24 exhibits that were specifically excluded through specific
25 orders. And I believe at the -- and that was based on your

1 objection. And the Prehearing Conference Summary addressed
2 the remaining exhibits. They are in the record and the weight
3 that's given to them are as I detailed in that Prehearing
4 Conference Summary.

5 MS. CALAGUAS: Yes, Your Honor. I recall that order.
6 Thank you for clarifying it.

7 At this point the Agency rests.

8 JUDGE KANG: Okay.

9 MR. BERGER: Do I have the privilege of asking a
10 question or two off of Agency counsel's questions?

11 JUDGE KANG: Yes, but –

12 MR. BERGER: I know this can't go on infinitely,
13 but –

14 JUDGE KANG: My oversight, Mr. – Mr. Berger. I
15 should have asked you if you had any further questions. Based
16 on that – based on those few questions asked by the Agency, –

17 MR. BERGER: Yes.

18 JUDGE KANG: – Mr. Berger, obviously you do. The
19 witness passes back to you.

20 MR. BERGER: Okay. Thank you.

21 FURTHER REDIRECT EXAMINATION

22 BY MR. BERGER:

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

1 A. Yes. His subsequent article stated there was more than
2 one source, and he sent me and my attorney, my former
3 representative in this case, that there were – there were more
4 than one. So there were three sources that he – that he spoke
5 to.

6 MR. BERGER: Okay. I don't have further questions,
7 Your Honor. Thank you.

8 JUDGE KANG: Again my apologies for that oversight.
9 Ms. Calaguas, any further questions for this witness
10 before I release him from the stand?

11 MS. CALAGUAS: No, Your Honor. Thank you.

12 JUDGE KANG: All right. Let me go through the
13 formality of releasing you then. Since both, both sets of
14 attorneys do not have any further questions for you, Mr.
15 MacLean, you are free to return to the table to be seated with
16 your counsel. You're released from the stand.

17 THE WITNESS: Thank you, Your Honor.

18 (Witness excused.)

19 JUDGE KANG: All right. Ms. Calaguas, –

20 MS. CALAGUAS: Yes, Your Honor.

21 JUDGE KANG: – I realize we covered this before, but
22 is there anything else with respect to the Agency's case for
23 the evidentiary portion of this Appeal?

24 MS. CALAGUAS: No, Your Honor.

25 JUDGE KANG: Mr. Devine or Mr. Berger?

1 MR. DEVINE: No, Your Honor.

2 JUDGE KANG: Okay. Then since both parties have
3 concluded with the evidentiary portion of this Appeal, the
4 only portion of the Appeal that remains are the closing
5 statements.

6 You folks have raised some interesting issues in this
7 Appeal. And I am going to – because of that, I am going to
8 invite the parties to submit written closing arguments. My
9 guess is that that is – that would be the preference of the
10 attorneys anyhow because – based on my prior dealings with you
11 folks. So I will invite the parties to submit written closing
12 arguments to me.

13 They must be – you are not required to submit them,
14 but I encourage you to do so. In order to timely submit
15 written closing arguments, they must be received by the Board,
16 my office, on or before November 16th, 2009. So that should
17 give you folks plenty of time to put that together.

18 If I have not received a written closing argument
19 from either side on or before November 16th, 2009, I will deem
20 – I will deem the party to have waived any such argument. It
21 is a hard deadline. Do not ask me for an extension. And you
22 either submit it on or before November 16th so that I receive
23 it on or before that day, or I'll deem it waived.

24 Any questions about that, Ms. Calaguas?

25 MS. CALAGUAS: No, Your Honor.

1 JUDGE KANG: Okay. Mr. Berger, Mr. Devine?

2 MR. BERGER: Yes, one quick question. Midnight
3 Pacific time or 5:00 p.m.?

4 JUDGE KANG: Because -

5 MR. BERGER: What time on November 16th?

6 JUDGE KANG: You know, I'm pretty loose with that. I
7 realize it gives you a three-hour advantage, though, on the
8 East Coast. So why don't - it will be no later than November
9 16th for Pacific Standard Time, which means midnight my time.

10 MR. BERGER: Okay.

11 JUDGE KANG: That way the Agency is not disadvantaged
12 by having you submit something at 2:59 a.m. Pacific Standard
13 Time.

14 MR. BERGER: I understand, Your Honor.

15 MR. DEVINE: Your Honor, if I could inquire, will
16 this be like entire posthearing briefs or this is more just
17 like a closing summary?

18 MR. BERGER: Posthearing brief alone.

19 JUDGE KANG: Right. Th- -

20 MR. DEVINE: This is the entire posthearing brief
21 where we'll summarize the record and make -

22 MR. BERGER: Yes.

23 MR. DEVINE: - a legal analysis?

24 JUDGE KANG: Right. Typically I invite closing
25 arguments that will address the entire case at the conclusion

1 of the evidentiary portion.

2 In this case I'm extending the courtesy of allowing
3 you folks to do it in writing, but it is still in lieu of a
4 oral presentation that you would normally make at the
5 argument.

6 And the reason I state in lieu of is that, you know,
7 if you folks, for whatever reason, start coming up with
8 different reasons why you need additional time in order to
9 prepare for this final closing argument, it will not – it will
10 not be granted because it's in lieu of that, and I'm giving
11 you plenty of time to get those statements to me.

12 And what I mean by that is if you're trying to order
13 a copy of the transcript, or something, and read the entire
14 thing before filing your closing arguments.

15 Is that clear, Mr. Devine, or did I just confuse it
16 further?

17 MR. DEVINE: I think it's clear. So we'll be filing
18 a subsequent brief after the transcript's –

19 MR. BERGER: No, no, no, no. We're going to have one
20 closing brief, –

21 MR. DEVINE: Uh-huh.

22 MR. BERGER: – all your law and facts, okay. Do
23 that, one brief.

24 MR. DEVINE: Okay.

25 MR. BERGER: Okay?

1 MR. DEVINE: Okay.

2 JUDGE KANG: All right. I'm -

3 MR. BERGER: We understand, Your Honor.

4 JUDGE KANG: I'm sorry if my attempted explanation
5 just now of my prior - what I felt was a far simpler statement
6 of complicated matter, so let me start again, just for
7 clarity.

8 This concludes the evidentiary portion of the Appeal
9 in the Matter of MacLean versus the Department of Homeland
10 Security. The record for this matter, with the exception of
11 closing statements, is now closed. The exception to that
12 closing of the record for all matters pertains only to and
13 exclusively to the invitation for the parties to file written
14 closing statements in lieu of an oral closing argument. And
15 they must be received on or before November 16th, 2009 or
16 shall be deemed waived.

17 Hopefully that clarifies it again. And once that
18 deadline comes and goes for the final arguments on this case,
19 the case is closed. And I will issue my decision after that.

20 Mr. Devine, -

21 MR. BERGER: Okay. Thank you, Your Honor.

22 MR. DEVINE: Thank you.

23 JUDGE KANG: And any questions, Mr. Devine - and,
24 please, feel free. This is the time to clarify it if I have
25 somehow muddied it up more.

1 MR. DEVINE: No. That answered all of them, Your
2 Honor.

3 JUDGE KANG: Okay. Mr. Berger, anything further?

4 MR. BERGER: No, no questions. I know on behalf of
5 Mr. Devine we would like to express our pleasure at dealing
6 with Ms. Calaguas in this long distance. And thank you for
7 your patience,, Your Honor.

8 JUDGE KANG: Thank you.

9 Ms. Calaguas, anything else?

10 MS. CALAGUAS: No. I think that's it. Thank you.

11 JUDGE KANG: Okay. Ms. Book.

12 MS. CALAGUAS: Thank you, everyone.

13 MS. BOOK: I hate to even ask one question, but I
14 thought I understood you to say that we only serve the closing
15 brief on you, not on the other party; is that correct?

16 JUDGE KANG: No. It's not. No. And there is to
17 be -

18 MR. BERGER: You have to serve it on us.

19 MS. BOOK: Okay.

20 JUDGE KANG: There -

21 MR. BERGER: They have to serve it on us, Your Honor.

22 JUDGE KANG: Right. It's - I'm sorry.

23 MS. BOOK: Okay.

24 MR. BERGER: We understood.

25 JUDGE KANG: By regulation -

1 MS. BOOK: There's no reply.

2 JUDGE KANG: No.

3 MS. BOOK: Right. And there's no reply, so it's just
4 serve it on the other side. There's no reply. And so I got
5 it. Thanks.

6 JUDGE KANG: By regulation – let me cover the basics
7 then. By regulation you may not engage in *ex parte*
8 communications with the Administrative Judge. Therefore, by
9 regulation, you must serve the opposing counsel with the
10 closing brief. And so the opposing counsel should – if you're
11 going to fax it to me, fax it to them as well so that they
12 receive it simultaneously.

13 MS. BOOK: Thank you for the clarification.

14 JUDGE KANG: Okay. All right. Then with that said,
15 during the course of this videoconference, the videoconference
16 portion of this hearing, there were no technical transmission
17 or other problems associated with the VTC transmission.

18 I was able to fully observe, hear, and experience the
19 testimony of the individuals from our Washington Field Office.

20 The record for this matter is now closed in the
21 manner that I previously described. Thank you very much,
22 parties, for bearing with us through the logistical
23 difficulties of this.

24 Ms. Book, thank you for volunteering on that end or
25 being volunteered, whichever the case may be, to help us with

1 the logistics of the Agency's exhibits so that that portion
2 went smoothly.

3 I thank the parties for their professionalism
4 throughout these proceedings.

5 We are now off the record.

6 (The hearing was adjourned at 12:25 o'clock p.m. PST.)

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I, Nancy J. Palmer, a duly-commissioned Electronic Reporter of Palmer Reporting Services and Certified Electronic Reporter by the American Association of Electronic Reporters and Transcribers, Inc., Certificate Number 000121, do hereby declare the statements appearing in this transcript were recorded digitally by me and transcribed under my direction to the best of my ability. I also certify this is a true and accurate record of the Hearing in the Appeal of Robert J. MacLean versus the Department of Homeland Security held November 5, 2009.

I further certify I am neither counsel for nor related to any party to said action, nor in any way interested in the outcome thereof.

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Nancy J. Palmer
Palmer Reporting Services
Dated November 9, 2009