

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

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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 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 - inspite 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.

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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 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 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 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 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

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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

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1 broken?

2 A It was a -- it was a line in the, it was a
3 section in the aviation and transportation security
4 account.

5 Do you got that file?

6 MR. NOONE: No.

7 BY MS. CALAGUAS:

8 Q As best you can recall it, there was some
9 provision of ASAC that you believed was being broken?

10 A No, I knew was being broken.

11 Q You may not remember the specific language,
12 but can you generally describe to me what about ASAC
13 that you thought was being broken?

14 A Yes, long distance aircraft that flew
15 non-stop, just like the four air crafts that were
16 highjacked and flown into the ground on September 11th.

17 I believe it specifically said September 11th,
18 and it said -- I don't remember, it was either long
19 haul or long distance flights that were non-stop. I
20 believe that was some of the language in that law.

21 Q In discussing the cancellation of RON missions
22 with Mr. Scoffield, did you know whether or not you

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1 were discussing sensitive security information?

2 A It did not matter.

3 Q Why didn't it matter?

4 A Because the law was being broken and the
5 public was being endangered, and it was an abuse of
6 authority. Public lives were at risk.

7 It did not matter to me whether it was
8 confidential, law enforcement sensitive, SSI, or
9 classified information. It was breaking the law and it
10 was endangering life.

11 Q What else was discussed with Mr. Scoffield?

12 A That's all I can remember.

13 Q How long would you say this conversation
14 lasted?

15 A Probably less than 15 minutes.

16 Q And when you said that he agreed with your
17 statement that you believed that the cancellation of
18 RON missions was breaking the law, how did he show his
19 agreement?

20 A He said, "I agree with you, full heartedly."

21 Q Those were his words?

22 A No. I'm -- he just was in agreement with me.

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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

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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.

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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

| | | |
|---|---|----------------------------|
| ROBERT J. MACLEAN, |) | DOCKET NUMBER |
| |) | SF-0752-06-0611-I-2 |
| Appellant, |) | |
| |) | April 11, 2011 |
| v. |) | |
| |) | |
| DEPARTMENT OF HOMELAND SECURITY, |) | |
| TRANSPORTATION SECURITY |) | |
| ADMINISTRATION |) | |
| |) | |
| Agency, |) | |
| |) | |

APPELLANT’S MOTION TO INTRODUCE NEW EVIDENCE

Appellant moves to reopen and supplement the record with the attached evidence on credibility of the agency’s only witness in this proceeding, appellant’s deciding official and former most senior field office manager¹ Frank Donzanti. The standard for admission of new evidence is that it was newly-discovered and not previously unavailable, and that it would have been material in the prior proceeding. 5 CFR 1201.58(c); 5 CFR 1210.115(d)(1). The latter regulation concerns submission of a new Petition for Review (PFR) based on new evidence. Petitioner suggests it should be controlling as well for submission of new evidence in a pending PFR.

Two evidentiary developments meet this standard.

¹ At at the time of the appellant’s April 11, 2006 removal, Frank Donzanti’s title was the *Special Agent in Charge* of the agency’s Federal Air Marshal Service field office. The title of this position has been recently reclassified as the *Supervisory Air Marshal in Charge*.

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1. On February 8, 2011, the Transportation Security Administration (TSA) Office of Inspection (OI), Special Investigations Unit (SIU), informed appellant that it had completed investigating and issued two reports based in part on appellant's allegations that Mr. Donzanti had engaged in improper sexual relations with a subordinate Federal Air Marshal (FAM) in the agency's Irvine, CA field office. Appellant further alleged that Mr. Donzanti had been shielded from discipline, because of a quid pro quo with Federal Air Marshals Service (FAMS) director Thomas Quinn, in exchange for engaging in retaliatory actions against himself and other FAMS whistleblowers from the Federal Law Enforcement Officers Association (FLEOA). (The email from the agency's OI/SIU Special Agent in Charge Patrick Caddigan, along with an earlier correspondence trail, is enclosed as Exhibit 1.) Mr. Caddigan added that administrative action had not been completed on the report.

By definition, this TSA fact finding was not available before the close of the record in 2009. As obvious from the email trail, the Appellant has diligently has monitored the progress for this development.

2. On March 22, 2011, the Project On Government Oversight (POGO) issued a blog investigative journalism report and documentary links, "Investigation Raises Questions about Government's Sole Witness Against High-Profile Whistleblower," by Nick Schwellenbach, which is enclosed as Exhibit 2. The blog report confirmed that administrative action on the investigation has occurred. While the agency has not officially explained itself, the action was significant and justifies timely notice to the Board. When he testified the appellant, Mr. Donzanti was an SV-K and Deputy Special Agent in Charge of the agency's FAMS Los Angeles field office. After completion of the

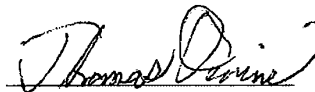
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investigation he was demoted in February 2011 another pay grade lower in a TSA job outside of FAMS, an SV-J non-supervisory Assistant Federal Security Director for Law Enforcement (AFSD/LE) at John Wayne Airport in Orange County, California, the nation's 40th busiest airport.

Until his first demotion to Deputy Special Agent in Charge of the FAMS Los Angeles field office in January 2007, Mr. Donzanti had command over hundreds of air marshals and all airport TSA law enforcement and air marshal operations throughout California and Hawaii, including such major Category X airports as Honolulu International, the 25th busiest U.S. airport, San Francisco International, the 10th busiest U.S. airport, and Los Angeles International, the 3rd busiest U.S. airport.

These developments are material to assessing the credibility of Mr. Donzanti, the deciding official who terminated Mr. MacLean, and the agency's only witness against him. Clearly the FAMS no longer finds Mr. Donzanti credible. Neither should the Board.

Respectfully submitted,



April 11, 2011

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CERTIFICATE OF SERVICE

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

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