

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE**

ROBERT J. MACLEAN,
Appellant,

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

v.

DEPARTMENT OF HOMELAND
SECURITY,
Agency.

DATE: September 8, 2006

**ORDER DENYING AGENCY MOTIONS, FOLLOWED BY A
SUGGESTION...**

Croft Issue. The agency seeks reconsideration of orders permitting the appellant to depose David Graceson. Cited is *Croft v. Department of the Air Force*, 40 M.S.P.R. 320 (1989). The appellant has not yet filed any objection, nor has his time to do so expired. 5 C.F.R. § 1201.55(a). I will be out of the country for the next two weeks, and in light of what follows, I find it unnecessary to delay resolution of this matter pending receipt of the appellant's opposition, if any.

Croft involved disclosure of classified information relating to national security. This case involves disclosure of sensitive information relating to transportation security. While transportation security is required, in part, for reasons of national security, that is not its only purpose. It is therefore unclear whether the holding in *Croft* applies to this case. Moreover, this may remain unclear, for the following reasons.

For the moment I assume, *arguendo*, that the Board may review the agency's determination that the information disclosed by the appellant was covered under the regulation at issue. Once the record is fully developed, I may well agree with that determination. If so, then the agency will have no reason to

seek review of my decision to address the issue. Hence, the question of reviewability may prove to be moot.

In any event: The question is a close one, and I choose not to foreclose discovery in the assumption that one view or the other would prevail on petition for review to the full Board.

“Final Order” Issue. After the appellant’s removal, and after the appellant filed the instant appeal, and after I had made the order allowing Mr. Graceson’s deposition, the agency issued a “Final Order” dated August 31, 2006, determining that the appellant’s disclosure is covered under the regulation at issue. A right of review is provided in the U.S. Court of Appeal pursuant to 49 U.S.C. § 46110.

The agency could have made such a Final Order before it proposed the appellant’s removal, and could have based its proposal on the determination therein. Had it done so I would likely have agreed that the determination itself was not reviewable by the Board. Instead, it chose to make an ad hoc determination that was not a Final Order, and was not appealable per se, and removed the appellant on that basis. In general, the Board will not sustain an agency action on the basis of a charge that could have been brought, but was not. *Johnston v. Government Printing Office*, 5 M.S.P.R. 354, 357 (1981). By analogy I question whether a Final Order, issued after the fact, can foreclose Board review of an earlier, non-appealable determination on which the agency chose to ground an action appealable to the Board.

Again, the issue is debatable and it may well be moot for reasons explained in the preceding section. I therefore choose to err, if at all, on the side that will create a more complete record.

The motion for reconsideration is therefore DENIED.

Motion To Certify. The agency also moves to certify for interlocutory appeal my adverse ruling, if any, on the question of whether 49 U.S.C. § 46110

precludes Board review of its determination that the information disclosed by the appellant constitutes Sensitive Security Information.

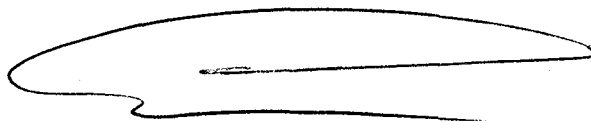
Pursuant to 5 C.F.R. § 1201.91, "The judge may permit the [*interlocutory*] appeal if he or she determines that the issue presented in it is of such importance to the proceeding that it requires the Board's immediate attention." *Id.* A judge may certify a ruling for interlocutory appeal "only if the record shows that: (a) The ruling involves an important question of law or policy about which there is substantial ground for difference of opinion; and (b) An immediate ruling will materially advance the completion of the proceeding, or the denial of an immediate ruling will cause undue harm to a party or the public." 5 C.F.R. § 1201.92.

I find that an immediate ruling on the issue in question will not materially advance the completion of the proceeding; rather, it will delay the proceeding to consider an issue that may well prove to be moot, for reasons explained above. I find further that denial of an immediate ruling will not cause undue harm to a party or the public for any of the reasons cited by the agency, or for any other reason that I can discern from this record. Accordingly, the motion to certify is DENIED. *Id.*

A Suggestion... If the appellant chooses to seek review of the agency's Final Order pursuant to 49 U.S.C. § 46110, I will entertain a joint motion to dismiss this appeal without prejudice to await resolution of that matter in the Court of Appeals. Absent such a motion all orders, deadlines and scheduled dates remain in effect.

It is so ORDERED.

FOR THE BOARD:



Philip D. Reed
Administrative Judge

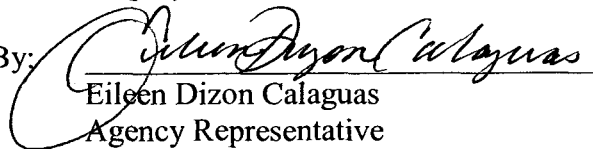
The Agency does not assert any privilege with respect to this request. The Agency responds as follows: it currently does not have any copy of the text-message at issue in this case or any notices that may have accompanied the text message indicating that it was Sensitive Security Information.

Respectfully Submitted,

Heather Siegrist
Assistant Chief Counsel
Employment Litigation

September 8, 2006

By:


Eileen Dizon Calaguas
Agency Representative

CERTIFICATE OF SERVICE

I certify that the attached discovery requests was sent as indicated this day to each of the following:


Appellant

Via U.S. Mail Robert J. MacLean
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Appellant's Representative

Via U.S. Facsimile Peter H. Noone, Esq.
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September 8, 2006


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