

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

JEFFREY LEWIS,)	
)	DOCKET NUMBER
APPELLANT,)	SF-0752-09-0139-I-1
)	
v.)	
)	
DEPARTMENT OF TRANSPORTATION,)	DATE: February 17, 2009
AGENCY.)	
)	

APPELLANT’S PREHEARING SUBMISSION

A removal is an adverse action, appealable to the Board under subch. II of ch. 75 of title 5. 5 U.S.C. §§ 7512(1), 7513(d). An individual who has been removed has Board appeal rights if, in addition to any other requirements, Mr. Lewis meets the definition of “employee” in 5 U.S.C. § 7511(a)(1).

The Appellant, Mr. Jeffrey Lewis, was a title 5 employee who served in the federal sector for nearly two decades as a air traffic control specialist with the Federal Aviation Administration (FAA or Agency) until February 16, 2007 the Appellant was placed on “administrative leave” until the time of his proposed removal on July 28, 2008. Mr. Lewis was ultimately removed from the Agency on November 6, 2008; only months prior to his retirement eligibility date.

STATEMENT OF THE FACTS

The circumstances leading up to Mr. Lewis’ removal and the ultimate justification for the removal remain largely elusive to Mr. Lewis despite the documentation delineated in the

Agency's Narrative Response, dated December 29, 2008. Based on the tenuous documentation provided by the Agency, Mr. Lewis posits the following statements of fact:

1. On February 16, 2007, the Appellant was locked out of his workplace at Concord Air Traffic Control Tower (ACTC).
2. Mr. Lewis remained uninformed and unaware of the reason he was precluded from entering Concord ACTC for a duration of approximately eight months.
3. Mr. Lewis tirelessly attempted to obtain information concerning the reason he was prohibited from returning to work. However, Agency personnel were directed by management not to respond to or otherwise engage Mr. Lewis' requests for information.
4. After several months of maintaining a virtually unknown employment status, Mr. Lewis was informed he was on administrative duty; albeit, required to utilize sick and vacation time to account for the period of absence.
5. It was not until approximately eight months later on October 10, 2007 that Mr. Lewis first received notice that he was being placed on administrative leave pending an investigation that he "lunged at his supervisor" Patricia Hardy.
6. During those eight months, the Agency's only reference to potentially violent misconduct was one paragraph, in a July 23, 2007 letter from Dr. Goodman, that simply declared that a Violence in the Workplace (ViWP) teleconference had been convened on February 16, 2007.
7. Appellant received no other records related to the ViWP; nothing in the ROI, and nothing in the many, partial-responses to Mr. Lewis' numerous requests for information made pursuant to the Freedom of Information Act and the Privacy Act engendered any allegation of such grave allegations.

8. Appellant has still not received the documentation pertaining to the charges put forth at the 2/16/07 ViWP as requested in no fewer than four FOIA Appeals at Agency's HQ FOIA office; two of which were filed in excess of fifteen-months ago.
9. Failure to provide this documentation is tantamount to breach of the Agency's labor union agreement.
10. Specifically, Article 10 Section 12 of the FAA/NATCA Contract requires the Agency to provide Appellant with a copy of letters of confirmation of discussion used to document future disciplinary action "*upon completion...as soon as practicable after the discussion.*"
11. On February 16, 2007, Dr. Goodman withdrew Appellant's medical clearance in violation of Art. 66 Sec. 6(c).
12. Article 66 Section 7 of the FAA/NATCA Contract obligated Dr. Goodman to communicate his medical incapacitation decision to the Appellant via confidential correspondence; in this case, Dr. Goodman made no such notification.
13. Patently, Article 66 Section 6(a) of the FAA/NATCA Contract also directs the Agency to pay for further medical evaluations or reports if necessary, to determine if Appellant met the national medical standards for the ATCS position he held; Agency failed to do this.
14. Appellant was permanently medically disqualified on 6/21/07, but his ATC medical certification was fully restored on 1/10/08;
15. Appellant allegedly lunged at Patricia Hardy on 2/6/07, but Agency never presented this specific charge to Appellant. Appellant first learned of this charge eight months later, on 10/10/07, when reading the copy of ROI AWP-20070078 he had just received from Agency. During the months between 2/6/07 and 10/10/07, Agency had numerous

opportunities yet failed to provide Appellant with the specifics of this serious lunge allegation. Agency management officials had ample opportunity to disclose the allegations, including but not limited to:

- a. 2/9 through 2/13, and again on 2/16: when Appellant was back at work (no mention was made);
- b. on 2/13/07 and 2/16/07, in official “Weingarten-context” meetings (no mention was made);
- c. on 3/23/07, in the careful selection of questions for Appellant’s investigative interview by Special Agent James Austin (no mention was made);
- d. In numerous phone discussions with Dick Fossier, AWP-16 in March/April 2007 (no mention was made);
- e. In May 2007, when Dr. Goodman and Jason Ralph both refused to provide “presenting concerns” to Dr. Haldeman, PhD, who was trying to be thorough in the psychological evaluation Jason Ralph had ordered;
- f. On and after 9/6/07, when Andy Richards telephoned Appellant at 9:07am, and initiated a series of dozens of communications, seeking to resolve the matter (no mention was made);
- g. In Agency’s repeated failure to respond to Appellant correspondence specifically requesting notes/documentation related to his performance/conduct and/or alleged behavior, as sent by Appellant on the following dates: 2/11/07, 2/13/07, 3/1/07, 4/2/07, 4/27/07, 6/11/07, 6/12/07, 6/28/07, 6/29/07, 7/12/07, 7/18/07, 7/25/07, 7/31/07, 8/3/07, 8/8/07, 8/15/07, 8/28/07, 8/29/07, and 9/2/07 (no mention was made);

- h. In Agency's repeated failure to provide specific details of their charges against Appellant in the correspondence Agency sent to Appellant on the following dates: 2/16/07, 3/12/07, 4/24/07, 6/5/07, 7/15/07, 7/16/07, 7/23/07, and 7/27/07 (no mention was made).
16. On 10/10/07, Appellant finally received a copy of the ROI, completed 3/28/07. In this 65-page document, the alleged lunge is referenced in five different locations;
17. Nevertheless, by Agency letter dated, 4/17/08, Andy Richards informed Mr. Lewis that "*a return to work plan*" would be forthcoming
18. Mr. Richards then proposed the Appellant's removal on July 28, 2008.

STATEMENT OF THE ISSUES

1. Whether the Agency proved the reasons for Appellant's removal by a preponderance of the evidence.
2. Whether the Agency showed that Appellant's removal was properly relevant to the promotion of the efficiency of the service by a preponderance of the evidence.
3. Whether the Agency's omissions and acts of malfeasance and misfeasance constituted harmful error.
4. Whether the Agency remove the Appellant for testifying on behalf of coworkers in union grievance proceedings.
5. Whether the Agency properly considered the *Douglass Factors*.

THE APPELLANT CAN SUCCESSFULLY ESTABLISH THE AFFIRMATIVE DEFENSES OF HARMFUL ERROR AND REPRISAL

- 1) Agency officials retaliated against Appellant for his exercise of essential rights to testify on behalf of a coworker, and to file a grievance.

- 2) The failure to provide Mr. Lewis with documentation necessary to appropriately respond to the proposed removal and the overt effort to stymie Mr. Lewis' ability to gather evidence and argument to rebut the agency's allegations constituted harmful error.
- 3) An undue delay in time between the date of the allegation and the proposed removal resulted in harmful error.
- 4) The prior constructive suspension of the Appellant precluded Mr. Lewis from obtaining any and all information related to the allegations that form the removal determination, thereby resulting in harmful error.
- 5) The Agency violated its own rules and regulations and resulted in harmful error.

AGREED UPON MATERIAL FACTS

The appellant and the agency have no agreed upon material facts at this time.

EXHIBITS

Indexed list of exhibits will follow under separate cover because of the size of the document.

WITNESSES

Austin, James (Special Agent, AWP-700)

Conducted formal investigations and produced ROI (Report of Investigation).

SUBJECTS: FAA internal investigations, investigative procedure and decisions, ROI.

Balton, Munro (FAA Regional Counsel, now retired)

Attended ViWP (as noted by Dick Fossier)

SUBJECTS: Content of 2/16/07 ViWP (Violence in the Workplace teleconference).

Barry, Dr. Michael (Manager, Medical Specialties Division, Federal Air Surgeon Office, FAA HQ)

Expert on Agency medical policy and procedures

SUBJECTS: Agency procedures for handling medical disabilities, propriety/impropriety of actions by Dr. Goodman and Jason Ralph.

Boitnott, Bill (FAA HQ; Manager, Investigations Division)

Expert on Agency internal investigations, policy, procedures

SUBJECTS: Limited scope of ACS-3 in “substantiating” ROI’s, as discussed with Appellant 8/27/08.

Breaux, Ann (Senior Investigator, AEO-500; ASH)

Fulfills ACS-3 role in AB Order 1120.125A.

SUBJECTS: Limited scope of ACS-3 in “substantiating” ROI’s, as discussed with Appellant 8/27/08.

Bristol, Teri (Acting Director of Terminal Operations, Western Service Area)

Designated as “Accountable Official” for Appellant’s AB case, but all her correspondence received by Appellant was signed by Monique France or Barry Davis.

SUBJECTS: Role of WSA-AT in Appellant’s investigation and removal; WSA-AT records related to Appellant’s AB case; explanation as to why these records continue to be withheld from Appellant; role of Barry Davis as apparent actual Accountable Official.

Brooks, Angela

As HR manager, would have conducted ViWP IAW Order WP1600.32, para. 6.

SUBJECTS: Content of 2/16/07 ViWP (Violence in the Workplace teleconference).

Caldwell, Dave (NATCA representative, SFO ATCT)

Attended Investigative Interviews for ROI. Communicated with Appellant in following months when Appellant had been constructively suspended.

SUBJECTS: Agent Austin’s hostile behavior at start of Appellant’s interview; Contract dispute (whitebook vs. greenbook); Union reactions against Appellant for filing under whitebook.

Castrellon, Dan (Acting Manager, AWP-16)

Signed letter denying 5/1/08 grievance (part of FLRA ULP settlement) at Step Three. Apparently in charge of assignment of Marable to research Appellant removal, and un-assignment of Rotella to no longer handle Appellant’s case.

SUBJECTS: AWP-16 procedures and responsibilities; interpretation of FAA/NATCA Contract; specific details of AWP-16 handling of Appellant’s case.

Clayton, Robert (FAA HQ, AHL)

Signed 11/19/08 letter rejecting Appellant’s contractual request for a stay on the Removal until all appeal options are exhausted.

SUBJECTS: Basis for rejection...what specific allegations about Appellant did he consider, and which of these were false and damaging?

Crabtree, John (controller/coworker, CCR ATCT)

Witness to discussion where Appellant used n-word while non-disparagingly quoting a song lyric.

SUBJECTS: Song lyric incident.

Davis, Barry (unknown, routinely signed “for Teri Bristol”)

Possibly attended ViWP. Nearly always signed for Teri Bristol, who was critical “Accountable Official” in Appellant’s AB case. His office is conspicuous for having produced no documents as requested under FOIA.

SUBJECTS: Content of 2/16/07 ViWP (Violence in the Workplace teleconference); documentation for AB processing; documentation for administrative actions against Appellant (in Jun-07, as indicated by AB forms, as well as indicated by 9/5/07 “he was admonished” email) .

Deplasco, Mark (Acting District Manager, SFO ATCT Hub)

Signed decision letter. No objective arguments given. Also rejected Appellant’s grievance at Step two regarding documents not allowable in ROI.

SUBJECTS: Explanation(s) for his sustaining each specification in his decision letter.

Duvall, Dr. (Federal Air Surgeon’s Office)

Phone conversations with Appellant 11/21/08 and 12/9/08.

SUBJECTS: Content of phone conversations, reference appropriate medical processing.

Ferrera, Frank (Support Manager, SFO ATCT, under Dennis Sullivan)

Scheduled to interview Appellant on 2/20/07; numerous emails to/from Jason Ralph during week Appellant was locked out.

SUBJECTS: content of Jason Ralph’s concerns on the week Appellant was locked out.

Fossier, Dick (Regional Office, Labor/Employee Relations, AWP-16)

Attended ViWP; also numerous communications with Appellant through 2007

SUBJECTS: Content of 2/16/07 ViWP (Violence in the Workplace teleconference); LR/ER actions.

France, Monique (Executive Advisor, Terminal Operations, WSA)

Attended ViWP (Dick Fossier advised appellant)

SUBJECTS: Participation of Teri Bristol, Barry Davis, and Kathryn Vernon in ViWP and AB case; handling of FOIA requests at her office (routinely ignored)

Fraser, Dr. James (Deputy Federal Air Surgeon)

In charge of Regional Flight Surgeons (as per Dr. Schwendeman)

SUBJECTS: Agency procedures for handling medical disabilities, propriety/impropriety of actions by Dr. Goodman and Jason Ralph.

Giles, Richard (AWP-750, Manager for investigations)

Managed production and distribution of ROI. Withheld ROI from Appellant for six months, until advised Appellant had been admonished and ROI thus releasable.

SUBJECTS: ROI production; ROI distribution; requirements to allow copy of ROI to be sent to Appellant; communications that confirmed ROI was releasable.

Goodman, Dr. Stephen (Regional Flight Surgeon, AWP-300)

SUBJECTS: Aerospace medicine standards and procedures; release of critical undisclosed records, especially the notes taken at ViWP; interpretation of NATCA Contract to explain why Article 66 had been virtually ignored in this case.

Griswold, Dr. Stephen

Marked as CC on Jason Ralph's 3/12/07 letter...which was not in Appellant's medical file until he mailed a new copy in July, per request by Mary Williams

SUBJECTS: what was his involvement in this case?; did he get the CC'd copy?

Haldeman, Dr. Douglas (PhD psychologist, Seattle)

Evaluating psychologist for Appellant in 1991 (Agency paid; ruled out diagnosis, reaffirmed Flight Surgeon's recommendation that Air Traffic bring in an organizational development specialist to fix a management/environment problem), and twice in 2007.

SUBJECTS: Highly unusual Agency refusal to present their concerns after ordering someone to get an evaluation; results of his evaluations; reasonableness of Appellant's handling of this situation.

Hardy, Patricia (supervisor, CCR ATCT)

SUBJECTS: Answer critical questions to resolve contradictions in her testimony; explain her handling of the migraine incident; explain the extraordinary delay in reporting the lunge and not acting to protect others.

Harris, Melvin (FAA HQ, AHL-1)

His office handles arbitrations with the Union and manages HQ level Contract matters

SUBJECTS: status of NATCA's alleged 8/27/08 arbitration request; explanation of rejection of Appellant's request to stay removal pending completion of all Appeals.

Horstman, Dr. Ann (PhD, clinical psychologist, Clackamas, OR)

Counseling psychologist seen intermittently to manage stresses related to lockout from work with no identified charges, no confirmation of pay status, etc.

SUBJECTS: Emotional impact of Agency's unexplained actions upon Appellant; Appellant's identified personality style, character, and credibility and how these may impact the situation.

Hull, Mike (NATCA, Regional LR Lead)

SUBJECTS: Contract dispute (whitebook vs. greenbook); Union reactions against Appellant for filing under whitebook.

Jones, Edward (Manager, Office of Security & Hazardous Materials, AWP-700)

Numerous phone conversations with Appellant.

SUBJECTS: Agency Investigative standards and procedures; Formal investigation details, ROI, distribution of ROI.

Kriner, Valri (Aerospace Medicine Field Office, Oakland ARTCC)

SUBJECTS: CPDSS; actions taken under orders from Dr. Goodman; directions to not communicate with Appellant but forward him to LR.

Kubik, Tim (Acting Director, AWP HR Management Office)

Attended ViWP (Dick Fossier advised appellant)

SUBJECTS: Handling of Appellant's case by AWP-10; gag orders; explanation of lengthy delay in processing FOIA 2007-007648 (not provided in chain of letters 8/15/08, 8/24/08, and 9/5/08).

Lopez-Hickson, Cindy (AWP, Employee Assistance Program manager)

SUBJECTS: Content of 2/16/07 ViWP (Violence in the Workplace teleconference).

Marable, C. Rosslyn (Regional Office, Labor/Employee Relations, AWP-16)

AWP-16 contact person on Appellant's proposal, decision letters.

SUBJECTS: Why she checked out ROI file on 4/17/09, 10-months after AB considered the case closed; who assigned her what tasks to perform.

Marks, William (controller/coworker/union representative, CCR ATCT)

Key Agency "witness" to meetings where behavioral problems were alleged but never presented to Appellant; filed charges with Agency management THEN assisted Appellant in Weingarten-context meetings.

SUBJECTS: why he did not recuse himself from representing Appellant.

Marshall, Gwen (Regional Office, Labor/Employee Relations, AWP-16)

HR POC during early months of AB case.

SUBJECTS: AB process; communications with Appellant; explanation of why the FOIA sent to her was closed without notification; questions to answer abundance of redactions in the few copies she eventually provided.

Moyer, Ken (controller/coworker, CCR ATCT)

SUBJECTS: His history of counseling for inappropriate racial comments; why he lied about the alleged comment by Appellant; why he lied about the poking in the chest;

Papageorge, Andy (controller/coworker, retired from CCR ATCT Feb/07)

Poland, Sandy (Program Analyst, AWP-310)

SUBJECTS: CPDSS; actions taken under orders from Dr. Goodman; directions to not communicate with Appellant but forward him to LR.

Ralph, Neville Jason (manager, CCR ATCT)

SUBJECTS: Content of 2/16/07 ViWP; by what authority he ordered Appellant to get a medical exam; by what authority he initiated a Constructive Suspension on Appellant; why he refused to answer Appellant's many reasonable and necessary questions; why he sent his 7/25/07 email seeking advice on the periodic feedback letter; his past work/grievance history; (Violence in the Workplace teleconference).

Ramos, Flor (title unknown, in AWP-700)

SUBJECTS: Agency Investigative standards and procedures; Formal investigation details, ROI, distribution of ROI.

Reeves, J. Mark, Director, ATO Western Service Center (administrative half of office??)

SUBJECTS: WSA handling of FOIA requests; handling unique for Appellant's case.

Richards, Andy (District Manager, SFO ATCT Hub)

SUBJECTS: Partial restoration of Appellant's Constructive Suspension, offer of medical retirement in Oct-07, "return to work plan" letter in Apr-08; removal proposal letter in Jul-08.

Richards, Pamela (FLRA, Senior Labor Relations Specialist)

SUBJECTS: Settlement of FLRA charge against Agency between Appellant and Glen Rotella; status of Appellant's FLRA charge against Union now in abeyance pending appointment of FLRA General Counsel as necessary to hear the complaint.

Robinson, Andrew (Accountability Board Coordinator)

SUBJECTS: Details of Appellant's case; limitations in AB review of ROI and authority reference agency managers.

Rotella, Glen (Regional Office, Labor/Employee Relations, AWP-16)

SUBJECTS: FLRA ULP settlement, AWP-16 actions, and scope of prior union activity.

Schwendeman, Dr. Steve (CAMI, AAM-300, Oklahoma City)

SUBJECTS: Explanation of his annotations on Appellant's 8/3/07 email (who is PS at OPM, what did he consider fabrication, and why did he not send his RoC to Appellant?); explanation of his 9/25/07 email to Goodman requesting a forensic psychiatric evaluation of Appellant.

Sills, Kevin (NATCA HQ)

SUBJECTS: NATCA, contract dispute (greenbook vs. whitebook), Papageorge case at CCR, alleged elevation of grievance for arbitration.

Sullivan, Dennis (Acting District Manager, SFO ATCT Hub)

SUBJECTS: Content of 2/16/07 ViWP; failure to reply to numerous letters from Appellant; minimal content of 7/27/07 Periodic Feedback letter he signed and sent to Appellant

Swanson, James (controller/coworker, CCR ATCT)

SUBJECTS: CCR workplace dynamic, his use of mimicry at CCR, his viewing of Boondocks DVD, further details of his conversations with Appellant not produced during investigation.

Taylor, Dr. Chris (Medical Officer, FAA, Northwest Mountain Region)

SUBJECTS: Agency medical certification procedures; Appellant's prior experience in 1991 with an FAA manager trying to use medical standards to achieve administrative results.

Veney, Valerie (Administrator's Hotline Operations Specialist, AOA-20)

SUBJECTS: Hotline calls processing and follow-up.

Vernon, Kathryn

SUBJECTS: Role of WSA-AT in Appellant's investigation and removal; WSA-AT records related to Appellant's AB case; explanation as to why these records continue to be withheld from Appellant.

Williams, Debbie (Accountability Board Coordinator)

SUBJECTS: Confirmation of limited role of AB in review of ROI's, as stated to Appellant in phonecalls. Failure to respond to Appellant's corresponded requests.

Williams, Mary (Medical Program Analyst, AWP-310)

SUBJECTS: Content of phone conversations with Appellant, describing how Jason Ralph was refusing to provide necessary information; CPDSS; directions to not communicate with Appellant but forward him to LR.

Yohe, Melanie (FAA HQ, FOIA Office)

SUBJECTS: Agency FOIA policy; inability of her office to override intransigent Agency managers who refuse to provide requested documents; FOIA backlog that results from this.

Young, Carlette (AWP FOIA Coordinator)

SUBJECTS: Causes of delays in FOIA processing; processing of Appellant's FOIA requests.

Zullo, Jene (WSA FOIA Coordinator)

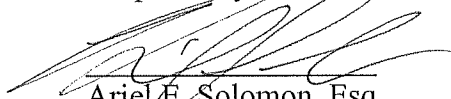
SUBJECTS: Difficulties and delays obtaining documents from Jason Ralph for FOIA 2007-007547.

Appellant hereby requests a subpoena for any and all of the aforementioned proposed witnesses who are not presently employed with the Agency. Further, Appellant requests leave to amend his prehearing submission as discovery endeavors are currently ongoing and the

Appellant also made a currently outstanding motion for a 30-day suspension to pursue settlement and conclude the discovery process.

Date: February 17, 2009

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Ariel E. Solomon', written over a horizontal line.

Ariel E. Solomon, Esq.
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CERTIFICATE OF SERVICE

I certify that the attached document(s) was (were) sent by the method described this day to each of the following:

MSPB

Hon. Craig A. Berg
Administrative Judge
Western Regional Office
201 Mission Street
Suite 2310
San Francisco, CA 94105-1831


**VIA FAX: (415) 904-0580
EXHIBITS BY USPS**

AGENCY

Naomi Tsuda
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Los Angeles, CA 90009
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**VIA FAX: 310-725-6816
EXHIBITS BY USPS**

Dated: February 17, 2009



Alexis Allevino
Paralegal

TRANSMISSION VERIFICATION REPORT

TIME : 02/17/2009 15:21
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FAX :
TEL :
SER.# : BROJ8J868504

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MODE	STANDARD

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Dated: February 17, 2009


Alexis Allevino
Paralegal

TRANSMISSION VERIFICATION REPORT

TIME : 02/17/2009 15:15
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FAX :
TEL :
SER. # : BROJ8J868504

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MODE	STANDARD ECM

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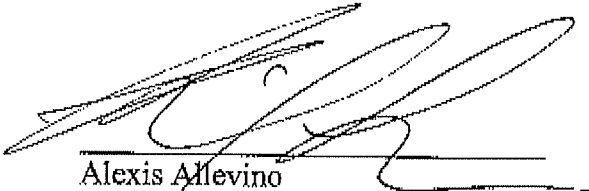
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Dated: February 17, 2009


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