

I. SUMMARY OF THE ARGUMENT

The Department of Homeland Security (“Respondent” or “the Agency”) cannot vindicate the August 31, 2006 Final Order on SSI (“the Order”) by restricting the issue in this case to the narrow question of whether the Order correctly determined a certain text message to be Sensitive Security Information (“SSI”). The Agency’s attempt must fail because the overwhelming weight of the evidence demonstrates that the July 29, 2003 text message (“the text message”) did not meet the regulatory definition of SSI and was never treated as SSI until years after the fact. The Order has no substantial evidence to support its SSI determination, as indicated by the Agency’s failure to place any evidence into the administrative record other than the Order itself.

Rather than producing substantial evidence, the Agency produces unpersuasive arguments why this Court should close its eyes to the Agency’s unlawful effort to punish Petitioner for a protected whistleblower disclosure. Although the Agency insists on portraying the Order as a non-personnel action, it is in actuality an attempt to insulate the ultimate personnel action – a removal decision – from judicial review. The timing of the Order, which issued years after Petitioner disclosed the text message, and in the midst of Petitioner’s Merit Systems Protection Board (“MSPB”) appeal regarding his removal, leaves no doubt that the Order is a product of the same retaliatory animus that led the Agency

to remove Petitioner in the first place. The Order is nothing less than an instrument of retaliation and, as such, it is invalid.

This conclusion is only strengthened by the many factual and legal errors outlined below. As the following analysis will demonstrate, the Order stretches the SSI designation past the breaking point by applying it to an unmarked piece of non-specific information that revealed a violation of law but did not and could not harm aviation security.

II. ARGUMENT

The brief submitted by the Agency makes no fewer than ten critical errors. Considered both independently and altogether, these errors demonstrate a complete lack of substantial evidence that would support the Order under review.

A. The Text Message Was Not Specific to the Las Vegas Office

The first error occurs already in the Agency's statement of the issue presented. According to the Agency, the issue presented is "[w]hether substantial evidence supports the Transportation Security Administration's order that a text message sent to *Las Vegas* Federal Air Marshals... constituted Sensitive Security Information when that information was disclosed on July 29, 2003." Brief for Respondent at 1-2 (emphasis added). With no citation to the evidentiary record, the Agency suggests that only Las Vegas Federal Air Marshals ("FAMs") received the text message. This suggestion contradicts the sworn deposition testimony of

Special Agent in Charge (“SAC”) David Adams, who testified that “all FAMs” and supervisors “received that message.” Appendix to Petitioner’s Request for Judicial Notice (“App.”) at 88. By disregarding this uncontradicted evidence, the Agency attempts to create substantial evidence for the Order where none exists. Under the Agency’s own regulations, the text message is not SSI unless it conveys *specific* information. See 49 C.F.R. § 1520.7(j) (twice limiting SSI with the modifier “specific”). As demonstrated more fully below, the Agency’s false claim that only Las Vegas FAMs received the text message is an effort to make the text message appear specific when it was not. This plainly erroneous statement of fact is an early indication that the extreme deference the Agency demands for its Order should be meted out with due caution.

B. The Cancelled RON Missions Were Not Specifically Las Vegas-Based

The Agency’s second error follows directly from the first. The Agency mischaracterizes the text message as “stating that a particular category of Air Marshal missions in a *specific part of the country* would be cancelled...” Brief for Respondent at 8 (emphasis added). This claim is so blatantly false that it contradicts the Order itself, which alleges that the text message indicated that “*all* Remain Overnight Missions up to August 9th would be cancelled.” Excerpt of Record (“E.R.”) at 1 (emphasis added); see also App. at 65-6 (suggesting an Agency-wide reduction in RON missions). But that does not prevent the Agency

from repeating this mischaracterization throughout its Brief, at one point stating explicitly that the text message “applies to Marshals in a *specific location* (Las Vegas).” Brief for Respondent at 13 (emphasis added); see also id. at 14 (suggesting that the text message indicated that FAMs “would not be staffed out of *Las Vegas* on overnight flights) (emphasis added). Ironically, the Agency’s reasoning supports Petitioner’s claim that the text message was not specific and therefore not SSI. After all, contrary to the Agency, the text message said nothing about where these missions would be cancelled. But if, as the Agency argues, a specific location would make the text message specific information, then a non-specific location must make the text message non-specific information.

C. The Text Message Identified No Specific Missions

The Agency’s third error involves another dubious claim that the text message was specific information. In addition to mischaracterizing the text message as restricted to Las Vegas, the Agency stretches the word “specific” to mean nearly the opposite. Thus the Agency interprets the text message, which employed the term “RON (Remain Overnight) missions,” an obscure piece of Agency jargon, as revealing “information about a *specific* type of assignment (remain overnight).” Id. at 13 (emphasis added). In an attempt to disguise its abuse of the word “specific,” the Agency contends that the neologism “remain overnight (‘RON’) missions” is not obscure but “obvious on its face.” Id. at 14.

Belying this contention, the Agency proceeds to offer a definition for this allegedly self-evident term. See id. But even if the Agency is correct that the term “RON missions” simply “means what it says,” this only obscures the fundamental question of whether disclosing the cancellation of unspecified RON missions “would be detrimental to the security of transportation.” Id.

D. Disclosing the Text Message Did Not and Could Not Harm Aviation Security

The Agency’s fourth error is its affirmative answer to the question of whether disclosing the cancellation of RON missions would be detrimental to the security of transportation. In order to support that conclusion, the Agency sets forth the doubtful premise that “a modicum of research or common sense *would* lead a determined individual to conclude that long-distance and evening flights would be more susceptible targets.” Id. (emphasis added). No reasonable person could agree. After all, it is undisputed that Petitioner’s disclosure did not cause actual – or even attempted – harm to aviation security. If the Agency were correct that Petitioner’s disclosure, combined with a modicum of research and some common sense, would lead a determined individual to harm aviation security, then we must conclude that no such determined individuals exist. In that case, Petitioner’s disclosure could not possibly harm aviation security. Of course, it is unlikely that *no one* in the United States is determined to harm aviation security. On the other hand, if we assume that these determined individuals do exist, but

were unable to take advantage of Petitioner’s disclosure, then we must conclude that common sense and a modicum of research were not sufficient to lead a determined individual to harm aviation security.

One important reason why Petitioner’s disclosure caused no actual or attempted harm to aviation security is because, outside the Agency, no one knows how to identify a RON mission. Identifying which flights require RON missions is emphatically not a matter of common sense. While the Agency suggests that RON missions involve “long-distance... flights” (*id.*), this clarifies nothing, instead substituting one opaque, technical term for another. Moreover, the Director of the Federal Air Marshal Service specifically testified that the meaning of “long-haul flights” is impervious to common sense. See Supplementary Appendix (“Supp. App.”) at 4 (testifying that the commonsense definition of “long-haul flight” is not the Agency definition, which relies on “scientific study and data” unavailable to the public). Defining RON missions as “long-distance flights” is not commonsensical; it is circular and evasive.

But while the Agency’s proposed definition reveals nothing about RON missions, it reveals something very telling about the Agency’s misuse of SSI. As part of its pretense that RON missions are easily identifiable, the Agency indicates that RON missions include “long-distance... flights.” Brief of Respondent at 14. But when counsel for the Petitioner asked Director Quinn for the definition of

“long-haul flights,” both Mr. Quinn and Agency counsel objected that the answer would constitute SSI. See Supp. App. at 2-3. This objection perfectly captures the SSI shell game in action. According to the Agency, RON missions are well-known to the general public as “long-distance flights,” but the meaning of “long-haul flights” is a closely-guarded secret that cannot be exposed even in a sealed deposition. The truth, of course, is that both terms are esoteric and have no specific meaning to the general public. As Director Quinn put it, “common sense means different things to different people.” Supp. App. at 4.

E. The Order is Based on a Retaliatory Motive and is Reasonably Likely to Deter Whistleblowers from Making Protected Disclosures

In contrast to common sense, which means different things to different people, the Agency’s fifth error sends a message that everyone can understand. By portraying the Order as a harmless and “unremarkable example of traditional agency adjudication” that “does not itself qualify as a ‘personnel action,’” the Agency sends the chilling message that it can remove whistleblowers with impunity by determining that they have disclosed SSI, thereby severely curtailing their appeal rights. Brief of Respondent at 22 and 24. Although the Agency’s threat is very real, it rests on two mistaken premises. First, the Agency is mistaken to portray the Order as unremarkable. The Agency’s own SSI expert testified under oath that he can recall no other SSI adjudications issued after the subject

information had already been disclosed. See App. at 125. The “unremarkable” Order is, in fact, unprecedented. Second, the Agency is mistaken to conclude that the Order does not qualify as a personnel action. This ignores the fact, which the Agency elsewhere concedes, that the Order appeared only after the Petitioner appealed his removal to the MSPB. See Brief for Respondent at 2. By issuing the Order after Petitioner’s appeal was underway, the Agency revealed that its true purpose was not to make a simple SSI determination but rather to punish a whistleblower who attempted to vindicate his rights before the MSPB. The Order is an instrument of retaliation and must be considered as such.

An analogy illustrates the point. In a Title VII context, this Court has recognized that an “adverse employment action” can include “any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity.” Ray v. Henderson, 217 F.3d 1234, 1242-43 (9th Cir. 2000) (looking beyond the immediate result of an Agency action and focusing instead on its “deterrent effects”). Arguing by analogy, a prohibited personnel action can and does include an administrative order that is reasonably likely to deter an agency’s employees from whistleblowing. In the case at bar, the deterrence effect is awesome. The Order is a critical component of the Agency’s inaugural effort to remove a whistleblower under the auspices of its SSI regulations. To maximize its intended deterrence

effect, the Order singles out Petitioner by name and attempts to frustrate his previously-initiated effort to appeal a retaliatory removal.

F. The Order Cannot be Valid Because it Violates the WPA

The Agency's sixth error is its disregard for the fact that no substantial evidence can support the Order because it violates the Whistleblower Protection Act ("WPA"). The Agency's decision to cancel RON missions was unlawful under the Aviation and Transportation Security Act ("ATSA"), as SAC Adams admitted under oath. See App. at 92. Even a high-ranking Agency official, therefore, must concede that Petitioner's alleged disclosure of SSI in actuality disclosed a violation of law, activity that the WPA protects.

G. The Order Cannot be Valid Because it Violates the Anti-Gag Statute

The Agency's seventh error is its disregard for the fact that no substantial evidence can support the Order because it violates the Anti-Gag Statute ("AGS"). To begin with, the Agency is mistaken to suggest that Petitioner's AGS claim "would be properly brought before the MSPB" and not this Court. Brief of Respondent at 25. While Petitioner may raise this claim before the MSPB, the MSPB does not have authority to enjoin illegal spending. By contrast, this Court has the inherent authority to invalidate the Order because the Agency lacks the lawful authority and financing to issue it. The Agency concedes that the AGS applies to non-disclosure policies, but somehow argues that orders and regulations

are not policies. See id. at 24. Nevertheless, the Agency offers no good reason why 49 C.F.R. § 1520.7, a regulation prohibiting the unauthorized disclosure of SSI, should be considered anything other than a “nondisclosure policy.” Indeed, the regulation is precisely a nondisclosure policy. The Agency’s expenditures to enforce this SSI policy through its Order, therefore, as well as its expenditures in connection with this litigation, violate the plain language of the AGS.

H. Lack of Evidence in the Record Should be Construed Against the Agency

The Agency’s eighth error is to suggest that Petitioner’s WPA and AGS claims are inappropriate in this forum due to an alleged “lack of any germane facts in the administrative record.” Id. at 26. To begin with, no factual matters in dispute require an administrative record on Petitioner’s AGS claim. The Agency’s violations, which continue unabated, are grounded in its decisions to issue the Order and to participate in this litigation. Moreover, any lack of evidence in the administrative record is the fault of the Agency and should be construed against it. After all, the Agency has compiled an administrative record that consists of nothing other than the Order. See Index of Administrative Record. During sworn deposition testimony, however, Mr. Colsky suggested that the Order and the administrative record are separate entities, not one and the same thing. See Supp. App. at 6; see also id. at 7 (wherein Agency counsel claims that the administrative record is “not compiled at this time,” although the Order had already issued).

I. The Agency Failed to Mark the Text Message SSI Because the Text Message Was Not SSI

The Agency's ninth error is another attempt to artificially restrict the scope of these proceedings, this time by claiming that the "issue" of whether the text message bore SSI markings is not relevant "to the validity of the SSI order before this Court." Brief of Respondent at 9. The Agency's choice of words is instructive. There exists no "issue" as to whether the text message bore SSI markings. It is undisputed that the text message was unmarked. See, e.g., App. at 89. But by characterizing this as an "issue" instead of an undisputed fact, the Agency gives the mistaken impression that consideration of Petitioner's argument would require another of those "fact-intensive inquiries" that this Court is not "suited to adjudicating." Brief of Respondent at 23. This mistaken impression, in turn, serves to reinforce the Agency's suggestion that the "issue" is irrelevant anyway because whether the text message was marked SSI has no bearing on whether it was SSI. See Brief of Respondent at 9.

But that is mistaken for two reasons.

First, Petitioner does not argue only that the text message was not marked SSI and therefore was not SSI. Petitioner also demonstrates, on the basis of sworn deposition testimony, that *no one* in the Agency took any steps to mark the text message SSI after receiving it. See, e.g., App. at 90. This collective failure to act would be incomprehensible if Agency management regarded the message as SSI.

Accordingly, the best explanation for why no one marked the text message SSI is that it was not SSI. This is confirmed by Director Quinn's admission that he made no effort to determine who issued the text message, which he did not authorize and which indicated RON mission cancellations that he also did not authorize. See App. at 105-106. Director Quinn's indifference to the question of who took the unauthorized steps of canceling RON missions and disseminating that information in an Agency-wide text message is understandable only if we conclude that the text message did not convey information of any special importance or sensitivity.

Second, the Agency is wrong to draw the conclusion that unmarked information can constitute SSI. As the Agency points out, the SSI regulations in place in July 2003 contain no SSI marking policy, but the new regulations do. See Brief of Respondent at 9. According to the Agency, the current version of the SSI regulations specifically allows for the possibility that unmarked information may constitute SSI. See id. But by the Agency's own admission, this policy did not exist in July 2003; it is only part of "TSA's new regulations." Id. The most likely reason why the Agency found it necessary to add this marking policy to its new SSI regulations is that, under the regulations in place in July 2003, unmarked information could not be considered SSI.

I. The Agency Denied Petitioner Due Process by Refusing to Grant Him an Opportunity to Lodge Objections with the Agency

The Agency's tenth error is its unsupported claim that unspecified "courts of appeals" have held that 49 U.S.C. § 46110(d) does not afford persons in Petitioner's position "an independent right to lodge objections with an agency." Brief of Respondent at 10. Instead, the Agency alleges that the statute contemplates the present outcome, in which Petitioner had no opportunity to lodge objections with the Agency. It is true that, under certain circumstances, the statute allows objections to be raised for the first time at the appellate level. But it does not follow that the statute permits the Agency to deny Petitioner an opportunity to be heard at the administrative level. Although 49 U.S.C. § 46110(d) does not explicitly guarantee Petitioner a hearing, it clearly contemplates one. Except for good cause shown, the statute allows appellate courts to consider only those objections raised "in the proceeding" below, implying that the Agency is obligated to conduct such a proceeding. By repudiating this implied obligation, the Agency interprets 49 U.S.C. § 46110(d) to mean that whatever is not explicitly forbidden is allowed. Notably, however, the Agency interprets its SSI regulations in precisely the opposite manner, claiming that whatever is not explicitly allowed is forbidden. The Agency's refusal to grant Petitioner an Agency-level hearing is not only self-serving, it is also a fundamental flaw rendering the Order invalid.

III. CONCLUSION

For the reasons stated above, the Order is unsupported by substantial evidence and must be set aside.