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June 8, 2007

Arbitrator Jill Klein
2470 Lambert Drive
Pasadena, CA 91107

In the Matter of the Arbitration between:
National Air Traffic Controller Association (NATCA), AFL-CIO - Union

Grievant: [REDACTED]

And

Federal Aviation Administration

Agency

Case No.: (NC) WP-06-0900- [REDACTED] 03

Office: [REDACTED] ATCT [REDACTED]

Hearing Dates: January 28, 2007 and February 28, 2007

CLOSING BRIEF FOR
THE FEDERAL AVIATION ADMINISTRATION

Nature of Action: *Notice of Five (5) Consecutive Calendar Day Suspension dated 08/24/2005 – Inattention to Duty and Negligent or Careless Work Performance*

I. INTRODUCTION

The above-entitled case was heard before Arbitrator Jill Klein, on January 28, 2007 and February 28, 2007, at the [REDACTED] ATCT, [REDACTED]. During the hearing the parties submitted relevant documents, exhibits and presented testimony from four witnesses. At the conclusion of the hearing the parties agreed to submit post-hearing briefs as closing argument. In dispute is the notice of five (5) consecutive calendar day suspension of the Grievant, [REDACTED], [REDACTED], Air Traffic Control Specialist, AT-2152-HH, [REDACTED] ATCT, [REDACTED].

II. ISSUE'S

The parties have stipulated the issue to be decided by the Arbitrator. In addition there are no issues of either substantive or procedural arbitrability and therefore this matter is properly 18 before the arbitrator for adjudication. The issue to be decided is as follows:

F10-8248 REMAND
RCVD 10-19-11
[20070608]

Issue:

Was the 5-day suspension for the grievant for "Inattention to Duty" and Negligent or Careless Work Performance" for such cause as to promote the efficiency of the service? If not, what shall be the remedy?

III. RELEVANT CONTRACTUAL PROVISIONS

- Article 5 – Management Rights
- Article 9 – Grievance Procedure
- Article 10 – Disciplinary/Adverse Actions
- Human Resource Policy Manual (HRPM) – Standards of Conduct ER-4.1
- FAA Human Resources Operating Instructions (HROI) -
FAA Table of Disciplinary Offenses and Penalties

Nature of Offense

16. Negligent or careless work performance, to include, creating an environment where credibility is questioned; inattention to duty.

First Offense

Reprimand to 10-day
Suspension

Second Offense

10-30 day suspension

Third Offense

Removal

IV. BACKGROUND

██████████¹ is an Air Traffic Controller Specialist (ATCS) with 23 + years of service with the Agency, and with a hire date of July 18, 1983. He has been employed at the ██████████ ATCT since August 16, 2001. The ██████████ ATCT is a VFR (Visual Flight Rules) tower and is designated as a Level 8 ATC. It is also equipped with a STAR scope radar primarily used to aid the controller in locating aircraft and is not used for radar purposes.

While on position and working live traffic in the tower cab on May 18, 2005, the grievant was observed by Air Traffic Manager (ATM) ██████████ rummaging through his backpack, 19

¹ Herein after referred to as "the Grievant".

then in the forms drawer withdrawing an SF-71 Leave Request Form and placing it on the podium at local control south. At the time the grievant had two or three aircraft for which he had direct responsibility. However, his attention was focused on the completion of the leave form he withdrew from the drawer.

During this same period the grievant was concentrating on his leave request form, he cleared a Cherokee (N17W) for takeoff and approved a southwest departure behind Piper Seminole (N20M) who had just completed a touch and go landing. Only when he was asked by [REDACTED] about the Cherokee on a conflicting course with the Seminole on downward leg, did the grievant turn to observe traffic.

During a review of the tapes by [REDACTED] he discovered the grievant had issued an incorrect control instruction to N20M (Piper Seminole) for a touch and go on runway 25R instead of 7R. He further discovered that the grievant failed to hear the pilot's read back of the incorrect runway.

It is these incidents described above that give rise to the charges of "Inattention to Duty" and "Negligent or Careless Work Performance" in the case before you.

V. SUMMARY OF UNION CONTENTIONS

The Union asserts the agency claims of negligent and careless work performance as baseless and without merit. They further assert that the actions of the grievant were not contrary to any agency rules or regulations. Given that the grievant was not charged with an operational error or operational deviation they contend that the grievant executed his duties pursuant to all agency rules and regulations and that he did not compromise safety, nor did he create an unsafe situation. The union claims that the grievant was not placed on any performance improvement measures from the alleged incident and continued working his air traffic controller duties without any changes before and after his serving the 5-day suspension. Moreover, the union contends that [REDACTED] considered various factors when considering the discipline imposed, but most were prejudicial and have no basis to form proper due consideration in the instant charges. They contend that [REDACTED] outlines these considerations to bolster it's case against the grievant and only to elevate his justification to suspend the grievant from duty. The union contends [REDACTED] failed to consider the "Douglas Factor's"² and the discipline was formed without

² Jt. Ex #7 pages 44 - 50

consideration of all aggravating and mitigating factors. Finally the union asserts that the suspension was excessive and unreasonable and punitive in nature and did not promote the efficiency of the service. The union asks that the grievance be sustained and the grievant made whole.

VI. ARGUMENT

1. A Nexus Exists Between the Misconduct and the Efficiency of the Service

The agency recognizes that it may take an adverse action against an employee only for such cause as will promote the efficiency of the service according to Article 10, Sec. 2 of the contract³. Before we can properly conclude that a particular action will promote the efficiency of the service, it must appear that the action takes reasonable account of the factors relevant to promotion of service efficiency in the individual case. The efficiency of the service is the ultimate criterion for determining both whether disciplinary action is warranted and whether the particular action may be sustained. A nexus exists between an adverse action and the efficiency of the service when the grounds for the action relate to either an employee's ability to accomplish duties satisfactorily or to some other legitimate government interest. Hatfield v. Department of the Interior, 28 M.S.P.R. 673, 675 (1985).

The nexus between the grievant's actions and the FAA is not hard to differentiate. The grievant's job requires him to separate active aviation aircraft on the runway, issue traffic advisories and safety alerts using visual flight rules (VFR) and agency procedures, and perform those duties in a professional manner, while not letting distractions or engaging in distracting behavior, interfere with his duties of controlling air traffic. Failing to comply with these standards compromises the safety of the flying public and the National Airspace System.

The agency has demonstrated a nexus between the appellant's misconduct and the efficiency of the service. The acts of "inattention to duty" and "negligent or careless work performance" are a type of misconduct from which a nexus between the employee's conduct and the efficiency of the service can be presumed.

The seriousness of the grievant's infractions are clear and unambiguous. The grievant's discipline was based on the facts of the case, the agency's Human Resource Personnel Manual ER 4.1⁴, and the reasonableness standard provided in Douglas v. Veterans Administration, 5

³ Jt. Ex. #1 – Parties 2003 CBA

⁴ Jt. Ex. #5 – Pages 21 - 32

M.S.P.B. 313 (1981)⁵. The agency's Human Resource Operating Instructions, (HROI) FAA Table of Disciplinary Offenses and Penalties ⁶, also served as guidance to management officials. The grievant exercised poor judgment and his actions were serious misconduct warranting the penalty meted out.

2. The Agency Responsibly Considered All Factors Relevant to Selection of a Penalty

In Merit Systems Protection Board cases 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). In determining whether the penalty was reasonable, the Board gives deference to the agency's discretion in exercising its managerial function of maintaining employee discipline and efficiency, recognizing that the Board's function is not to displace management's responsibility, but to ensure that management judgment has been properly exercised. Thus, the Board will modify a penalty only when it finds that the agency failed to weigh the relevant factors or that the penalty the agency selected clearly exceeded the bounds of reasonableness.

The parties CBA at Article 10 Section 13 requires the Agency's table of penalties be used, when applicable, and as a guide to determine an appropriate penalty. The CBA incorporates the same principles as that of the MSPB when the Agency is making its determination that disciplinary/adverse action is necessary and when determining the appropriateness of a penalty, the Agency shall consider the factors as outlined in *Douglas v. Veterans Administration*, 5 MSPB 313 (1981).

[REDACTED] adequately and credibly testified that he considered the Douglas Factors in making his decision to suspend the grievant. [REDACTED] testified that he considered the grievant's written response dated 07/31/05⁷ as well as the grievant's 22 years of service, prior work history, letters of commendations, and "way to go" awards. [REDACTED] noted that these commendations and awards did not entice the grievant to change his performance. In fact on direct, [REDACTED] testified that the he considered a lesser penalty however, the grievant informed him during a meeting on June 16, 2005 that formal discipline would be ineffective and

⁵ Jt. Ex. #7 – Pages 44 - 50

⁶ Jt. Ex. #6 – Pages 33 - 43

that he (the grievant) would only get mad. ██████ stated on direct that the incident at hand related to safety which had the potential for creating at least a near mid-air collision and when he had pointed this out to the grievant his response was somewhat cavalier considering the length of time the grievant has with the agency as a certified professional controller.

VII. SUMMARY

It is the Federal Aviation Administration's position that the five-day suspension issued for "inattention to duty" and "negligent and careless work performance" caused a danger of injury to others. The discipline was issued to promote the efficiency of the service since the grounds for the suspension relate to the employee's failure to accomplish his duties satisfactorily or to further some other legitimate government interest. The agency believes its burden of proof was met presenting a preponderance of the evidence and showing that the disciplinary action promoted the efficiency of the service since the suspension was reasonable and warranted.

The FAA's legitimate government interest and primary mission is to provide the safest and most efficient aerospace system. While each division within the FAA plays an integral part in meeting this interest, the Air Traffic Division's contribution directly impacts and carries the prime responsibility in fulfilling the mission. In the Air Traffic Division there are two facility types: towers and centers. Towers, also known as terminals, are responsible for ensuring required minimum separation when aircraft arrive and or depart their assigned airspace.

To accomplish the mission, an air traffic control specialist actively applies established separation standards, actively monitors traffic situations, and is on constant alert to anticipate adverse situations such as visibility and or weather changes that may impact the required minimum separation between aircraft. Controllers are responsible for immediately correcting adverse situations before required separation is lost between aircraft. Although air traffic control specialists have other air traffic responsibilities, actively controlling traffic is always the first duty priority and the paramount concern.

The importance of separation standards is emphasized at each stage of an air traffic control specialist's training and beyond including time at the FAA academy. Various FAA and

facility orders reinforce the fact that separating aircraft and issuing safety alerts are always the first priority, and attention to other duties occurs only when the work situation permits.

When an air traffic control specialist does not properly prioritize active traffic situations and moves his eye away from a situation, serious and deadly consequences can result. Failing to properly prioritize or positively control an active situation directly compromises the FAA's interest of providing safe air travel. Such behavior is negligent and careless, especially when separation is the core of an air traffic control specialist's duties.

Madame Arbitrator, management has credibly testified that there is compelling evidence against the grievant that convincingly establishes the grievant's actions on May 18, 2005, compromised the FAA's interest of providing safe air travel. The grievant in this case does not dispute he retrieved a leave request form and began filling it out while on position, what he does dispute however, are his actions in the separation of the two aircraft he was responsible for. Although the grievant maintains he had everything under control, the observations of [REDACTED] and the tape recordings prove he issued an incorrect control instruction to N20M (Piper Seminole) for a touch and go on runway 25R instead of 7R. He further discovered that the grievant failed to hear the pilot's read back of the incorrect runway and for that his actions were careless and negligent. In the grievant's own written response⁸ to the proposed suspension, he acknowledges he made a mistake and apologizes for this. On cross-examination, the grievant again admits he made a readback/hearback error, that he was unaware it had occurred and acknowledges that he should have corrected the incorrect call back from the pilot. It is these errors along with the grievant's inattention to duty on the day in question that gave rise to the grievant's 5-day suspension from duty.

VIII. CONCLUSION

In conclusion, the FAA has met its burden in the disciplinary action taken against the grievant. Management acted appropriately and within their discretion to the facts and the grievant's culpability. The evidence of record confirms Management made a full, impartial investigation in regards to the grievant's actions. The evidence is supported by credible testimony and documentary evidence that management's ultimate decision was not unreasonable,

⁸ Jt. Ex. #2 – Page 4

excessive, arbitrary or capricious but within tolerable limits of reasonableness. The Union has not presented any evidence to support their contentions that the disciplinary action was baseless and without merit or that management did not give fair and proper consideration to the "Douglas Factors." It is for all the above reasons the FAA asks that you deny the grievance in its entirety.

Respectfully submitted,

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