UNITED STATES DISTRICT COURT

DISTRICT OF OREGON
PORTLAND DIVISION

JEFFREY NATHAN LEWIS, **Plaintiff,** **v.** **FEDERAL AVIATION ADMINISTRATION** **Defendant.**	**Civil Case No. 3:11-CV-1458-AC** **PLAINTIFF'S MEMORANDUM OPPOSING DEFENDANT FAA'S MOTION FOR SUMMARY JUDGMENT**

Jeffrey Nathan Lewis ("Plaintiff"), a pro se individual, submits this memorandum of law in opposition to the Motion for Summary Judgment, as filed by Defendant Federal Aviation Administration ("FAA").

Introduction & Background

1. Plaintiff filed a Civil Complaint on December 5th 2011, accusing FAA officials of violating the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. Plaintiff's complaint consisted of two claims: first, that FAA misapplied Exemption #5, 5 U.S.C. § 552(b)(5) and improperly withheld records that should have been disclosed; and,

second, that FAA repeatedly engaged in a "pay-to-play" tactic, citing excessive and unreasonable FOIA fee estimates, so as to constructively deny Plaintiff's FOIA rights.

2. Defendant FAA filed three pleadings on May 31st 2012, including "Defendant FAA's Motion for Summary Judgment," "Defendant FAA's Memorandum in Support of Motion for Summary Judgment," and "Declaration of Jeb Kreischer." Within these pleadings are records (mostly FOIA correspondence) and statements. Many of these records and statements may be considered undisputed; to narrow the scope of argument, Plaintiff filed "Plaintiff's Statement of Material Facts as to which there is no Genuine Dispute."

3. After subtracting as many material facts as possible from the list of those disputed with Defendant FAA, there still remains a very large list with very many material disputes.

4. Plaintiff finds that many of the remaining disputed facts are concisely summarized in the Four Phases of the Lewis-CCR Case diagram he created in May 2010.[1] A copy of this was attached to Plaintiff's May 29, 2010 FOIA request which became FOIA 2010-5390. Regrettably, the quality of the document provided by Defendant FAA at Exhibit 5, page 2 of Declaration of Jeb Kreischer is partially illegible. To correct this problem, Plaintiff submits the attached gray-scale version, at Opposing Exhibit-1.

[1] This diagram was created in May 2010. At that time, Plaintiff knew nothing about the Justin-AWOL Terminal Reports, the 14-day suspension, Mark DePlasco's very-late Douglas Factors, the deep background involvement of Tony DiBernardo, the Fossier "slime-ball" email, and many other details. All of these have been learned in the past two years, mostly from FOIA responses.

5. Simultaneous with with this pleading, Plaintiff is filing Declaration of Jeffrey Lewis ("Lewis Decl.").[2]

6. Plaintiff finds the cites provided by Defendant FAA in their Motion for Summary Judgment are sufficient; Plaintiff will not re-cite them here.

Argument I: Defendant FAA is not entitled to Summary Judgment, due to abundant genuine dispute as to material facts, and due to evidence of Agency bad faith.

7. Practically speaking, summary judgment cannot be granted if either of two tests are failed: first, the movant must show that there is no genuine dispute as to any material fact, and must show this in a light most favorable to the non-moving party; and second, the movant must be able to dodge all charges of "bad faith."

8. Plaintiff asserts that abundant dispute remains, as to the appropriateness of Defendant FAA's handling of many of Plaintiff's FOIA requests. In the past few years, some of these disputes have been resolved, albeit belatedly, when Defendant FAA has eventually produced disclosable records that were initially and improperly withheld. These records form a vast collection of empirical evidence of Agency bad faith and continuing dispute. See Opposing Exhibit-1 as attached to this pleading. See also, Lewis Decl., which is amply filled with examples.

9. As a specific example, Defendant FAA took the greatest possible disciplinary action against Plaintiff, yet never provided Plaintiff with names of his alleged accusers. *see* Lewis Decl. ¶ 29-32, and Ex. 1.

[2] 110-pages total: a 41-page document, a 2-page Exhibits Index, and 69-pages of Exhibits.

10. As a second specific example, attached to this pleading at Opposing Exhibit-2 is a copy of Plaintiff's badge photo. It was initially distributed by Plaintiff's manager, Jason Ralph, with an alert, directing personnel at other facilities to be on the watch for suspicious activities. Agency FOIA records reveal that two copies of this photo were removed by Agency Counsel from MSPB Discovery. It was never provided to Plaintiff during the Discovery process, as it was removed by Agency Counsel, citing "pre-decisional or Privacy Act."

11. As a third example, attached to this pleading at Opposing Exhibits 3 &4 are two letters, both with the same twenty-digit certified mail number. Both were prepared by Ros Marable. Opposing Exhibit-3 was prepared for Andy Richards' signature; it was not sent. Opposing Exhibit-4 was a re-draft of the first letter, and Ros Marable signed it. Note that in the unsent version, Opposing Exhibit-3, Item #7 lists: ***"Email from Monique France –Line of Business – grid-off of review of letter."*** Although Plaintiff made FOIA requests seeking this copy, and seeking grid-off copies related to his case, Agency continues to fail to produce. This is a very significant document. It represents the most critical step in an adverse action: the diligent review by an accountable official, and the clear assignment of accountability for the adverse action decision. Yet, despite the grave significance of this document, when handling Plaintiff's FOIA requests, Defendant FAA continues to pretend it does not exist. It has now been three and a half years since Monique France gridded this critical record.

Argument II: Defendant FAA continues to mis-apply FOIA Exemption #5 on the three disputed records .

12. This argument concerns three emails; two are dated 7/7/2008 and 7/8/2008, from FOIA 2011-4258, and one other email is dated 4/5/2008, from FOIA 2011-9148. Defendant FAA refuses to produce these disputed records, claiming they are pre-decisional and/or deliberative. On the two July emails, Defendant FAA notes that the author was an FAA attorney, and thus justifies an exemption based on "attorney-client privilege."

13. FOIA Exemption 5 protects disclosure of internal government documents based on the deliberative process privilege, attorney-client privilege, and attorney work-product. *Maricopa Audubon Society v, U.S. Forest Service*, 108 F.3d 1089, 1092 (9th Cir. 1997). Exemption 5 provides that an agency may withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). To fall within Exemption 5, a document must be both predecisional and deliberative. *Id.*

> A 'predecisional' document is one *prepared in order to assist an agency decisionmaker in arriving at his decision*, and may include recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the agency. A predecisional document is a part of the' deliberative process,' if the disclosure of the materials would expose an agency's decisionmaking process in such a way as to discourage candid discussions within the agency and thereby undermine the agency's ability to perform its functions. *Id.* at 979-80. (*underline/italic emphasis added*)

14. As regards the two July emails, these reflect communications between Ros Marable and Don Bobertz. Ros Marable happens to be an AWP-LR Specialist, and she was assisting Air Traffic officials in the drafting of Plaintiff's removal letter, begun in early May 2008. *see* Lewis Decl., ¶ 66-74. Don Bobertz happens to be employed by

Defendant FAA as an attorney. Ros Marable, after laboring for nearly two months on this letter, had a requirement to let other offices review her work and initial their approval. So, in late June 2008, Ros Marable asked her coworker, Joe Harris, to collect a package of documents, add a grid, and make delivery to the AWP Counsel office. *see* Lewis Decl., ¶ 73.

15. Defendant FAA wishes to believe that all words and thoughts uttered by one employed as an FAA attorney are attorney-client emanations. Why not just declare all FAA managers honorary attorneys? That would certainly help correct the problems of open government and accountability posed when our Congress passed these FOIA laws.

16. The work relationship between Don Bobertz and Ros Marable is clearly not 'attorney-client', but rather is one of simple, mechanical review. Don Bobertz was neither guiding Ros Marable through legal waters, nor counseling her in anticipation of possible future litigation. He was just reading her final draft.

17. Plaintiff has no doubt that Ros Marable is intelligent enough that she would avoid drafting disciplinary letters that might precipitate legal actions. Thus, it is highly unlikely that Don Bobertz opined anywhere: *"Roz, you need to take out a few words where you said '...proposed removal because you are a slime-ball....'*

18. The role of AWP Legal, as fulfilled with the document-review services of Don Bobertz and Lierre Green, was simply to "grid-off" Ros Marable's final draft removal proposal letter, and simply to offer minor suggestions. These suggestions, many of which were grammatical repairs or minor word-choice changes, are not materially 'with-holdable'; i.e., the gravity of these changes is so minimal, it defies logic that Defendant FAA's internal counsel would argue for their continued concealment.

19. Furthermore, it is a fact that all versions of this draft letter have previously been disclosed under FOIA. Thus, Plaintiff has both the "before" and "after" versions for the AWP Legal Counsel review. As such, by context, it is readily discernible what Don Bobertz recommended in the redacted portions of his emails of 7/7/08 and 7/8/08. The only content that is not discernible is that which should never have been redacted: the segregable statements, reflecting actual or plausible factual mis-statements by Dick Fossier or others. Clearly, and especially in view of the slanders revealed when the original redaction set was subjected to a FOIA Appeal, all such statements would be fully releasable to a citizen in litigation with an agency, especially in a slander lawsuit. Therefore, all such statements must be disclosed.

20. As one more argument, consider Defendant FAA's past history of excessive Exemption 5 redactions in FOIA responses to Plaintiff. Extraordinary examples are provided within Plaintiff's memo, at Ex. 4, Ex. 10 and Ex. 13. Other notable examples are provided within Lewis Decl., at Ex. 1 and Ex. 3.

Argument III: Defendant FAA has obstructed Plaintiff's FOIA rights with an arbitrary "pay-to-play" tactic, and now pretends that Plaintiff has failed to pay.

21. Plaintiff charges that Defendant is practicing a "pay-to-play" tactic, and has constructively denied Plaintiff's FOIA rights. The FOIA laws, as interpretted by FAA FOIA officials, delineate a specific sequence of events. A requestor submits a FOIA request. That FOIA request is not processed until it is "perfected", which requires, among other things, a fee agreement from the requestor. If a FOIA request is not

perfected, by virtue of the fact that the requestor has failed to agree to the fees offered by FOIA officials, the request is not processed and declared closed.

22. In the "pay-to-play" tactic, an official quotes an exorbitant fee agreement, and the requestor is unwilling (or quite possibly unable) to pay. The exorbitance of the tendered fee agreement amount is discernable by comparing it with fee agreements for similar FOIA requests.

23. In the past few years, Plaintiff has received similar FOIA responses, for which fees were reasonable and not exorbitant. For example, FOIA 2011-0273, received by Plaintiff on January 27, 2011: this FOIA response included 252-pages, had a $215 search fee, and required HQ/IT archives searches for three AWP employees. Another example is FOIA 2010-3984, received by Plaintiff on September 27, 2010: this FOIA response included 260-pages and cost only $27 while requiring three archival searches.

24. A reasonable person would conclude that for FOIA responses requiring archival HQ/IT searches, non-exorbitant fees will be in a range of $50-$100 per search.

25. The (five) FOIA requests within this legal complaint include FOIA 2010-3323, FOIA 2010-4091, FOIA 2010-5324, FOIA 2010-5390 and FOIA 2011-6114. Four of these sought emails for one person, thus should have produced archive fee estimates in the $50-$100 range. Instead, the fee estimates were: $900 for FOIA 2010-3323 (Dan Castrellon emails), $900 for FOIA 2010-4091 (Monique France emails), $3,300 for FOIA 2010-5390 (the Tim Kubik emails), and $800 for FOIA 2011-6114 (Dick Fossier emails). These fee estimates are all clearly exorbitant, and arbitrarily set with the intent to scuttle Plaintiff's FOIA rights.

26. Plaintiff asserts that Defendant FAA's past record in mishandling his FOIA requests grew out of Agency's mishandling of Plaintiff's minor disciplinary case, beginning in early 2007. Agency officials remain motivated to obstruct the proper disclosure of these email records, so as to conceal facts that would disclose many embarrassing performances.

27. As evidence of these misconducts, Plaintiff presents the following within Lewis Decl.:

    a. For FOIA 2010-3323, Dan Castrellon relevant performance: *see* ¶ 23, 86, 87, 88, 89, 90 and 91; Ex. 31 and 32; and footnotes 40, 45, 49 and 50.

    b. For FOIA 2010-4091, Monique France relevant performance: *see* ¶ 16, 19, 20, 27, 51, 73, 83, 94, 99 and 104; Exh. 12, 15, 16, 28, 33, 34, and 39; and footnotes 16, 29 and 40.

    c. For FOIA 2010-5390, Tim Kubik relevant performance: *see* ¶ 22 and 89; Exh. 12, 15, 16, 28, 33, 34, and 39; and footnotes 10 and 18. Given Tim Kubik's role as manager of AWP-LR for the duration of Plaintiff's lockout until he was promoted to HR Director in August 2008, it is reasonable to expect Mr. Kubik was engaged or at least knowledgeable of all misconducts.

    d. For FOIA 2011-6114: Dick Fossier relevant performance pervades nearly all parts this case. *see* entire Lewis Decl.

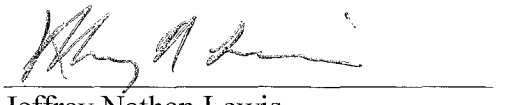
28. Plaintiff provided summaries of all five FOIA requests in paragraphs 55, 56, 57, 58 and 60 of Plaintiff's Memorandum, Defining his Complaint and Requesting an

Amendment to Add FOIA 2011-9148, as filed on May 8th 2012. These summaries include a concise assessment of Relief Sought for each FOIA case.

Conclusion

Plaintiff requests the Court's assistance in resolving this ongoing dispute. Elements of a solution might include: disclosure of documents submitted by Defendant FAA for in camera review; a meeting of the parties, in conference to discuss settlement; scheduling a hearing; directing Defendant FAA to provide a knowledgeable accountable official (e.g., Tim Kubik, Richard Saltsman, or Douglas Taylor) to ensure Agency is meaningfully engaged in the process of resolving this matter.[3]

Respectfully submitted this 2nd day of July 2012.



Jeffrey Nathan Lewis,
Plaintiff, *pro se*

[3] One of the evident deficiencies at present is that Defendant FAA is insulated from this matter, through the use of the U.S. Attorney's office. The presence of Mr. Danielson is appreciated, but the continued absence of FAA is prolonging this case.

Four Phases of the Lewis-CCR Case

❶ *Lockout & Admonishment [2/16/07 to SEP-07]*

2/16/07: At ViWP telecon, Jason Ralph made an assortment of statements (four-days before he fabricated the lunge); Dr. Goodman suspended Lewis' medical clearance.

Lockout began. Although Lewis had departed on Sick Leave, Hardy quietly changed it to paid Administrative Leave 600-days later (see 9/25/08 and 10/9/08).

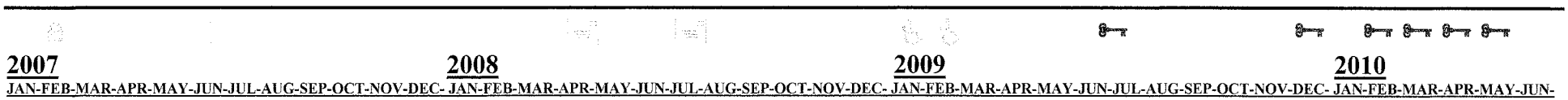
4/17/07: Lewis was Constructively Suspended (no work, no pay, and no due process notification); this continued into October. Lewis was partially restored by Andy Richards, later in 2007. He is still awaiting an arbitration for the approx. $40K in lost pay FAA still owes. The arbitration was requested in August 2008.

6/21/07: Lewis' medical was permanently revoked. Lewis was offered a disability retirement. Lewis appealed, and was medically re-certified on 1/10/08.

❷ *Waiting... [SEP-07 to JUL-08]*

In early SEP-07, Andy Richards was the new SFO District Manager and was trying to clean up the mess. From then until JUL-08 was a period of quiet: Lewis was locked out, but being paid. He awaited a call to return to work; the call never came.

4/17/08: Andy Richards' letter advised Lewis, ***"a return to work plan will be discussed"***. Richards never followed up. Instead, in July, he sent Lewis a letter proposing his removal, based solely on the 15-month-old ROI. Lewis had been continuously locked out since 2/16/07 and had done nothing except exercise his basic rights. In total, he had filed two grievances, a ULP, and made numerous inquiries trying to establish the Due Process he was being denied.



DOCUMENTED FACTS:

FACT: Suppressed Agency records show Jason Ralph slandered Lewis repeatedly, then actively manipulated the flow of information to other Agency officials. The ROI and charges were never substantiated.

FACT: While this case started with Jason Ralph's lies, the damages were magnified by a small circle of protective but misinformed adjuncts. Arguably, the greatest damage has been done not by Jason but by Agency Counsel's suppression of evidence and employee fear-driven silence. Lewis' Due Process rights were fully obstructed for more than two years.

❸ *Removal & Record Destroyed [JUL-08 to 5/5/09]*

5/5/09: Lewis retired at age 50

11/6/08: Lewis removed

6/30/08: Email from WSA to AWP-16 (France to Marable, cc to Davis, but NOT cc'd to Vernon); Vernon's Executive Assistant was granting LR the go-ahead for Lewis removal process. This was the first document suggesting removal, and a full year after the AB Cases had been closed. Prior disciplinary proposals were all focused on admonishment (see 6/14/07, 7/14/07, 7/16/07 Ralph draft letter, and 9/5/07).

❹ *Release of Evidence [post- 5/5/09]*

Evidence was suppressed by Agency Counsel, and by officials intimidated by Counsel. Key evidence, was released only after Lewis retired, received on these dates:

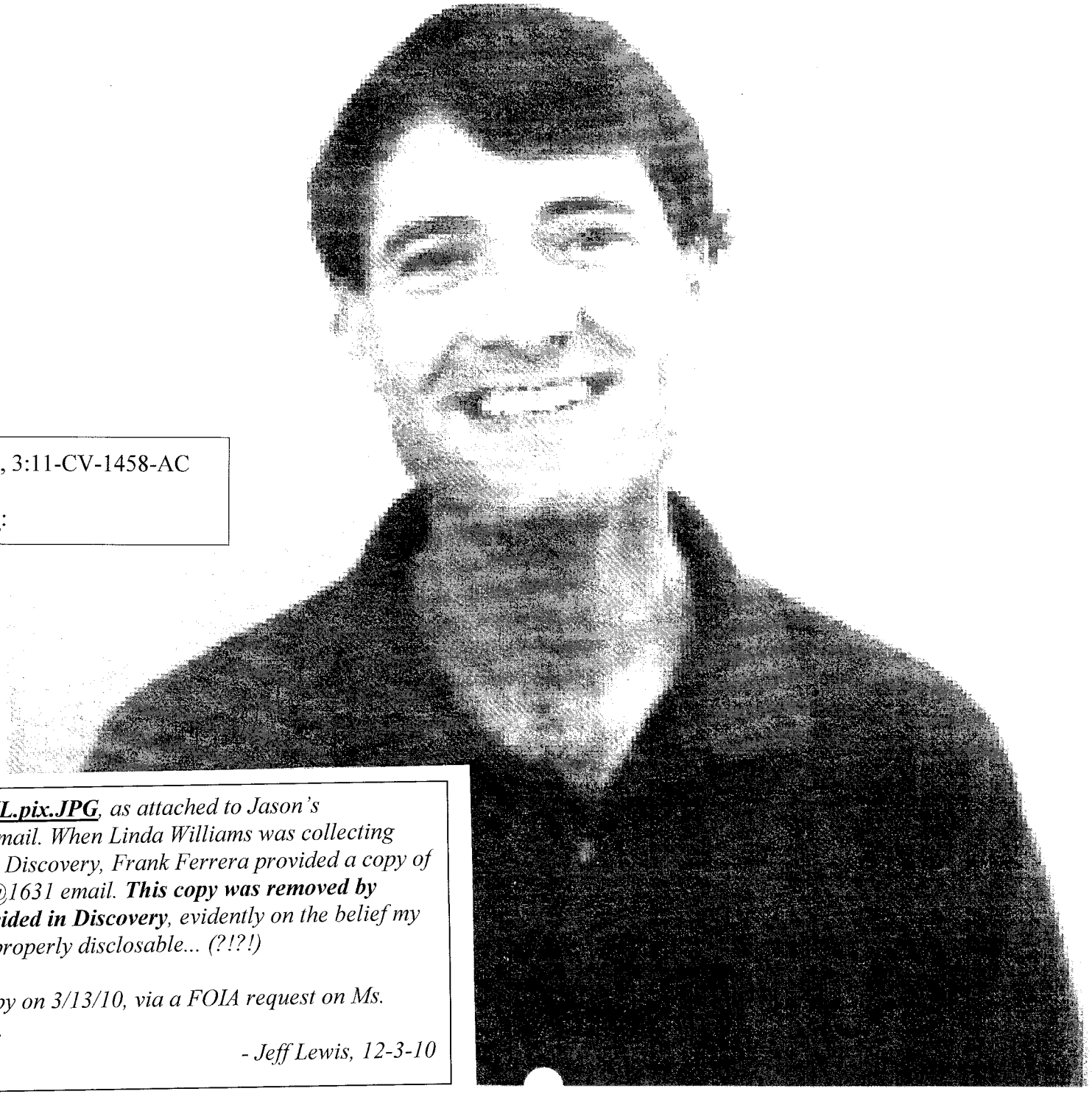
- 6/29/09: copy of DIR (28-months-old)
- 12/3/09: Barry Davis emails (198-pg)
- 2/16/10: Giles emails (193-pg)
- 3/8/10: AB Intake Form (37-months-old, via Appeal)
- 3/13/10: Williams FOIA (101-pg), w/Marks recusal
- 3/15/10: ViWP notes and Lettertemplate, 37-months-old (FOIA Appeal re: Lopez-Hickson, 2-pg)
- 3/18/10: Sullivan emails (219-pg)
- 5/3/10: Castrellon emails (34-pg)

FACT: After Lewis' wrongful removal, and during the run-up to the MSPB Hearing, Agency Counsel unethically offered Lewis a disability retirement. Agency Counsel knew Lewis had been fully medically re-certified on 1/10/08, and his medical file had no documentation supporting any disability, yet they persistently invited Lewis to join their disability fraud, to help them "settle" this mess. Lewis was not eligible, so he ethically declined the offer.

Lewis v. FAA, OPPOSING EXHIBIT-1

C0079

Lewis v. FAA, et. al., 3:11-CV-1458-AC
July 2, 2012
Opposing Exhibit-2:



*This is a copy of **JL.pix.JPG**, as attached to Jason's 10/30/08@1043 email. When Linda Williams was collecting records for MSPB Discovery, Frank Ferrera provided a copy of this in his 2/9/09@1631 email. **This copy was removed by Counsel, not provided in Discovery**, evidently on the belief my own photo is not properly disclosable... (?!?!)*

I obtained this copy on 3/13/10, via a FOIA request on Ms. Williams' records.

- Jeff Lewis, 12-3-10

F10-15710 wd S
ROND 3-15-10

U.S. Department
of Transportation
Federal Aviation
Administration

Labor and Employee Relations
15000 Aviation Blvd – AWP-16
Lawndale, CA 90261
(310) 725-7821

December 4, 2008

Mr. Jeffrey Lewis
28242 South Salo Road
Mulino, OR 97042

Certified Letter # 7003 2260 0003 7298 1419
Return Receipt Requested

↑ SAME COVER AS MARKED 1 11/4/08 LETTER. THIS VERSION NEVER SENT TO LEWIS

Dear Mr. Lewis:

Based on your letter to Mark Deplasco dated Thursday November 20, 2008, in which you requested a copy of the entire contents on the disciplinary file as described in paragraphs 109 and 308 of Prib # 17, I have enclosed the documents from your disciplinary file, which are listed below. However I did not enclose another copy of the Report of Investigation – AWP20070078, since you have a copy of this document per your previous Freedom of Information Act (FOIA) request.

1. Letter of Proposed Removal- draft
2. Letter of Proposed Removal – signed copy
3. Copy of mailing receipts
4. Letter of Response to the Proposed Removal from Mr. Lewis, dated Friday August 22, 2008
5. Letter of Decision – draft
6. Letter of Decision – signed copy
7. Email from Monique France – Line of Business – grid off of review of letter.
8. Words of song named Rednecks, by Randy Newman
9. Emails received from Mr. Lewis and responses sent from Employee Relations regarding his Letter of Decision and his request for an appeal for application of Article 10- Section 16
10. Letter of response regarding Article 10 from HQ -Labor Relations dated November 19, 2008
11. Letter of explanation from Employee Relations regarding response from HQ-Labor Relations dated December 3, 2008
12. Standards of Conduct ER 4.1
13. Table of Penalties

Also in response to your inquiry, your disciplinary file records are kept by the Labor Relations Department.

Sincerely,

Andy Richards
Manager, San Francisco District

SOURCE: MSPB DISCOVERY, pg AD-41 (RCVD 2/18/09)

Lewis v. FAA, et. al., 3:11-CV-1458-AC
July 2, 2012
Opposing Exhibit-3:

11

RCVD CERT. 12/8

U.S. Department
of Transportation
**Federal Aviation
Administration**

Labor and Employee Relations
15000 Aviation Blvd – AWP-16
Lawndale, CA 90261
(310) 725-7821

December 4, 2008

Mr. Jeffrey Lewis
28242 South Salo Road
Mulino, OR 97042

Certified Letter # 7003 2260 0003 7298 1419
Return Receipt Requested

Dear Mr. Lewis:

This letter is in response to the enclosed copy of your letter to Mr. Mark Deplasco dated Thursday November 20, 2008, in which you requested a copy of the entire contents on the disciplinary file as described in paragraphs 109 and 308 of Prib # 17. Our records show that you have received the documents relating to your discipline file and the information relied upon, which are listed below:

1. Copy of the Report of Investigation – ROI – File # 20070078
2. Standards of Conduct ER 4.1.
3. Table of Penalties
4. Letter of Proposed Removal – signed copy.
5. Your Letter of Response to the Proposed Removal, dated Friday August 22, 2008.
6. Letter of Decision – signed copy.
7. Copy of your email message, regarding your request to apply Article 10- Section 16.

The following letter was mailed to your address of record on December 3, 2008 by certified mail, return receipt with the following tracking number. 7003 2260 0003 7298 1402

1. Letter of explanation from ER regarding response from HQ-LR dated December 3, 2008, with the enclosed Letter of response regarding Article 10 from HQ -LR dated November 19, 2008.

Also in response to your inquiry, your disciplinary file records are kept by the Labor Relations Department.

Sincerely,

C. Rosslyn Marable

C. Rosslyn Marable
Labor/Employee Relations
AWP-16 - Western Pacific

Lewis v. FAA, et. al., 3:11-CV-1458-AC
July 2, 2012
Opposing Exhibit-4: