

SEP 21 2011

U.S. Department of Homeland Security
601 South 12th Street
Arlington, VA 20598

The Honorable Bennie G. Thompson
Ranking Member
Committee on Homeland Security
U.S. House of Representatives
Washington, DC 20515



Transportation
Security
Administration

Dear Congressman Thompson:

Thank you for your June 21, 2011, letter expressing your concerns with the Transportation Security Administration's (TSA) Screening of Passengers by Observation Techniques (SPOT) Program. Specifically, your letter cites allegations of profiling at Newark Liberty International Airport (EWR) that occurred nearly 2 years ago. Since that time, I have installed new leadership at EWR, including a new Federal Security Director (FSD). Your letter also requests information related to the May 20, 2010, Government Accountability Office (GAO) report of the SPOT program. Please accept my apologies for the delayed response. TSA conducted a thorough review of this matter to be as responsive as possible to your requests.

TSA does not tolerate the unlawful profiling of any race, ethnicity, or nationality. The SPOT program includes safeguards to protect the privacy, civil rights, and civil liberties of individuals who are screened across the transportation system.

Regarding your specific requests for information, I am pleased to provide you with the following responses.

1.) TSA's internal report on the Newark SPOT program and any other reports TSA has conducted to investigate inappropriate activity by BDOs at airports.

Attached are copies of three reports related to the investigation of the SPOT Program at EWR and an Initial Decision of the Merit Systems Protection Board (MSPB), which upheld TSA's disciplinary action against the EWR SPOT manager. The manager has appealed the initial decision to the full MSPB. The Agency has responded to the appeal which, as of the date of this letter, is pending. Some of these documents contain Sensitive Security Information (SSI) and are appropriately marked. Additionally, Personal Identifiable Information (PII) has been redacted consistent with Privacy Act requirements. If, for any reason, you intend to release any of these materials, we ask that you consult with us beforehand so that SSI can be redacted and withheld from public release.

2.) Specific steps taken by TSA to address the racial profiling allegations at Newark Liberty International Airport and to alert Federal Security Directors at airports with Behavior Detection Officers of best practices to avoid racial and ethnic profiling in behavior detection activities.

In the case involving the EWR SPOT Program, TSA conducted a thorough investigation upon receiving reports that EWR employees were engaged in prohibited activities. When it became clear that some EWR management officials may have engaged in misconduct, TSA conducted

appropriate follow-on investigations. Ultimately, TSA took disciplinary action against one EWR SPOT manager. As a result of the investigation's findings, TSA has retrained the entire EWR Behavior Detection Officer (BDO) staff and appointed new management officials at EWR. The TSA FSD at EWR continues to closely monitor the performance of the BDO workforce to ensure that appropriate techniques and procedures are utilized at all times.

Several procedures outlined in the SPOT standard operating procedures (SOP) and the SPOT training curriculum provide best practices to avoid racial and ethnic profiling in behavior detection activities. The SPOT SOP references 7 times that behavior detection activities be done without racial and ethnic profiling. The SOP includes the requirement that BDOs work in pairs to validate and confirm each other's observations. The SOP also requires managers who oversee the SPOT program to spend time on the floor observing his/her BDOs to ensure SPOT is being performed correctly. The SPOT Program has been reviewed by the U.S. Department of Homeland Security's (DHS) Office of Privacy and Civil Rights and Civil Liberties to ensure compliance.

Additionally, as part of their basic training, BDOs who perform SPOT receive cultural awareness training and specific instruction with emphasis on the DHS policy against racial or ethnic profiling. BDO core training references 11 times that racial or ethnic profiling is not tolerated and that it detracts from the real threat as high risk passengers do not fit any specific profile. If allegations of profiling arise, TSA immediately conducts an investigation and takes corrective action as warranted.

3.) Timeline for developing a comprehensive, independent, peer-reviewed study to validate whether behavior detection can be used to reliably identify individuals in an airport environment who pose a security risk to aviation.

The DHS Science and Technology (S&T) Directorate completed the SPOT Validation Study and issued the final report in April 2011. DHS S&T also sponsored an independent peer review of the Validation Study's methodology. The peer review concluded that the methodology for conducting the validation study was sufficient.

4.) Timeline for the completion of a comprehensive risk assessment, to include threat, vulnerability, and consequence at airports nationwide, to determine the effective deployment of SPOT.

TSA is conducting a comprehensive SPOT-specific risk assessment. The assessment demonstrates risk reduction and consequence avoidance values across a spectrum of BDO effectiveness values and adversary indicator display values. TSA expects to finalize the report by the end of calendar year 2011.

5.) Timeline for the completion of a cost-benefit analysis of the SPOT program including a comparison of SPOT to other security screening programs and existing security measures at airports.

TSA is conducting a cost-benefit analysis of the SPOT program as a component of the SPOT specific risk assessment. The preliminary cost-benefit analysis is based on vulnerability, threats, and consequences utilizing a parametric table of BDO effectiveness and adversary indicator

display values. TSA expects to finalize the cost-benefit analysis by the end of calendar year 2011.

6.) Timeline for the implementation of a strategic plan for SPOT implementation that incorporates risk assessment information, costs and resources, and how SPOT will be integrated with other aviation security protocols at airports.

TSA is finalizing the SPOT strategic plan, which includes strategic goals for fiscal years 2011 and 2012, detailed action plans, and resource requirements to achieve each strategic goal. TSA expects to complete the SPOT strategic plan by the end of calendar year 2011.

7.) Timeline for TSA to develop a record keeping process to track SPOT referrals to law enforcement officers and the nature of subsequent legal action brought against referred individuals.

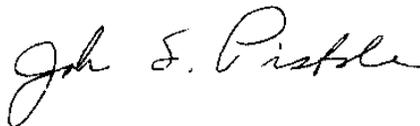
SPOT referrals to law enforcement are currently tracked in TSA's SPOT database. TSA also traces arrests from SPOT referral screening. However, law enforcement frequently conducts further investigation of referred individuals, and TSA is not made aware of the reason for or the outcome of this additional investigation.

8.) Training guidelines for BDOs that specifically address how BDOs can avoid racial and ethnic profiling in behavior detection activities.

The training curriculum does not contain any racial or ethnic considerations for performing SPOT. BDOs are instructed to refer individuals for additional screening based solely on their behavioral observations. As stated above, several procedures outlined in the SPOT training curriculum provide best practices to avoid racial and ethnic profiling in behavior detection activities. These include the requirement that BDOs work in pairs to validate and confirm each other's observations, and for managers who oversee the SPOT program to spend time on the floor observing his/her BDOs.

I look forward to working with you on this and other homeland security issues in the future. Should you need additional information, please do not hesitate to contact me personally or the Office of Legislative Affairs at (571) 227-2717.

Sincerely yours,



John S. Pistole
Administrator

Attachments

1. *SPOT Standardization Team Report* dated November 20, 2009
2. *Administrative Inquiry* dated January 25, 2010
3. *Administrative Inquiry regarding BDO Manager* dated February 17, 2010
4. *Merit Systems Protection Board Initial Decision* dated June 24, 2011

601 South 12th Street
Arlington, VA 20598



**Transportation
Security
Administration**

November 20, 2009

MEMORANDUM FOR: Barbara Powell
Federal Security Director
Newark Liberty International Airport (EWR)

Russell McCaffery
Acting Federal Security Director
Newark Liberty International Airport (EWR)

FROM: John Bettac
SPOT Program Manager
Office of Security Operations

SUBJECT: SPOT Standardization Team Report

INTRODUCTION

Assistant Federal Security Director-Screening (AFSD-S) at Newark Liberty International Airport (EWR) requested that the Standardization Team (STAN) visit to observe and evaluate Behavior Detection Officers (BDOs) at the airport. This report summarizes the STAN's observations and overall operational evaluation of EWR's BDO program from the period of November 2 to November 5, 2009.

BACKGROUND

The Aviation Transportation Security Act of 2001 (ATSA) requires the TSA Administrator to provide for the screening of all passengers boarding a passenger aircraft. Additionally, the Implementing the Recommendations of the 9/11 Commission Act of 2007 states that TSA "shall provide advanced training to transportation security officers for the development of specialized security skills, including behavior observation and analysis...in order to enhance the effectiveness of layered transportation security measures."

The SPOT Program began deploying nationwide in October 2006 to provide behavior observation and analysis training to select employees at the nation's highest-risk airports. The Behavior Detection Officers (BDO)s charged with this task provide an additional layer of security to mitigate the threat of an individual causing harm to the nation's transportation systems.

The SPOT Program Office is charged by the Office of Security Operations (OSO) to provide oversight of the proper operation of the BDO program in cooperation with the Federal Security Director and the Assistant Federal Security Director-Screening (AFSD-S) at each SPOT airport. SPOT Standardization Teams is a to ensure uniform compliance with the SPOT Standard Operating Procedures (SOP) and all other applicable program directives, with the goal of having a well-trained, high-performing SPOT team at each airport.

DISCUSSION

Adherence to Procedures

- During the visit, the STAN Team observed and anecdotally heard stories of BDOs who selected passengers for additional screening based on other reasons than SPOT behaviors. In some instances, these passengers were allegedly selected because of their race or ethnicity. In other situations, the STAN Team observed a BDO select a motorcycle gang member because they frequently carry prohibited items. The SPOT SOP states that the program "must be conducted without regard to race, color, religion, national origin, ethnicity, sexual orientation, or disability." It further states that individuals will only received additional screening where a BDO has observed certain behaviors that are indicative of stress, fear and deception.
- Further, there were instances when BDOs did not complete the required paperwork after making a referral. These practices are not in accordance with Section 3.10.A of the SPOT SOP which states B3; 49 U.S.C. § 114(r)
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- BDOs need to be very aware of the location and activities of their partner. The STAN Team observed one BDO hold up B3 fingers signaling to his partner when they were working B concourse. These practices not only violate the SSI policy by disclosing the point values associated with the SPOT Referral Screening threshold, but are also a poor means of communication between BDOs. as electronic media are provided to BDOs at airports as a means of discreet communication.

Quotas

TSA policy is that the SPOT program must not be held to the use of a quota system because it will compromise the integrity of the program. By mandating a certain level of SPOT referrals, BDOs may feel compelled to select people who are not exhibiting the indicative behaviors.

The standardization team found several instances where the BDOs were assigning behaviors where no such behavior existed or it was inflated by the reporting BDO. The AFSD-S promotes what he calls "metrics" and sees his system as a measure for productivity and promotions. The BDOs interviewed see this as a quota. BDOs state they know it is a major factor in promotions and have been told by the supervisors that they "need more activity." A BDO manager told the BDOs that promotions from F to G band would be based on who had the most referrals. A non-BDO member of the management team reports that quotas were being used and that two BDO supervisors had directed their subordinates that promotions depended on the number of referrals that they made. There is a belief held by the BDO staff and voiced by the first line supervisors that the numbers of referrals are important to getting promoted.

On November 12, 2009, the AFSD-S approached the Standardization Team lead and questioned him again on why referrals could not be used as a measure for BDO performance. The AFSD-S stated that it was the only viable metric.

Training and Implementation

The standardization team noted that many EWR BDOs were not using new implemented programs like the "walk the line" initiative. Some BDOs appeared to have forgotten some of their training, including casual conversation, knowledge of behaviors, and appropriate resolutions, rather than "trip stories."

There are a number of underlying causes to the behavior noted above. Some BDOs were initially trained as long ago as 2006. A lack of recurrent training has made it difficult to reinforce what had been learned during training. Members of the National Training Team report that the "Walk the Line" procedure was not stressed as being critical in those early classes. This lack of training may have caused the inability on the part of some BDOs to demonstrate this procedure to the standardization team. First line supervision, however, should have corrected that lack of training by adopting the technique from newly trained BDOs.

Management

BDO managers must continue to work and employ their SPOT training. The STAN team observed, however, that if BDO managers do not work the floor, their skills are diminished in a short amount of time. Because managers do not mentor, new BDOs quickly become rusty because they have no one to ask about proper technique. Managers do not properly correct BDO mistakes. Managers get a "no confidence" vote from the BDOs.

The BDO managers are not sufficiently maintaining their behavior detection skills as required in the SPOT SOP. (b)(3):49 U.S.C. § 114(r)

(b)(3):49 U.S.C. § 114(r)

(b)(3):4 Behavior observation is a perishable skill which requires practice and is soon lost without it. Not maintaining certification in behavior observation is detrimental not only to the BDO manager, but also to their team of BDOs, due to the manager's inability to provide proper supervision and counseling in job performance.

Failure to Properly Employ BDO Assets

Another issue observed was allocation of BDO assets for non-BDO functions. The EWR non-BDO manager reported the BDOs are a constant source for filling the TDC position particularly on Sundays and Mondays. The FSD has a contingency plan and BDOs are one of the larger sources of personnel on that plan. This manager also reported that this past summer saw a "horrendous" use of BDOs as TDCs. This practice is in direct conflict with the above direction provided by the Assistant Administrator of Security Operations.

Several communications regarding the proper use of BDOs have been released to FSDs from OSO Senior Leadership. SPOT OD 400-50-1-9A, dated April 28, 2009, and signed by Assistant Administrator Lee Kair, states "Transportation Security Officers (TSO) selected and designated as Behavior Detection Officers (BDO) must be exclusively assigned to SPOT duties on a full time-basis unless otherwise assigned by the FSD for exigent circumstances, such as responding to critical incidents."

The SPOT Operational Directive (OD) further states that "BDOs will not perform traditional TSO screening functions except to establish and maintain certifications for whole bag searches and Explosives Trace Detection as part of their BDO duties."

Additionally, an FSD Communication dated October 7, 2009 states "The redirection of BDOs may be implemented for 20 minute intervals and may be extended as deemed necessary by the senior TSA management official. Extensions must be reported to the TSOC."

Two unsigned letters allegedly from the EWR BDOs to the SPOT Assistant General Manager, the SPOT Program Manager and the OSO Assistant Administrator allege similar events. One letter states all BDO assets at times were reassigned to CTX bag rooms. This was also stated to SPOT program office personnel at EWR on November 17, 2009.

RECOMMENDATIONS

1. Re-Train the Entire BDO Workforce

The Standardization Team recommends retraining the BDO workforce, including all supervisors and managers. The BDOs will be fully cognizant of all the techniques that a BDO should be using. It is incumbent upon the EWR management to set a new culture where BDO work is used properly and valued for the security layer that it provides.

2. *Strengthen the Law Enforcement Relationship*

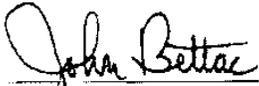
It is recommended that the AFSD-LE work on the relationship problem with the Port Authority Police Department (PAPD), with Customs and Border Protection and with any other law enforcement agency working at the airport. LEOs must first understand the program through training and then must understand their role in responding to a call for assistance. BDOs are not empowered beyond identifying threats.

3. *Establish Clear Communications between Airport Management and BDOs*

Clear communications from senior FSD management to first line supervisors and subsequently to BDOs need improvement. While some informational fall-out is expected in any large organization, many EWR BDOs report that they are not receiving the information that is important to their job. When questioned about some recent policy changes, the team found that several BDOs were unaware of any changes.

4. *Restore the Overall Trust Within the Workforce*

A new paradigm must be established between FWR's senior management and the first line BDO supervisors. The lack of trust verbalized by the AFSD-S on several occasions combined with a failing grade from almost all interviewed subordinates points to a serious problem. While there may be supervisors who are not fulfilling their responsibilities, identify the ones who are putting forth an effort and re-establish the relationship. This recommendation will be accomplished when the BDOs, first line BDO managers and senior management report that there is a tangible improvement over past practices.



John Bettac
SPOT Program Manager

11-20-2009

Date

Cc:
Lee Kair
Assistant Administrator

Jim Blair
Area Director

Scott Johnson
General Manager, Field Operations

Daniel Burche
Assistant General Manager



Transportation
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To: Barbara Bonn Powell, Federal Security Director
Newark Liberty International Airport

From: Carol Bernardini, Behavior Detection Officer - Transportation Security Manager (Inquiry Officer)
John Ferragamo, Behavior Detection Officer - Transportation Security Manager (Inquiry Officer)
Boston Logan International Airport

Date: January 25, 2010

Re: Administrative Inquiry

On December 17, 2009, you appointed us to conduct an administrative inquiry into allegations that Behavior Detection Officer - Transportation Security Managers (TSM) Luis Chevere and Robert Hakius have utilized quotas in order to evaluate the performance of their subordinate Officers and/or have encouraged profiling of passengers in order to meet quotas established. For the purposes of this inquiry: "quotas" shall refer to a set number or percentage of Screening of Passengers by Observation Technique (SPOT) selectee referrals that may serve as a minimum or a goal; and "profiling" shall refer to the use of specific criteria, related to the race, ethnicity or nationality of a passenger, to select and search a passenger more carefully and extensively than would have occurred without the use of such criteria.

During our administrative efforts we requested any documents that may exist regarding these allegations and we received an excel spreadsheet containing monthly and yearly averages of all the Behavior Detection Officer's (BDO) SPOT referrals, including Law Enforcement Officer (LEO) referrals and Attachments 1 - 7 of the Standardization Report issued by the SPOT Program Office.

In our efforts to conduct this inquiry, we interviewed forty (40) individuals. Included in this group were six SPOT TSMs (George Schultz, Joseph Yurechko, Vincent Mossa, Matt Dohn, Robert Hakius and Luis Chevere), as well as TSM (b)(6) TSM (b)(6) and Assistant Federal Security Director - Screening (b)(6). We requested written statements from fifteen interviewees and received ten, with the exception of TSMs (b)(6) (b)(6) Officer (b)(6) specifically declined as she was concerned about BDO-TSM Luis Chevere's ability to view her statement and potentially take retaliatory actions against her as a result.

In summary, in the course of our inquiry we found no evidence to support the allegation of a quota system. However, we collected information regarding the allegation of profiling that would result in a reasonable conclusion that such activity was both directed and effected on a limited basis at EWR. Below we have included more detailed information associated with the inquiry, as well as some recommendations that may be beneficial to your SPOT program at EWR.

Potential use of quotas:

Several individuals stated orally and in writing, prior to and during our inquiry, that certain BDO-TSMs utilized quotas in order to evaluate the performance of their Officers. When we asked these individuals to provide specific names or instances when such information about quotas was conveyed to the Officers or when promotions were made based on a criterion of quotas, the individuals stated they couldn't remember the necessary details or that they heard the information third hand but had no firsthand knowledge. None of the foregoing individuals provided any supporting documentation or detailed information that sustains the statements they made.

During our inquiry, we were provided with an excel spreadsheet containing monthly and yearly averages of all the BDO's SPOT referrals, including LEO referrals. Nowhere on this document is there any indication that BDOs were either above or below an established quota. However, most of the BDOs were aware that the document existed and believed it was the sole criteria which the TSMs used for promotions.

During our interview with BDO-TSM (b)(6) he stated that the document was a method of statistical analysis that he created and used to identify potential anomalies or weaknesses among the BDOs. He further stated that if any BDOs were above or below average (based on a bell curve), he would work with these individuals to resolve the discrepancy. BDO-TSM (b)(6) specifically denied that referrals were the sole determining factor for promotions. While BDO-TSM (b)(6) was aware that the document existed it was not something he generated or used and when asked about the use of a quota system, BDO-TSM (b)(6) stated that one does not exist.

The BDO-TSMs as a whole, not just BDO-TSM (b)(6) and BDO-TSM (b)(6) were emphasizing productivity during daily briefings. This emphasis, likely in combination with the awareness of BDO-TSM (b)(6) productivity report, left many BDOs with the impression that increased referrals would be viewed positively. When the BDOs were asked about a quota system, they generally stated that they were briefed to increase their "activity, productivity or numbers". Numerous BDOs interviewed stated that there was an over-emphasis on generating referrals to keep Newark in competition with other airports. The BDO-TSMs response to this was they were asking the BDOs to be vigilant while on duty.

Finding:

There is no supporting evidence to reasonably conclude that a quota system was established. The BDO-TSMs may have been briefing vigilance and focus while working in the field; however the perception from the BDOs was numbers and productivity. The overwhelming majority of BDOs however expressed concern that the BDO-TSMs' focus was solely on increasing the number of referrals and LEO calls. The message and the manner in which it was delivered was inconsistent, confusing and in some cases, misleading. The miscommunication on this issue evolved into allegations of a quota system and, in turn into the sole basis for promoting BDOs. The document created to track BDO referrals seems to have been used as a tool to detect certain performance factors (i.e. over assessing or not seeing behaviors), yet it was perceived as standard for promoting BDOs to the Expert position. While productivity should not be used as the sole factor for evaluating performance, it can be beneficial to determining areas that need improvement.

Encouraged profiling of passengers:

Unlike the allegations regarding the potential use of a quota system, when BDOs were asked about participation in potential profiling activities they were forthcoming with specific names and direction regarding the same.

The practice of the BDOs at EWR based on the direction from specifically BDO-TSM (b)(6) and to a lesser degree other TSMs, was to observe passports at the Travel Document Checker (TDC) position for a lack of valid visas and/or entry stamps. Based on the statements of the BDOs it appears that different direction as to how to address such situations were provided. When the BDOs observed a passenger without a valid visa and/or entry stamp the BDOs were to refer such passenger as a SPOT Selectee, or call a BDO-TSM for guidance, or directly contact Port Authority Police Department or Customs and Border Protection.

It has never been the practice of the SPOT program to refer a passenger to selectee screening based on the above criteria. Prior to the TSA assuming the responsibility for the TDC function, if a passenger had already been referred to SPOT selectee screening and during the course of such screening was determined not to possess a valid visa and/or entry stamp, that individual would have been referred to LEO as a result. However, even this process was eliminated (except in limited circumstances) in an email issued by the SPOT program office on October 24, 2008 titled "Clarification on BDO TDC Procedures" (attached).

The following information was provided by BDOs with respect to the encouragement of profiling of passengers:

- BDO (b)(6) stated (written statement dated January 8th, 2010 attached), (b)(6) instructed me to watch flights going to Puerto Rico and Mexico, he also instructed me to stand next to the Travel Document Checkers to ensure that all passports contained visas. If the passports did not contain visas I was instructed to refer those passengers for SPOT selectee screening, even if the passengers did not show behaviors."
- BDO (b)(6) stated (written statement dated January 12th, 2010 attached), "When a BDO working TDC came across a passenger with a foreign passport missing either a US entry stamp or a visa whoever the BDO team working that particular terminal was notified by their government cell phone. The BDO team would...notify the walk-through officer to refer the individual(s) for additional screening...Once inside the BDO team would start the referral and turn it into a LEO call". Additionally BDO Anemone in his written statement alleges that this activity occurred as a result of the direction of (b)(6)
- BDOs (b)(6) have written statements (attached) with similar situations involving BDOs at the TDC. (~~Note that BDOs (b)(6) have EEO complaints pending against (b)(6) and possibly other managers, for promotions/discrimination.~~)
- Some BDOs stated that individuals without visas or entry stamps were not referred for screening; they were referred directly to Customs and Border Patrol (CBP) at the TDC. TSM Lisa Nelson stated (written statement attached) that BDOs working TDC "sometimes noticed that the passenger did not have the proper stamp or visa and they called CBP or LEO but they did not refer the passenger."

- BDOs (b)(6) allege that (b)(6) would often times replace a BDO team at the checkpoint that was not checking for visas with a team that would perform this practice.
- Additionally, the email directive of October 24, 2008 titled "Clarification on BDO TDC Procedures" was not implemented until the refresher training from the Standardization Team in November 2009.

In addition to the allegations contained above, BDO-TSM (b)(6) significant and sustained efforts to train the BDOs on document validation reinforced the perception among the BDOs that their focus was to identify potential illegal immigrants and not focus on observing all passengers for anomalous behavior. While document validation (i.e. to be able to identify fraudulent documents) is a component of the BDO function it is not the primary focus of the SPOT Program.

Furthermore, the most common statement made by the BDOs interviewed regarding profiling was that TSM-BDO (b)(6) had briefed the BDOs to watch out for "Dominicans" or "Dominican baggage handlers" for illegal activity. All of these BDOs have provided written statements (attached). When we asked BDO-TSMs (b)(6) about these comments, both stated that it was intelligence driven, based on an incident involving drug smuggling from a Transportation Suspicious Incidents Report (TSIR). Further investigation into this TSIR revealed an incident at Newark Airport involving a flight from the Dominican Republic and two airline employees (TSA TSIR - dated September 15th, 2009 attached). This information that was included in the TSIR does not serve to direct any changes in SPOT protocols and the only basis for altering the criteria for SPOT referrals are identified in Section 2.1D of the SPOT SOP. In essence, it has to be driven by intelligence and approved by the FSD. This process does not seem to have been adhered to with respect to the above direction by BDO-TSM (b)(6)

Allegedly, other comments were made during briefings by (b)(6) that "Dominicans are criminals and/or untrustworthy" and these comments were perceived as racially derogatory remarks by several BDOs in the briefing.

Findings

Due to the abundance of testimony and written statements regarding direction to refer passengers without valid visas or stamps, as well as the racial comments made by (b)(6) it is reasonable to conclude that a procedure for profiling or identifying illegal aliens was implemented by several BDOs.

With regard to the statements made based on the TSIR report, such information neither was actionable intelligence to look at a specific race or ethnicity, nor was the process followed in accordance with the SOP. It should have been stated clearly to the team that it was briefed for situational awareness only; instead it resulted in a misdirection of the team's mission.

Recommendations:

- We propose appropriate corrective action be initiated.
- The promotion process for BDOs remains misunderstood and continues to be a cause for concern amongst the majority of the team. This in turn has been a catalyst for negative behaviors among the staff (arguments regarding whose name is listed 1st for SPOT referrals), reinforcing their mistaken belief that they must produce more referrals and LEO calls in order to be promoted. A thorough explanation of the promotion process should mitigate these concerns.
- A thorough explanation of the rationale and use of the document tracking BDO referrals should be communicated to all BDOs.
- Additionally, the motivation and focus of the SPOT team should be on security and the TSA mission. It is up to management to find better ways to encourage and promote enthusiasm for the mission, without appearing to focus on numbers alone.
- Management should ensure all current management/operational directives are followed and all SPOT screening is conducted in accordance with Standard Operating Procedure.
- The SPOT coordinator should closely evaluate the program and stay involved as much as possible to fully understand the dynamics between BDO staff and management. This will alleviate any disconnect between the BDOs on the floor and upper-management.
- The BDO-TSMs and any Management staff available should participate in the monthly SPOT Teleconferences, hold weekly meetings and ensure a management representative attends BDO council meetings.
- The entire BDO staff and management would benefit from meeting monthly or bi-monthly to discuss issues of importance and relevance to the SPOT Program. Furthermore, weekly briefing notes could be recorded and disseminated to ensure the BDOs are up to date with the latest procedures or concerns.
- Management should participate in EEO training to ensure that comments and briefings to the staff are clear and appropriate.
- Daily work assignments for BDOs should be rotated such that BDOs routinely are partnered with varied BDOs. This rotation should serve to make all BDOs familiar with all other BDOs and allows opportunity for the strengths of each to be communicated and migrate among the partners.
- The Conflict Management team that exists at Newark should work with the BDO management and staff to implement techniques and solutions for the group as a whole.

Thank you for the opportunity to work with your staff. We would like to particularly thank Kimberly Murphy, who was especially helpful during our stay and in providing assistance and expediting appointments. We are available at any time to discuss the above in more detail. Thanks again for this opportunity.

SENSITIVE SECURITY INFORMATION

U.S. Department of Homeland Security
Office of the Federal Security Director
Newark Liberty International Airport
Liberty Hall Corporate Center
1085 Morris Avenue, 2nd floor
Union, New Jersey 07083



Transportation
Security
Administration

February 17th, 2010

From: DAFSD Patrick J. Boyle
To: FSD Barbara Powell
Re: Administrative Inquiry regarding BDO Manager (b)(6)

On February 4th, 2010 you appointed me to conduct an administrative inquiry into the allegation that BDO Manager (b)(6) had engaged in retaliation against members of the BDO work force at Newark Liberty International Airport.

I conducted interviews of 34 members of the BDO work force and 3 BDO managers assigned to the second shift. The only officers not interviewed were three members (b)(6) (b) after SM (b)(6) was removed from the floor and BDO (b)(6) who is (b)(6)

I found that Security Manager (b)(6) repeatedly engaged in and directed his officers to engage in racial profiling and improper referrals of certain groups of people such as Mexicans. Proper procedures were not followed and SM (b)(6) issued instructions to the work force contrary to established policies and engaged in or threatened retaliation for those who did not accept his direction. SM (b)(6) routinely assigned BDO's to stay in close proximity to the Travel Document Position (TDC) so they could spot foreign passports or foreign looking passengers. When a foreign passport or foreign looking passenger was spotted BDO's were told by SM (b)(6) to look through it for the presence of entry stamps and visas. If none were found the passenger was made a LEO referral and Customs and Border Protection was called. This was done without regard to behaviors and on more than one occasion he ordered BDO's to assign behaviors to a passenger to justify the referral and cover up the fact that it was done as result of a document check.

SM (b)(6) created the perception if not the reality that the BDO program was a numbers game and those who produced would be looked upon favorably by management while those who did not would be punished or would not be promoted. In addition he instructed the BDO workforce that if they wanted to get promoted they needed to conduct these improper referrals. There is evidence to suggest that certain BDO's routinely

SENSITIVE SECURITY INFORMATION

singled out certain groups of people for referral without regard to behavior. BDO (b)(6) was repeatedly identified as doing this and his high number of referrals would tend to support this.

I interviewed both BDO-TSM (b)(6) and BDO-TSM (b)(6) regarding these allegations. BDO (b)(6) denied any knowledge of any improper referrals or racial profiling. BDO (b)(6) was identified as being present at a briefing being given by SM (b)(6) where SM (b)(6) directed the BDO's to check passports for the presence of visas and entry stamps. SM (b)(6) was interviewed and denied engaging in racial profiling or directing anyone to conduct improper referrals.

The following Newark Liberty International Airport Behavior Detection Officers gave statements to me relative to this investigation. A brief synopsis of their statements is provided for your reference:

(b)(6) Stated that (b)(6) told him to watch for Dominicans and (b)(6) repeatedly stressed that BDO's produce LEO calls and increase their activity if they wanted to get promoted.

(b)(6) Stated that BDO (b)(6) singled out a flight from Puerto Rico while on playbook and when he brought it to the attention of SM (b)(6) the next day, SM (b)(6) told him that it was none of his concern.

(b)(6) She was told by SM (b)(6) to concentrate on visa and entry stamps and to look for self deportees. When self deportees were found they were to be made a LEO call and referred to Customs and Border Protection. BDO (b)(6) provided me with a reference list she was given by SM (b)(6) on what to look for on a passport. A copy of this reference is attached to her statement. BDO (b)(6) stated that when she refused SM (b)(6) collateral duty she was harassed by him, called repeatedly on phone by him, followed to the bathroom and when assigned to B-3 Check point removed from the checkpoint by SM (b)(6) when Air India passengers started to arrive and replaced with BDO (b) who would then start making referrals and LEO calls. BDO (b)(6) also stated that BDO (b)(6) was assigned to work alone by SM (b)(6) and had the run of the airport.

(b)(6) Stated that BDO (b)(6) did a referral on a Mexican self deportee and when (b)(6) questioned SM (b)(6) the next day about it was told it was none of his concern. (b)(6) also state that when he graduated BDO training SM (b)(6) told him don't pay attention to what you learned in training this is how we do it in Newark. We check passports to see if they are fraudulent.

(b)(6) SM (b)(6) instructed her to look at visa and entry stamps, SM (b)(6) told her to look at Mexicans because they were easy and it was a numbers game (b)(6) stated that this continued for a few years until October or November 2009. (b)(6) also stated that SM (b)(6) made comments about Dominicans and told her to watch the Dominican baggage handlers because they had easy access to aircraft.

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(b)(6) Stated that SM (b)(6) never allowed her to work with other black female BDO's. If she was assigned by another manager to work with a black female (b)(6) would split them up. She stated that other managers allowed her to work with black females. (b)(6) stated that (b)(6) put BDO's behind the TDC position for the purpose of looking at visas and entry stamps. If there was no visa or entry stamp in the passport a LEO call was generated without regard to behaviors or points. When DFSD (b)(6) put out the directive to stop looking at passports (b)(6) told (b)(6) to disregard it. (b)(6) stated (b)(6) assigned her a collateral duty to teach classes on fraudulent documents. When (b)(6) refused she and (b)(6) argued about it and when (b)(6) told (b)(6) that she was going to (b)(6) to discuss it he threatened to write her up if she did it. TSI (b)(6) who was a BDO at the time witnessed and confirmed this event took place. (b)(6) stated that in September 2009 (b)(6) briefed the BDO workforce about Dominican baggage handlers who were most likely to be involved in the drug trade. About two days later Chevere called an audible and assigned (b)(6) and (b)(6) to go out on the ramp and watch the Dominican baggage handlers. (b)(6) states that she went out on the ramp and checked employee identification cards for expiration dates.

(b)(6) stated whenever (b)(6) was working she was directed to stand behind TDC podiums and look for illegal aliens. (b)(6) directed her to look for expired visas, no visa and no entry stamps.

(b)(6) Stated that SM (b)(6) instructed him to check travel documents of traveling passengers during casual conversation. He was instructed to check passports, identification, I-94 and all other documents used to enter and exit the country.

(b)(6) Stated SM (b)(6) gave lectures and classes on visa waivers and visa requirements.

(b)(6) stated that (b)(6) instructed him to check for entry stamps when doing casual conversation. Stated that this was standard operating procedure until the standardization team visit in late September 2009.

(b)(6) SM (b)(6) always reminded the BDO workforce to check passports, visas and entry stamps.

(b)(6) SM (b)(6) conducted BDO out briefings and instructed the work force to pay attention to passports, visas and entry stamps.

(b)(6) Stated that SM (b)(6) informed him that he was going to go after the BDO's for every little thing when he got back on the floor.

(b)(6) Was told to target certain flights based on intelligence briefings. Some BDO's were out front of the TDC position checking documents but he does not know who told them to do this or if they did it themselves.

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(b)(6) SM (b)(6) had BDO's out front of the TDC checking documents for the purposes of finding people with no visas, entry stamps or I-94's. SM (b)(6) referred a male and female (Mother and son) at the A-3 checkpoint on 8/20/2008 (incident report attached) while doing TDC duties due to behaviors that he observed that were not observed by (b)(6) and her team. SM (b)(6) assigned people to work on projects to find security features of passports from different countries. People who refused to do it were threatened by SM (b)(6). He told them that they would be written up or not have a job much longer. (b)(6) stated that she was often assigned to B-3 to check documents and SM (b)(6) would stand there and make sure that they did it. (b)(6) states that she flipped through the documents to appease (b)(6) but did not refer anyone with a missing Visa or entry stamp. If (b)(6) saw someone in line that caught his interest he would actually take over TDC functions to look at that person's documents. (b)(6) also provided emails from (b)(6) to her and the BDO workforce that asked questions about travel documents such as I-94's and contained CBP traveler entry forms and Visa Waiver countries.

(b)(6) SM (b)(6) and (b)(6) often stated no quota but we want to see activity. Both managers stated that it helped to get promoted if you had your name on top of referral sheets. (b)(6) always made sure that BDO's knew visa codes and visa waiver countries. (b)(6) directed (b)(6) to stand behind TDC position for the purpose of reviewing travel documents and (b)(6) also reviewed travel documents behind the TDC.

(b)(6) (b)(6) gave training on Visas, I-94 and entry stamps. (b)(6) told him to check for these at TDC position. (b)(6) stated he often worked with BDO (b)(6) who stood at the TDC podium and looked at the travel documents of males and females who looked Latin. When (b)(6) got one with no entry or visa stamp he initiated a LEO call without regard to behaviors. SM (b)(6) often pulled (b)(6) and (b)(6) off of a check point and sent them to the gates where they were supposed to pull Latin American and Arabic looking passengers. People without visas or entry stamps were then referred to the ground based FAMS and sometimes CBP. SM (b)(6) always stressed numbers and said come time for promotion numbers would be one of the things looked at.

(b)(6) SM (b)(6) instructed him to pay special attention to passports from Latin American or Middle Eastern countries and look to see if they were fraudulent or were missing visas and entry stamps. (b)(6) states (b)(6) assigned him to the TDC position to check these documents. (b)(6) stated that (b)(6) instructed him to call CBP if a passenger had no visa or entry stamps and was told to make the passenger a referral regardless of behaviors. (b)(6) states that this went on from 2007 until they were retrained in 2009. SM (b)(6) told (b)(6) that if he wanted to get promoted he had to produce LEO calls and checking documents was a way to accomplish this. (b)(6) stated that the first six expert promotions were given out this way.

(b)(6) told him to pay special attention to visas and entry stamps of certain countries such as Mexico or from Latin America. This was part of fraudulent

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document training that (b)(6) gave. (b)(6) described a referral at C3 or C2 where two males were stopped by BDO (b)(6) for no entry stamps or visas. (b)(6) states that (b)(6) told (b)(6) to assign them (b)(3):49 of deception and to call Customs.

(b)(6) Former BDO was told by (b)(6) to check passports for the presence of visas and entry and exit stamps. If these were missing (b)(6) had them give the passenger behaviors, make the passenger a referral and call customs. (b)(6) witnessed altercation between BDO (b)(6) and (b)(6) about collateral duties and recalls (b)(6) threatening (b)(6) with a write up if she went over his head.

(b)(6) Was told by others that (b)(6) instructed BDO's to stand at TDC position and look at documents.

(b)(6) Instructed by (b)(6) to look at a flight to Puerto Rico because there was a large amount of Dominicans traveling on it. Instructed by (b)(6) to look at documents for lack of Visas and entry stamps.

Based on my investigation, there is over whelming evidence to suggest that BDO -TSM (b)(6) engaged in or directed BDO's under his supervision to engage in prohibited activities on a regular basis such as:

1. Profiling of passengers based on appearance or race
2. Checking of Travel Documents for the presence of entry stamps and visas
3. Referrals made without required behaviors present/Assigning nonexistent behaviors to passenger to justify referrals
4. Improper Law Enforcement referrals to Customs and Border Protection (CBP)
5. Threats of retaliation and retaliation for not following his direction to conduct improper referrals of passengers

It is the recommendation of the undersigned that Behavior Detection Officer-Transportation Security Manager (b)(6) be the subject of disciplinary action for the five prohibited activities he performed or ordered subordinates under his supervision to perform.



Patrick J. Boyle
Deputy Assistant Federal Security Director
Newark Liberty International Airport
Screening Operations

**MERIT SYSTEMS PROTECTION BOARD
NEW YORK FIELD OFFICE**

(b)(6)

Appellant,

DOCKET NUMBER

(b)(6)

v.

DEPARTMENT OF HOMELAND
SECURITY,

Agency.

DATE: June 24, 2011

Stephen Millard, Esquire, Covina, California, for the appellant.

James Penzi, Esquire, Philadelphia, Pennsylvania, for the agency.

BEFORE

María M. Dominguez
Administrative Judge

INITIAL DECISION

INTRODUCTION

On October 18, 2010, the appellant filed a timely¹ appeal with the Merit Systems Protection Board (the Board) challenging the agency's decision to

¹ The 30th day for filing an appeal with the Merit Systems Protection Board was October 16, 2010, which fell on a Saturday. The appellant therefore had until October 18, 2010 to file an appeal since that was the first workday after October 16, 2010. See 5 C.F.R. § 1201.23.

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demote him, effective September 16, 2010, from his position of Transportation Security Manager – Behavior Detection Officer (TSM-BDO) with the agency's Transportation Security Administration (TSA) at Newark Liberty International Airport, to the position of Transportation Security Officer (TSO) based on charges of inappropriate conduct, poor managerial judgment, and lack of candor. See Initial Appeal File (IAF), Tabs 1; 11, Subtabs 4a; 4b.

The Board has jurisdiction over this appeal. See 49 U.S.C. § 40122(g)(3) (2000); see also 5 U.S.C. §§ 7511(a)(1)(C), 7512(3) and (4), and 7513(d) (2000). The hearing that the appellant requested was held in New York, New York on April 25, 2011. For the reasons set forth below, the agency's action is AFFIRMED.

ANALYSIS AND FINDINGS

Factual Background

Certain facts are not in dispute². On May 25, 2008, the appellant was promoted to his position of TSM-BDO, SV-1801-H, with TSA's Newark Liberty International Airport and remained in that position until September 16, 2010. IAF, Tab 11, Subtab 4g. This position was a high level security position in a Federal security and law enforcement agency. See *id.*, Tabs 27; 25, agency's prehearing submissions, stipulation contained in ¶ 2.

As a TSM-BDO, the appellant had supervisory duties and occupied the highest operational level of passenger and baggage security screening. Among

² During the prehearing conference on March 30, 2011, the parties stipulated to a number of facts that were contained in each of the parties' prehearing submissions. See IAF, Tab 27, order and summary of telephonic prehearing conference.

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his responsibilities were the following: managing the local screening of passengers by observation techniques (referred to as "SPOT"); managing subordinate Behavior Detection Officers (BDOs); exercising tact and diligence to avoid embarrassment to the traveling public and TSA; assessing individuals' behaviors which are indicative of terrorist activity; and delivering clear and concise oral and written briefings involving the SPOT program. *See* IAF, Tab 11, Subtab 4h; *see also id.*, Tab 25, agency's prehearing submissions, stipulation contained in ¶ 2.

On December 17, 2009, Federal Security Director Barbara Powell (FSD Powell), of Newark Liberty International Airport, initiated an investigation (referred to as the "Boston inquiry"³), into allegations that the appellant and (b)(6) another TSM-BDO, had "utilized quotas to evaluate the performance of their subordinate officers and/or [had] encouraged profiling of passengers in order to meet [the] quotas [that were] established." *Id.*, Tab 25, Agency Exhibit 1 at 1. Although the investigators assigned to conduct the Boston inquiry did not find enough evidence to support a finding that a quota system had been established, they concluded that BDOs had been directed that upon identifying a passenger without a valid U.S. Visa or a U.S. entry stamp, they were to either call a TSM-BDO for guidance or, to refer that passenger as a SPOT selectee, meaning the passenger was directly referred to Customs and Border Protection (CBP) or to the Port Authority Police Department, which the agency asserts was contrary to its policies. *See id.* at 3.

³ The agency asserts that it did not rely upon the results of the Boston inquiry to demote the appellant. *See* Hearing Transcript (HT) at 42-45, testimony of Russell McCaffery, Deputy Security Director and the deciding official here; *see also* IAF, Tab 11, Subtab 4b, n.3.

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On February 4, 2010, FSD Powell appointed Deputy Assistant Federal Security Director Patrick J. Boyle (DAFSD Boyle) to conduct another investigation into allegations that the appellant had retaliated against his subordinates for cooperating with the investigators of the Boston inquiry. IAF, Tab 11, Subtab 4e; *see also* Hearing Transcript (HT) at 88, testimony of FSD Powell. A total of 37 employees were interviewed, i.e., 34 members of the BDO workforce and 3 TSM-BDOs. *See id.*, Subtab 4e at 1; 6-19; 53-71; 80-90. DAFSD Boyle's investigation resulted in a finding that the appellant had "repeatedly engaged in and directed his officers to engage in racial profiling and improper referrals of certain groups of people such as Mexicans." *Id.* at 1. In his February 17, 2010 investigative report, DAFSD Boyle recommended that the appellant be disciplined based on his findings. *See id.* at 5.

On February 22, 2010, Deputy Federal Security Director Russell McCaffery (DFSD McCaffery) held a pre-decision discussion with the appellant, during which time he advised him of the allegations and the type of administrative action, if any, that could result from them. *See id.* at 72; *see also* HT at 13-14. Subsequently, in a letter dated April 7, 2010, Assistant Federal Security Director William H. Smith proposed to remove the appellant. *Id.*, Tab 11, Subtab 4d. The appellant provided an oral reply to the proposed action on April 21, 2010, during which time he also submitted documentation to the deciding official for his consideration. *See id.*, Subtabs 4c; 4b. By decision letter dated September 15, 2010, DFSD McCaffery mitigated the proposed removal action to a demotion from the appellant's position of TSM-BDO to Transportation Security Officer, SV-1902-E, effective September 16, 2010. *Id.*, Subtabs 4b; 4a. The letter informed the appellant of the reasons upon which the

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decision had been made, as well as advised him of his right to appeal. See IAF, Tab 11, Subtab 4b. This appeal followed. *Id.*, Tab 1.

Agency's burden of proof

TSA was established by the Aviation and Transportation Security Act (ATSA), Public Law 107-71. Because the appellant is a TSA employee, this appeal is governed by the provisions of the ATSA. *Connolly v. Department of Homeland Security*, 99 M.S.P.R. 422, ¶ 9 (2005). Under the ATSA, TSA employees are covered by the personnel management system that is applicable to employees of the Federal Aviation Administration (FAA) under 49 U.S.C. § 40122, except to the extent that the Under Secretary of Transportation for Security (now the TSA Administrator) modifies that system as it applies to TSA employees. 49 U.S.C. § 114(n); *Lara v. Department of Homeland Security*, 97 M.S.P.R. 423, ¶ 9 (2004).

Under the FAA personnel system, the provisions of title 5 do not apply except in specifically enumerated instances, and chapter 75 is not one of them. See 49 U.S.C. § 40122(g)(2). Thus, the Board has held that instead, the FAA's internal procedures are applicable. See *Hart v. Department of Transportation*, 109 M.S.P.R. 280, ¶¶ 10-11 (2008). In *Winlock v. Department of Homeland Security*, 110 M.S.P.R. 521, ¶ 9 (2009), the Board noted that, pursuant to ATSA, the TSA Administrator modified the FAA's system by issuing Management Directive (MD) 1100.75-3, "Addressing Conduct and Performance Problems." Because MD 1100.75-3 did not purport to modify the list of title 5 provisions that are expressly applicable to the FAA, the Board concluded that the provisions of that directive, rather than chapter 75, apply in appeals of disciplinary actions against TSA employees. See *Winlock*, 110 M.S.P.R. 521, ¶ 9.

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Unlike chapter 75, 5 U.S.C. § 7701 is a provision that is expressly made applicable to the agency by section 40122(g)(2)(H). Section 7701(c)(1)(B) provides that the Board will sustain the decision of an agency to take a disciplinary action against an employee only if the charge brought against him is supported by a preponderance of the evidence. *See* 5 U.S.C. § 7701(c)(1)(B). Under the Board's regulations, a preponderance of the evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. *See* 5 C.F.R. § 1201.56(c)(2). In light of the applicability of chapter 77 to appeals by those TSA employees over whom the Board has jurisdiction, I find that the Board's definition of "preponderant evidence" is applicable to the instant appeal and I will apply the Board's regulatory definition in analyzing whether the charge is proven in this case by preponderant evidence.

Pursuant to MD 1100.75-3, TSA may take an adverse action against an employee for "such cause as will promote the efficiency of the service." *See* IAF, Tab 11, Subtab 4f, ¶ 6.E(1). MD 1100.75.3 also requires that there be a nexus between a legitimate governmental interest and the employee's misconduct that is the basis for the disciplinary action. *See id.*, ¶ 6.E(2). Under 5 U.S.C. § 7701(c)(2)(A), an adverse action must be sustained if the employee cannot show harmful error in the application of the agency's procedures in arriving at such a decision; the decision was based on a prohibited personnel practice as described in 5 U.S.C. § 2302(b); or the decision was not in accordance with the law. *See* 5 U.S.C. § 7701(c)(2)(A).

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Charge 1: The agency met its burden of proof on its charge of inappropriate conduct.

A charge of "inappropriate conduct" has no specific elements of proof; it is established by proving that the employee committed the acts alleged in support of the broad label. *Canada v. Department of Homeland Security*, 113 M.S.P.R. 509, ¶ 9 (2010) (citing *Alvarado v. Department of the Air Force*, 103 M.S.P.R. 1, ¶ 22 (2006), *aff'd*, 626 F.Supp.2d 1140 (D.N.M.2009)). Nothing in law or regulation requires an agency to affix a label to a charge of misconduct, and an agency may simply describe actions that constitute misbehavior in narrative form and have its discipline sustained if the efficiency of the service suffers because of the misconduct. *Otero v. U.S. Postal Service*, 73 M.S.P.R. 198, 202 (1997).

The agency relied on two specifications to support this charge, the first of which stated as follows:

Specification 1:

Contrary to current BDO training and TSA policy, on numerous dates starting in early 2008 through November 2009, you instructed Behavior Detection Officers (BDOs) under your supervision to select passengers for behavior detection referrals based on their appearance or ethnicity. You directed BDOs under your supervision to stand at the Ticket Document Checker (TDC) position to look at the passports of certain passengers for the presence of Visas and entry stamps. You identified passengers to be examined at the TDC position on the basis of their ethnicity or appearance.

LAF, Tab 11, Subtabs 4b; 4d.

In support of this specification, the agency provided a copy of its Standard Operating Procedure (SOP) pertaining to its SPOT program (SPOT SOP) which states, in relevant part, that upon observing a passenger exhibiting a number of behaviors that deviate from the environmental baseline or are inappropriate for the environmental baseline, BDOs should engage in casual conversation with that

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passenger while conducting a SPOT⁴ in order to confirm or dispel anomalous behavior. See IAF, Tab 11, Subtab 4e at 74-79. The SPOT SOP describes with specificity the steps that are required before notifying a Law Enforcement Officer (LEO) of the fact that a passenger has exhibited certain SPOT behaviors, after which the passenger's identification and travel documents may be reviewed. See *id.* at 77-78. Finally, the SOP authorizes notifying an LEO of the passenger's presence once that passenger's behaviors add up to a cumulative point value (b)(3):49 U (b)(3):49 U *Id.* at 79. The SOP specifies what point values must be assigned to the various types of behavior. See *id.* at 74-79.

The agency also provided a copy of DAFSD Boyle's February 17, 2010 report of investigation, including copies of all of the witness statements that were gathered during his investigation. See *id.*, Subtab 4e at 6-19; 53-71; 80-90. BDO (b)(6) statement indicated that contrary to the agency's training, the appellant had directed her to concentrate on U.S. Visas and U.S. entry stamps, and to look for self deportees. See *id.* at 66. She also stated that BDOs were instructed to call CBP if a self-deportee was found. See *id.* Both BDO White and BDO (b)(6) reported having been instructed to concentrate on terminal C-3 because a Mexico City flight arrived there. See *id.* at 66 and 61.

In his statement, BDO (b)(6) indicated that when he graduated from BDO training, the appellant told a group of BDOs not to pay any attention to what he was taught during the training because in Newark, referring to Newark Liberty International Airport, what they do is look at passports to determine whether they are fraudulent. See *id.* at 65. Thereafter, he recalled that a Mexican

⁴ As mentioned above, a "SPOT" is a screening of a passenger by observation techniques. See IAF, Tab 11, Subtab 4e at 74-79.

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male had been referred to the CBP based on the fact that his passport had no Visa stamp⁵. See IAF, Tab 11, Subtab 4e at 65.

Both the statements of BDOs (b)(6) and (b)(6) corroborate the fact that the appellant instructed them to look at passports for the presence of U.S. entry stamps and U.S. Visas. See *id.* at 64; 13. Moreover, BDO (b)(6) reported that the appellant told BDOs to check the passports of Mexican passengers because they were easy to detect and "it was a numbers game." *Id.* at 64.

BDO (b)(6) provided a statement indicating that the appellant put the BDOs behind the Ticket Document Checker (TDC) to look at documents and they were instructed that if an invalid document was found, or a Visa and/or entry stamp was missing, they were to make a referral and call CBP. See *id.* at 61. The statements of BDOs (b)(6) and (b)(6) also corroborate this fact. See *id.* at 13; 9. According to BDO (b)(6) statement, referrals that were made to CBP were without regard to behaviors and the referral point system. See *id.* at 61. Moreover, BDO (b)(6) stated that when DFSD McCaffery put out a directive advising BDOs not to check for U.S. Visas, the appellant told them to disregard his directive and continue doing what they were doing. See *id.*

BDO (b)(6) statement also indicated that the BDOs were directed to stand behind the TDC and look for illegal aliens by checking their documents, looking for such things as expired U.S. Visas, a lack of a U.S. Visa and/or a U.S. entry stamp. See *id.* at 60. BDOs (b)(6) and (b)(6) reported having

⁵ During his oral reply, the appellant challenged the deciding official's consideration of BDO (b)(6) statement, arguing that it did not specifically implicate him in the wrongdoing. See IAF, Tab 11, Subtab 4b.

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been instructed to do this during casual conversation. *See* IAF, Tab 11, Subtab 4e at 57; 59. BDOs (b)(6) and (b)(6) also reported having been instructed by the appellant to these documents, although they did not indicate that this was to be done during casual conversation. *See id.* at 55; 56.

DFSD McCaffery testified that the report of investigation, including the statements, supported the specification to the extent that it alleged that the appellant had directed his employees to look at passports for the presence of either a U.S. Visa or a U.S. entry stamp. HT at 25. Although he determined that there was insufficient evidence to show that the appellant directed BDOs to review the documents of passengers based solely on their appearance or ethnicity, he did find that the appellant had directed BDOs to stand at the TDC position to review the documents of passengers who appeared to be of an ethnic descent by looking for the presence of U.S. Visas or U.S. entry stamps on their foreign passports. HT at 26; *see also* IAF, Tab 11, Subtab 4b.

I agree with the deciding official's determination. I find that the agency established by preponderant evidence that the appellant directed BDOs to look at the passports of passengers for the presence of U.S. Visas and/or U.S. entry stamps irrespective of behaviors or points assigned to specific behaviors. I further find that irrespective of whether the appellant directed BDOs to review the documents of passengers based solely on their appearance or ethnicity, his instruction to check passports without first witnessing the required behaviors as provided for under the SPOT SOP constitutes inappropriate conduct, especially in light of the fact that BDOs were told to call CBP or an LEO if the passengers' documents lacked a U.S. Visa and/or a U.S. entry stamp. *See id.*, Subtab 4e at 79; *see also* HT at 24-25, deciding official's testimony. Accordingly, specification 1 is SUSTAINED.

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The second specification related to the charge of inappropriate conduct stated as follows:

Specification 2:

You directed BDOs under your supervision to stand at the TDC position and inspect the passports of foreign passengers for entry stamps or visas. Passengers without entry stamps or visas were referred to Customs and Border Protection (CBP) as a Law Enforcement call. These referrals made to law enforcement were justified by assigning behaviors to the passengers that met the threshold for law enforcement referral, even though they did not display such behaviors. This resulted in at least one Behavior Detection Program Incident Report, dated August 20, 2008, being falsified.

IAF, Tab 11, Subtabs 4b; 4d.

In support of this specification, the agency provided statements by BDOs (b)(6) *See id.*, Subtab 4e at 15; 16; 17; 18-19. They each indicated in their statements that the appellant had instructed them to stand at the TDC position to check whether passengers had proper documentation. *See id.* BDO (b)(6) reported that the appellant would often pull him and BDO (b)(6) off of a check point and put them at gates to do observations, which meant that they were required to pull passengers that appeared to be Latin American or Arabic and check their documents. *See id.* at 16.

BDO (b)(6) statement corroborates that the appellant instructed the BDOs to pay special attention to passengers who appeared to be Latin American or Middle Eastern and to check their documents to determine whether they were in the county legally and to make referrals to CBP regardless of the passengers' behaviors. *See id.* at 15. BDO (b)(6) statement indicates that the appellant told him to pay special attention to passengers from Mexico or other

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Latin American countries and to check for U.S. Visas and entry stamps. *See* IAF, Tab 11, Subtab 4e at 14. In addition, BDO (b)(6) reported that BDO (b)(6) had stopped two males for not having U.S. entry stamps or Visas and when BDO (b)(6) called the appellant, the appellant told him to assign them two signs of deception and to call CBP. *See id.*

BDO (b)(6) reported that the appellant directed her to look at I-94 forms and if they were green I-94 forms, she was required to add 90 days to the date on the form and to call CBP if the passenger was suspected of having overstayed his visit. If the I-94 form was white, she was to look for a U.S. Visa and check the date to determine whether the person had overstayed his visit. *See id.* at 18. She also reported that the appellant had gone as far as giving the BDOs under his supervision a printout listing various types of Visas to educate them on all the variations, which they were supposed to know. *See id.*

BDO (b)(6) also indicated that she was present during an incident at the A-3 checkpoint in 2008 when a man from Mexico and his mother were referred to CBP even though they had not exhibited SPOT SOP triggering behaviors, i.e., behaviors which must be witnessed before a referral to law enforcement is made. *See id.* at 74-79. According to BDO (b)(6) these passengers were referred solely because they did not have proper travel documents, not because they exhibited the behaviors that would warrant being referred to CBP. *See id.* at 18. She also provided a copy of the incident report related to the encounter with the Mexican passenger and his mother. *Id.* at 21-22.

The deciding official testified that although he did not find sufficient evidence to support a finding that the appellant had directed BDOs to improperly assign behaviors or that he had falsified the August 20, 2008 Behavior Program Incident Report mentioned above to make a law enforcement referral, it was clear

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demeanor of all the parties and witnesses. In resolving credibility testimony on material issues, the Board has held that an administrative judge must consider factors such as: (1) the witness' opportunity and capacity to observe the event or act in question; (2) the witness' character; (3) any prior inconsistent statement by the witness; (4) a witness' bias or lack of bias; (5) the contradiction of the witness' version of the events by other evidence or its consistence with other evidence; (6) the inherent improbability of the witness' version of events; and (7) the witness' demeanor. *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458-62 (1987).

I find that the appellant was not credible based on the fact that the statements provided by the majority of the BDOs who were interviewed during DAFSD Boyle's investigation contradicted the appellant's testimony in this regard. Moreover, the appellant's prior statement during his oral reply that he checked U.S. Visas and entry stamps in reliance on paragraph 3.9.A(7) of the SPOT SOP is inconsistent with the testimony he gave at the hearing on April 25, 2011. I also note that in response to the question by DAFSD Boyle to Branch Chief - SPOT Program John Bettac (Branch Chief Bettac), of when it is appropriate for BDOs to examine U.S. Visas and passports, Branch Chief Bettac responded as follows: "Visas are not examined. Passports would be reviewed during a SPOT referral screening." IAF, Tab 11, Subtab 4e at 91. Finally, in his decision to demote the appellant, the deciding official indicated as follows:

You have acknowledged that you directed BDOs to look specifically for visas and/or entry stamps while reviewing the documentation of foreign passengers. I note that there is nothing within the BDO program or any other TSA Standard Operating Procedure which directs or otherwise requires BDOs or any other TSA employee to make a determination as to a person's legal status in the United States. The purpose of reviewing a passenger's documents is to

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establish the person's authorization to enter the sterile area of the airport, and to establish their identity, not their legal status. As to the TDC SitRep Dashboard containing space to capture items such as "No Visa" or that persons were arrested for being an "Illegal Alien," that information would only be recorded if the TDC in performing their duties, became aware of it. Again, nothing in the BDO program authorizes BDOs to establish a person's legal standing in the United States.

IAF, Tab 11, Subtab 4d. Based on all of the above, I find that specification 2 is also SUSTAINED. Consequently, I find that the charge of inappropriate conduct is SUSTAINED irrespective of the fact that the deciding official did not find that the specifications could be sustained in their entirety by a preponderance of the evidence. *See Rivoire v. U.S. Postal Service*, 103 M.S.P.R. 643, ¶ 10 (2006) (an agency is only required to prove the essence of a charge).

Charge 2: The agency met its burden of proof on its charge of poor managerial judgment.

The second charge⁶ upon which the agency relied to demote the appellant alleged that the appellant exhibited poor managerial judgment when he told his subordinates that those who failed to produce referrals based on travel documents would not be promoted. *See* IAF, Tab 11, Subtabs 4b; 4d. In support of Charge 2, the agency relied on the statements of BDOs (b)(6) (b)(6) all of whom indicated that the appellant told them that if they failed to produce referrals on the basis of inadequate travel

⁶ Although the notice of proposed action relied on 2 specifications in support of this charge, *see* IAF, Tab 11, Subtab 4d, only the specification alleging that the appellant told his subordinates that if they failed to produce referrals based on travel documents they would not be promoted was sustained by the deciding official. *See id.*, Subtab 4b. I will therefore only address specification 2 in relation to whether the agency met its burden of proof pertaining to Charge 2.

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documents, they would not be promoted. *See* IAF, Tab 11, Subtab 4e at 13; 15; 16; 18-19.

At the hearing, the deciding official testified that based upon his review of the record, including the witness statements, it was evident that the appellant was providing erroneous direction to his employees pertaining to making CBP and LEO referrals. HT at 27. He testified that the statements provided by the BDOs demonstrate that they were led to believe that if they wanted to get promoted, they had to have a lot of activity in the way of CBP and LEO referrals and that this was one of the primary factors weighing in favor of getting promoted. HT at 28. DSFD McCaffery testified that the appellant did not do anything to dispel this myth and that in fact, he may have even exaggerated it. *See id.* He also testified that based on his review of the BDOs statements, it appeared that they believed that one of the ways to get increased activity was to routinely check passports of foreigners, which is not authorized by the SPOT SOP. HT at 28.

DFSD McCaffery's decision letter indicates that amongst the reasons for sustaining this charge was the fact that the appellant failed to make clear to his subordinates that his encouragement for increased activity was not simply that he wanted an active workforce. As a result, it became widely understood by BDOs that they needed high levels of activity in order to be considered for promotion. *See* IAF, Tab 11, Subtab 4b. I agree with the deciding official in this regard. After reviewing record, including the statements provided to DAFSD Boyle, I find that the agency met its burden of proof in this regard. Even assuming that the appellant did not tell his subordinates that those who failed to produce referrals would not be promoted, he failed to dispel their beliefs in this regard. Consequently, Charge 2, along with its attendant specification, is therefore SUSTAINED. *See Rivoire*, 103 M.S.P.R. 643, ¶ 10.

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Charge 3: The agency met its burden of proof on its charge of lack of candor.

Charge 3 of the agency's reasons for demoting the appellant alleged that on February 16, 2010, when he was questioned by DAFSD Boyle about having instructed his subordinates that while standing at the TDC, they were to look at the passports of people who appeared to be foreigners for the presence of Visas and entry stamps, he denied having done this. See IAF, Tab 11, Subtabs 4b; 4d. In support of this charge, the agency relied on the statements of BDOs (b)(6)

(b)(6)

(b)(6) all of which supported the allegation that he did in fact direct these BDOs to stand at the TDC position for the purpose of checking passports for the presence of Visas or entry stamps. See id., Subtab 4e at 9-19; 55-68.

Lack of candor exists when an employee breaches the duty "to be fully forthcoming as to all facts and information relevant to a matter . . . whether or not such information is particularly elicited." *Ludlum v. Department of Justice*, 87 M.S.P.R. 56, ¶ 13 (2000) (citing *Swan Creek Communications, Inc. v. Federal Communications Commission*, 39 F.3d 1217, 1222 (D.C. Cir. 1994)). The Board has held that "when an underlying misconduct charge has been proven, a concealment or lack of candor charge must also be sustained based on appellant's failure to respond truthfully or completely when questioned about matters relating to the proven misconduct." *Gootee v. Veterans Affairs*, 36 M.S.P.R. 526, 528 (1988) (overruled on other grounds). Falsification involves an affirmative misrepresentation and requires intent to deceive. *Naekel v. Department of Transportation*, 782 F.2d 975, 977 (Fed. Cir. 1986). Lack of candor, however, is

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a broader and more flexible concept whose contours and elements depend upon the particular context and conduct involved. It may involve a failure to disclose something that, under the circumstances, should have been disclosed in order to make the given statement accurate and complete. *Ludlum*, 87 M.S.P.R. at 62.

Here, the deciding official testified that during the administrative inquiry that was conducted by DAFSD Boyle, the appellant was asked a couple of specific questions about whether he was aware of anyone checking passports of foreigners in either an appropriate or inappropriate fashion, to which the appellant responded that he had no knowledge of that whatsoever. HT at 28. DFSD McCaffery also testified that during the pre-decision discussion with the appellant, he disavowed any knowledge of having conducted or having ordered his subordinates to conduct passport checks without first engaging in the steps required by the SPOT SOP. HT at 28; *see also* IAF, Tab 11, Subtab 4e at 72, 6-8, appellant's questionnaire. In his decision letter, DFSD McCaffery indicated that the witness statements provided to DAFSD Boyle were contrary to the appellant's version of events and that it was unlikely, based on the fact that 16 different BDOs confirmed having been instructed by the appellant to stand at the TDC position to check for the presence of U.S. Visas and entry stamps, that in fact, the appellant had not given such an instruction. *See* IAF, Tab 11, Subtab 4b; *see also id.*, Subtab 4e at 9; 12; 13; 14-18; 55-66, BODs statements.

I find that when the appellant was questioned by DAFSD Boyle on February 16, 2010, he failed to disclose the fact that he had instructed his subordinates to look at the passports of certain groups of people at the TDC for the presence of U.S. Visas and entry stamps. This fact should have been disclosed in order to make the given statement accurate and complete. *Ludlum*, 87 M.S.P.R. at 62. Moreover, because I found that the appellant's testimony was

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not credible with respect to the other charges in this appeal, I find that his overall credibility is, at a minimum, questionable. See *Cross v. Department of the Army*, 89 M.S.P.R. 62, ¶ 14 (2001) (although an administrative judge is not required to discredit a witness's credibility on all issues once he/she has found the witness not credible on one issue, the specific instance of lack of credibility is a proper consideration in assessing the witness's overall credibility); *Hawkins v. Smithsonian Institution*, 73 M.S.P.R. 397, 404 (1997) (an administrative judge's finding that a witness is not credible with respect to some testimony may call into question the witness's character for truthfulness with respect to other related testimony). The overall evidence in the record contradicts what the appellant testified to at the hearing. For instance, although the appellant testified that at no time did he ever instruct his subordinates to check passports to determine if they had a U.S. entry stamp, HT at 138, the statements provided in support of this charge indicate that he did. I therefore find that the agency proved its charge of lack of candor by preponderant evidence. Charge 3 is therefore SUSTAINED.

The appellant failed to establish his affirmative defenses of national origin and race discrimination⁷

An employee may establish a prima facie case of prohibited national origin and/or race discrimination by introducing preponderant evidence to show that he is a member of a protected group, he was similarly situated to an individual who was not a member of the protected group, and he was treated more harshly or disparately than the individual who was not a member of his protected group, or

⁷ During a prehearing conference on March 30, 2011, the appellant, through his representative, indicated that the only affirmative defenses he was raising were related to national origin and race discrimination and harmful procedural error. See IAF, Tab 27.

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some other evidence giving rise to an inference of prohibited discrimination. *Buckler v. Federal Retirement Thrift Investment Board*, 73 M.S.P.R. 476, 497 (1997). The burden of going forward then shifts to the agency to articulate a legitimate and nondiscriminatory reason for its action; and, finally, the employee must show that the agency's stated reason is merely a pretext for prohibited discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973).

Where the record is complete, as is the case in this appeal, it is unnecessary to follow the traditional burden-shifting order of analysis; rather, the question to be resolved then is whether the appellant has produced sufficient evidence to show that the agency's proffered reason was not the actual reason for the removal and that the agency intentionally discriminated against him. *Adams v. Department of Labor*, 112 M.S.P.R. 288, ¶ 12 (2009) (citing *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507-08 (1993); *Marshall v. Department of Veterans Affairs*, 111 M.S.P.R. 5, ¶ 17 (2008)). The evidence to be considered at this stage may include: (1) the elements of the prima facie case; (2) any evidence the employee presents to attack the employer's proffered explanations for its actions; and (3) any further evidence of discrimination or retaliation that may be available to the employee, such as independent evidence of discriminatory statements or attitudes on the part of the employer, or any contrary evidence that may be available to the employer, such as a strong track record in equal opportunity employment. *Adams*, 112 M.S.P.R. 288, ¶ 12 (citing *Aka v. Washington Hospital Center*, 156 F. 3d 1284, 1289 (D.C. Cir. 1998) (en banc)).

For a comparison employee to be similarly situated, all relevant aspects of the appellant's employment situation must be nearly identical to those of the comparative employee. *Goodwin v. Department of the Air Force*, 75 M.S.P.R.

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204, 209 (1997). Comparative employees must have had engaged in conduct similar to the appellant, without differentiating or mitigating circumstances that would distinguish the misconduct or the appropriate discipline for the misconduct. *Id.*; see also *Hidalgo v. Department of Justice*, 93 M.S.P.R. 645, ¶ 10 (2003) (“the appellant and the comparison employee must have been supervised by the same individual”).

Here, the appellant alleged that he was discriminated against based on his national origin (Puerto Rico) and race (Puerto Rican) when other TSM-BDOs who were accused of similar misconduct were not disciplined. See IAF, Tab 12. He listed TSM-BDOs (b)(6) (b)(6) as employees who were similarly situated but outside of his protected class. See *id.*

In response to these allegations, both FSD Powell and DFSD McCaffery testified that had sufficient information been provided during the course of DAFSD Boyle’s investigation supporting a finding that these other supervisors had engaged in similar misconduct, they would have taken appropriate disciplinary action against them as well. HT at 58; 87; 93. FSD Powell testified that the only 2 statements to which the appellant referred in support of his allegation that other TSM-BDOs engaged in misconduct but were not disciplined, arose out of the Boston inquiry and were amongst the 40 statements gathered, 38 of which did not support his allegation of disparate treatment. HT at 93.

DFSD McCaffery corroborated FSD Powell’s testimony. He testified that any information that he received pertaining to other TSM-BDOs being involved in misconduct came to him not for issuance of a decision pertaining to a proposed disciplinary action based on misconduct but rather, they arose out of the Boston inquiry, which was not the subject of the investigation involving the appellant

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here. According to DFSD McCaffery, the question of whether other supervisors were involved in similar misconduct was in FSD Powell's and AFSD Smith's hands, not his. HT at 58. The deciding official here testified that although he became aware of the fact that the appellant was "Hispanic" because he offered this information to him during his oral reply to the proposed action on April 21, 2010, prior to this, he was not aware of his national origin and it nonetheless played no part in his decision. HT at 35.

Finally, DAFSD Boyle testified that during his investigation into allegations of retaliation brought against the appellant by his subordinates, one of the people he interviewed told him that TSM-BDO (b)(6) had been present during a briefing where the appellant had instructed BDOs to look through passengers' travel documents. HT at 111-112; *see also* IAF, Tab 11, Subtab 4e at 57. DAFSD Boyle testified that although he did not specifically question other witnesses about whether TSM-BDO (b)(6) had participated in similar misconduct, no other witnesses reported that he had. However, DAFSD Boyle recalled having questioned TSM-BDO (b)(6) who denied having been involved in similar misconduct. According to DAFSD Boyle, because only 1 statement made reference to TSM-BDO (b)(6) he did not find that it was enough to pursue it any further. HT at 113.

Although the appellant falls into two protected classes, I find that he did not produce sufficient evidence to show that the agency's proffered reasons for its action were not the actual reasons. Nor did he provide sufficient evidence to show that the other TSM-BDOs were similarly situated to him or that he was treated disparately. Although he testified that these other managers were treated more favorably, besides the 2 statements out of 40 that were gathered during the Boston inquiry, the information that DAFSD Boyle gathered during his

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investigation is devoid of concrete evidence that these other TSM-BDOs were actually involved in the same types of and/or number of alleged instances of misconduct as the appellant was here. In addition, even assuming that the agency should have considered the Boston inquiry, the findings there nonetheless only implicated the appellant. See IAF, Tab 26, Exhibit A at 3. Therefore, I find that the appellant has failed to put forward a comparative employee with similar misconduct, or any other evidence raising an inference of discrimination. *Goodwin*, 75 M.S.P.R. at 210 (citing *Stokes v. Department of Agriculture*, 9 M.S.P.R. 372, 375-76 (1982)). He also failed to show that his national origin and/or race were factors in the agency's decision to demote him. Accordingly, I find that the appellant has failed to prove his affirmative defense of discrimination based on his race or national origin.

The appellant failed to establish his affirmative defense of harmful procedural error.

The appellant also argued that the manner in which the agency conducted its investigation was flawed. The agency allegedly failed to consider the extent to which the BDOs' statements were contradictory and the fact that in the statements that were gathered, 34 of the TSA employees denied ever being told by the appellant to do what the agency alleges he told them to do. See IAF, Tab 1. It also allegedly failed to explain when and where the incidents occurred. See *id.*, Tab 12. The agency also allegedly ignored the statements that would have absolved the appellant or those that showed that other TSM-BDOs were guilty of similar misconduct. He alleged that the agency's investigation selectively targeted him and only 6 employees actually made statements against him. See *id.*, Tabs 1; 12. Finally, the appellant argued that he was demoted three ranks and

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that normally, this is against policy since demotions are ordinarily only to the next lower rank. See IAF, Tabs 1; 12.

To prove harmful procedural error, the appellant must show that the agency committed an error in the application of its procedures that is likely to have caused it to reach a conclusion different from the one it would have reached in the absence or cure of the error. See 5 C.F.R. § 1201.56(c)(3). The burden is upon the appellant to show that the agency committed an error and that the error was harmful, i.e., that it caused substantial prejudice to his rights.

Here, the agency provided evidence to demonstrate that it followed its own procedures and that it considered all of the relevant information before issuing its decision to demote the appellant. First, DAFSD Boyle testified that at FSD Powell's request, he conducted an administrative inquiry into allegations of retaliation by the appellant against his subordinates. HT at 107. During the course of his investigation, a number of additional issues arose, i.e., allegations of racial profiling, improper behavior detection procedures, improper procedures in general, and allegations that members of the BDO workforce were being directed to conduct procedures that were not a part of the BDOs' policies. These issues arose when during his interviews of BDOs from the first shift – the shift that the appellant worked on – they made reference to the fact that they were directed to look at passports and other travel documents of passengers who appeared to be Mexican. He also testified that when other issues arose, as an investigator, he was required to investigate those issues as well. HT at 108. He explained that he asked open-ended questions to elicit the maximum amount of information without focusing on one particular individual or issue. HT at 109-12. As stated above, although one of the statements implicated another supervisor, since no other

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employee corroborated this, DAFSD Boyle was not inclined to look into that allegation any further. HT at 111-12.

DAFSD Boyle testified that he did not interview anyone from the first shift since only the second shift BDO workforce worked with the appellant because the appellant was always a second shift manager. HT at 120. When questioned about the statements which implicated other supervisors, DAFSD Boyle testified that since BDOs (b)(6) most likely worked on the first shift, he did not interview them since they probably did not have any information about the appellant. HT at 120.

After considering the above, including the appellant's testimony during cross-examination, during which time he acknowledged that contrary to his prior assertion that only 6 of the BDOs' statements supported the agency's charges, see HT at 157-63, I disagree with the appellant that the agency ignored statements that would have absolved him from wrongdoing. I am also not persuaded by the appellant's argument that the agency failed to advise him of when and where the alleged incidents of misconduct occurred since the record contains ample evidence that it did. Finally, the appellant failed to indicate what policy and/or regulation, if any, the agency violated by demoting him by three ranks. For these reasons, I find that the appellant failed to meet his burden of proof with regard to his affirmative defense of harmful procedural error.

The agency established a nexus between the sustained misconduct and the efficiency of the service.

As stated above, MD 1100.75-3 requires the agency to prove that its action was taken to promote the efficiency of the service. To meet its burden in that regard, "the agency must show by preponderant evidence that there is a nexus between the misconduct and the work of the agency." *Brown v. Department of*

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the Navy, 229 F.3d 1356, 1358 (Fed. Cir. 2000). See also *Winlock*, 110 M.S.P.R. 521, ¶ 24 (“the nexus requirement, for purposes of whether an agency has shown that its action promotes the efficiency of the service, means there must be a clear and direct relationship between the articulated grounds for an adverse action and either the employee’s ability to accomplish his or her duties satisfactorily or some other legitimate government interest”); MD-1100.75-3 (“Nexus is presumed when the basis for disciplinary action is [...] on-duty misconduct, or in the case of ... other egregious or especially notorious misconduct”).

Here, the agency has established the required nexus for all of the sustained charges in this appeal. The appellant’s on-duty misconduct, especially in light of the fact that he provided improper guidance and direction to the BDOs under his supervision, obviously impacts the work of the agency. There is sufficient nexus between an employee’s conduct and the efficiency of the service where the conduct occurred at work. *Parker v. U.S. Postal Service*, 819 F.2d 1113, 1116 (Fed. Cir. 1987). Finally, the Board has held that agencies may legitimately expect employees to be honest, trustworthy and fully candid during investigations and an employee’s lack of candor strikes at the very heart of the employer-employee relationship. See *Ludlum*, 87 M.S.P.R. 56, ¶ 28. Thus, I find that the agency has established the required nexus between its proven charges of misconduct and the efficiency of the service.

The agency established that the penalty of demoting the appellant was within the tolerable limits of reasonableness.

The Board will review an agency-imposed penalty only to determine if the agency considered all the relevant factors and exercised management discretion within tolerable limits of reasonableness. *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981). When the Board sustains all of an agency’s charges,
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SENSITIVE SECURITY INFORMATION

the Board may mitigate the agency's original penalty to the maximum reasonable penalty when it finds the agency's original penalty to be too severe. *Lachance v. Devall*, 178 F.3d 1246, 1260 (Fed. Cir. 1999).

The Board examines, first and foremost, the nature and seriousness of the misconduct and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional. *See Neuman v. U.S. Postal Service*, 108 M.S.P.R. 200, ¶ 23 (2008); *Martin v. Department of Transportation*, 103 M.S.P.R. 153, ¶ 13 (2006). Here, although the appellant did not have a prior disciplinary record, I find that the sustained misconduct was serious because it conflicts with the agency's mission. HT, testimony of DFSD McCaffery and FSD Powell. In addition, law enforcement officers, such as the appellant here, occupy positions of substantial responsibility and trust and may be held to a higher standard of conduct than other Federal employees, especially in light of the fact that here, the appellant supervised other employees. *See Merino v. Department of Justice*, 94 M.S.P.R. 632, ¶11 (2003); *Neuman*, 108 M.S.P.R. 200, ¶ 23; *Cantu v. Department of the Treasury*, 88 M.S.P.R. 253, ¶ 8 (2001).

DFSD McCaffery testified that even though the public did not become aware of the appellant's actions, including the fact that he improperly directed his subordinates to check travel documents, this did not affect his decision because the potential for embarrassment was great. He also testified that had this information been revealed, it could have potentially killed the BDO program. The deciding official testified that in the event traveling passengers believed that they were improperly singled out based on ethnicity, the potential for lawsuits was great. HT at 32. Moreover, he was concerned by the fact that there is a myriad of things that happen to a person who is detained by either CBP or the Law Enforcement Department. The inspection takes a long time, which would

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most definitely mean that the person would miss his or her flight. In addition, it would cause a disruption to the airline since it would be required to search for the baggage as well as any person's baggage with whom the detained member was traveling if they chose to stay behind. HT at 33.

The deciding official testified that he had lost confidence in the appellant because he did not believe that he could properly interpret the SPOT SOP, especially since the parts he provided in support of his position that he did not engage in misconduct were taken out of context. HT at 33-34. He also testified that he did not trust the appellant's ability to properly guide his subordinates on operational matters, such as the substance of the SOP or on administrative matters such as how to get promoted. He also did not trust his ability to be fully truthful and forthcoming to his supervisors considering the fact that he had not been forthcoming with regard to the investigation. HT at 34.

When asked why the appellant could not be retrained, the deciding official testified that he had already been trained in the BDO program and the lack of candor charge was serious. He also determined that it would be inappropriate for the appellant to be in a management position. His testimony pertaining to whether the appellant could be rehabilitated was as follows:

I never got the impression that he was open to rehabilitation mostly because even up until our meeting of April 21st he did not believe that ... the checking of passports for visas and entry stamps that he had done anything wrong.

HT at 34. Finally, he testified that although there were no similar employees to whom the appellant could be compared since he was not aware of anyone having engaged in the same type of misconduct, had all of the facts and circumstances been the same with regard to another employee, he would have reached the same decision.

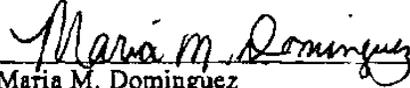
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In sum, I find that DFSD McCaffery considered all of the relevant factors in this case and appropriately exercised his discretion in reaching his decision to demote the appellant rather than remove him. Under these circumstances, I find that the agency's demotion of the appellant is within the tolerable bounds of reasonableness and is for such cause as will promote the efficiency of the service.

DECISION

The agency's action is **AFFIRMED**.

FOR THE BOARD:


Maria M. Dominguez
Administrative Judge

NOTICE TO PARTIES CONCERNING SETTLEMENT

The date that this initial decision becomes final, which is set forth below, is the last day that the administrative judge may vacate the initial decision in order to accept a settlement agreement into the record. See 5 C.F.R. § 1201.112(a)(5).

NOTICE TO APPELLANT

This initial decision will become final on July 29, 2011, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever

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comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Equal Employment Opportunity Commission (EEOC) or with a federal court. The paragraphs that follow tell you how and when to file with the Board, the EEOC, or the federal courts. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.
Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (<https://e-appeal.mspb.gov>).

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days

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SENSITIVE SECURITY INFORMATION

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after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION REVIEW

If you disagree with the Board's final decision on discrimination, you may obtain further administrative review by filing a petition with the EEOC no later than 30 calendar days after the date this initial decision becomes final. The address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20036

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08/24/2011 13:05 FAX 2122841417

JUDICIAL REVIEW

If you do not want to file a petition with the EBOC, you may ask for judicial review of both discrimination and nondiscrimination issues by filing a civil action. If you are asserting a claim under the Civil Rights Act or under the Rehabilitation Act, you must file your appeal with the appropriate United States district court as provided in 42 U.S.C. § 2000e-5. If you file a civil action with the court, you must name the head of the agency as the defendant. See 42 U.S.C. § 2000e-16(c). To be timely, your civil action under the Civil Rights Act, 42 U.S.C. § 2000e-16(c), must be filed no later than 30 calendar days after the date this initial decision becomes final. If you are asserting a claim under the Age Discrimination in Employment Act, your claim must be filed with the appropriate United States district court as provided in 29 U.S.C. § 633a(c). In some, but not all districts you may have up to 6 years to file such a civil action. See 28 U.S.C. § 2401(a).

If you choose not to contest the Board's decision on discrimination, you may ask for judicial review of the nondiscrimination issues by filing a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read

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this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.ca9.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

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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:

Appellant

Electronic Mail

(b)(6)

Appellant Representative

U.S. Mail

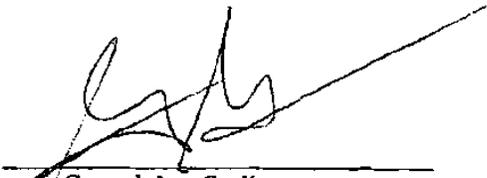
(b)(6)

Agency Representative

Electronic Mail

James Penzi, Esq.
Department of Homeland Security
Transportation Security Administration
701 Market Street, Third Floor
Philadelphia, PA 19106

June 24, 2011
(Date)



Gwendolyn Gatling
Paralegal Specialist

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Department of Homeland Security
Transportation Security Administration
701 Market Street, Third Floor
Philadelphia, PA 19106

June 24, 2011

(Date)

Gwendolyn Gatling
Paralegal Specialist

FOR FRONT OFFICE USE ONLY - DO NOT DUPLICATE

TSA CONTROL NUMBER	TSA-110622-003 THOMPSON	ORIGINATING OFFICE: OSO
Transportation Security Administration	<input type="checkbox"/> Action Memo	<input type="checkbox"/> DHS SOL
	<input type="checkbox"/> Information Memo	<input type="checkbox"/> DHS Congressional
	<input type="checkbox"/> QIR	<input checked="" type="checkbox"/> TSA Congressional
	<input type="checkbox"/> Report to Congress	<input type="checkbox"/> Other:
		WRITER: John Wasowicz
		PHONE: 7(b)(6)
		DUE DATE: 7/14/11

TSA Executive Level Clearance Sheet

AA Approvals:	Date:	SUBJECT:
1. (b)(6)	8/14	Writes with concerns regarding TSA's Screening of Passengers by Observation Technique (SPOT) program and requests that the program be discontinued until DHS conducts an independent peer review.
2.	8/25	
3.	9/19	

Revised.

OFFICE OF THE EXECUTIVE SECRETARIAT PREPARATION

Title	ES Editor	Date	Approve	Approve w/ edits	Reject	Comments
IMS	Jewel Wright	7/25/2011	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	To SCurtis for review.
W/E	(b)(6)		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
Sr. W/E		7/25	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<i>to Stacy on 9/8</i>

OFFICE OF THE EXECUTIVE SECRETARIAT APPROVAL

To:	OLA (b)(6)					
To:	FO (b)(6)	9/9/11	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<i>to front office</i>

CLEARANCE

Check all Needed	Review Requested?	Action Taken						Comments
Reviewer	Office	Initials	Date	Approve	Approve w/ edits	Reject	Use Autopen	
<input checked="" type="checkbox"/> Peter W. Hearing	OLA	(b)(6)	7/25/11	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	N/A	<i>see email 8/24 clear</i>
<input checked="" type="checkbox"/> Francine Kerner	OCC		7/25/11	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	N/A	
<input type="checkbox"/> Kim Walton	OSC			<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	N/A	
<input checked="" type="checkbox"/> Art Macias	(b)(6)		7/28/11	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	N/A	<i>OLA & OSD re</i>
<input checked="" type="checkbox"/> (b)(6)			7/28/11	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	N/A	<i>writing based</i>
<input checked="" type="checkbox"/> (b)(6)			9/19/11	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	N/A	<i>on post-ADIB</i>
<input checked="" type="checkbox"/> Gale D. Rossides	Deputy Administrator	(b)(6)	9/20/11	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<i>discussion</i>
<input checked="" type="checkbox"/> John S. Pistole	Administrator		9/21/11	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	

APPROVAL

Explanation, Special Instructions, Comments:



TSA CLEARANCE SHEET

ORIGINATOR

Ryan Oswald

DOCUMENT FOR ACTION

OFFICE

PHONE

DATE

Action Memo Letter
 Info. Memo Other

OSO

7. (b)(6)

8/17/11

SUBJECT

URGENT Administrator Correspondence: HHS Ranking Member Bennie Thompson writes Administrator Pistole regarding the SPOT Program at EWR

TSA
CONTROL NUMBER

TSA 110622-003

ACTION REQUIRED

REVIEWERS		OFFICE	DIRECT PHONE NO.	INITIAL	DATE	CORRECTION REQUIRED
1.	Scott Houston, Senior Advisor to AA	OSO		(b)(6)	8/17	o/as - Minor edit
2.	John Lenihan, Deputy AA	OSO		OUT OF OFFICE	(b)(6)	
3.	Chris McLaughlin, AA	OSO		18		
4.						
5.	Steve Colon, Attorney	OCC		SC/email	8/15/11	Edits Made
6.						
7.						
8.						

Executive Secretariat

Logging

Review

Office of the Assistant Sec

1.

2.

3.

4.

OLA should reach out
 to Ranking Member Thompson,
 staff and inform him/her
 that the unredacted
 documents have been provided
 to Chairman King
 - Scott