

IN ARBITRATION PROCEEDINGS PURSUANT TO THE
COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES

NATIONAL AIR TRAFFIC CONTROLLERS]
ASSOCIATION, AFL-CIO,]

Union,]

and]

FEDERAL AVIATION ADMINISTRATION,]

Employer.]

Re: NC-WP-0500187- [REDACTED]]
[REDACTED] 10-day suspension for sleeping]

OPINION and DECISION

of

JOHN KAGEL
Arbitrator

July 9, 2007

[REDACTED]

APPEARANCES:

For the Union: Melinda Kim, Labor Relations Staff Representative, Washington,
D.C., Mike Hull, Lead Advocate

For the Employer: Kevin Gray, Labor Relations Specialist, Lawndale, CA

ISSUE:

The issue as stated by the Union is: Was the 10-day suspension of the Grievant
[REDACTED] for failure to perform duties while sleeping or exhibiting a
sleep-like state for such cause as to promote the efficiency of the service? If not, what
shall be the remedy? (Tr. 4)

The issue as stated by the Employer is: Was the 10-day suspension issued to the Grievant for sleeping or exhibiting a sleep-like state while performing safety-related duties for cause as to promote the efficiency of the service? If not, what shall be the remedy? (Tr. 5)

The Parties have given the Arbitrator authority to determine the issue from those submitted by the Parties. (Tr. 5)

BASIS FOR DISCIPLINE:

The letter of proposed discipline of a 10-consecutive calendar day suspension dated December 10, 2004, upheld as a final decision on March 3, 2005, reads in pertinent part:

Reason: Sleeping or exhibiting a sleep-like state while performing safety-related duties.

Specification 1. On September 27, 2004, you were working the Flight Data position in the Departure area at [REDACTED]. While working you were observed to be sleeping, or exhibiting a sleep-like state by [REDACTED] and [REDACTED] who stated you appeared 'out of it.' Subsequently [REDACTED] approached you and called your name, after which you appeared to awake from a sleep-like state, stood up, signed on the position and then stated that you should 'probably walk around.'

On September 27, 2004 [at a *Weingarten* meeting ...] you admitted you were 'seated in a reclined position at the Departure area Flight Data Position,' with your 'feet propped-up on a trash can' and your 'eyes closed.'

You have displayed a disregard of the rules and regulations required governing an organization entrusted with the safety of the flying public.

...I have considered the following factors:

- a. You have been employed with the FAA since [REDACTED].
- b. On August 22, 2004, you were officially reprimanded for improper use of leave programs.
- c. You have been counseled on numerous occasions regarding your conduct with respect to leave programs.
- d. It is the responsibility of all employees to maintain a level of behavior that will promote the efficiency of the Federal service and conform to accepted ethical principles.
- e. The penalty's consistent with the FAA's HROI Table of Penalties.
- f. Your actions are in violation of the agency's Standards of Conduct, Conduct and Discipline, Human Resources Policy Manual (HRPM), ER-4.1, Paragraph 8.a.
- g. All FAA employees are expected to comply fully with the letter and spirit of the standards of conduct set forth in Human Resources Policy Manual ER-4.1, Standards of Conduct. The agency's policy on employee conduct applies to all FAA employees and is designed to encourage employees to maintain a level of behavior that will promote the efficiency of the Federal service and conform to accepted ethical principles. All employees are required to respond promptly to directions and instructions received from their supervisor. The conduct you displayed will not be tolerated. ..." (Jt. Ex. 3)

STIPULATIONS:

Third parties observed the Grievant with her eyes closed. The Union agrees that her eyes were closed at some point. (Tr. 6-7)

BACKGROUND:

Grievant's Position on September 27, 2004:

The Flight Data position supports radar and handoff Controllers. (Tr. 110) It requires its occupant, who rotates into it, possibly several times a shift (Tr. 111), to deliver flight progress strips that print out at that station, to the proper sector indicating an aircraft is in the system, either active or proposed. (Tr. 102) The strips are printed out 30 minutes before departure. (Tr. 103) Strips can be accumulated and then distributed before departure. (Tr. 103) A WATTS line, which rings at the position (Tr. 40-41), disseminates clearances to pilots from an uncontrolled field and monitors weather. Flight plans are put in when requested by various facilities or radar controllers. (Tr. 35) The position is considered somewhat busy (Tr. 36) but there are times when the line does not ring and strips are not printing out so that there are no duties for the Flight Data Controller to fulfill. (Tr. 42, 106) If nothing is happening at a given moment it is acceptable for the Controller to lean back. (Tr. 45)

A medical clearance is required for the position showing that the Controller is physically capable of working air traffic control duties. (Tr. 45)

Observations of Grievant:

[REDACTED] now retired, testified that in her monitor she saw that someone had been in the Flight Data position for an hour-and-a-half so that a break might be due. Around 10 a.m. she was going to do a routine walk-around of the work area and went to the [REDACTED], [REDACTED] also now retired,

to tell him that the person at Flight Data was not the person signed on to that position, noticing, from the Supervisor's desk that the person there was the Grievant. (Tr. 11-12, 13-14) That location was six to eight feet from the Grievant's but the Supervisor's back was to her position. (Tr. 24) It was not uncommon for people to forget to sign on. (Tr. 13)

However, on [REDACTED] seeing the Grievant, she was leaning back, her chair reclined slightly (Tr. 14), slumped down with her head back, eyes closed, her feet up on a trash can, not moving. She told [REDACTED] that "that's not acceptable. Take care of it. And she isn't signed on either." [REDACTED] said he would. (Tr. 15)

[REDACTED] according to [REDACTED] called the Grievant's name and the Grievant did not move, as [REDACTED] walked away. [REDACTED] called her name a second time, louder than the first, and "she kind of, you know, came alert, I guess you could say, came up out of the chair and that was it." (Tr. 16) In a statement recording the incident, [REDACTED] did not note that she heard [REDACTED] call the Grievant's name twice nor her reaction. (Er. Ex. 1)

[REDACTED] testified that after [REDACTED] asked him to look at the Flight Data position, because the posture of the individual sitting there was unacceptable, he took a look. The Grievant appeared to be asleep. She was slumped down in her chair which was leaning back, eyes closed and feet on a trash can. Calling her name twice she appeared to wake up and said, "Maybe I better get up and walk around." (Tr. 33) In a post-incident statement, [REDACTED] referred to calling the Grievant's name once. (Er. Ex. 3)

At an 8-minute (Tr. 49) *Weingarten* meeting later that day the Grievant described herself as being in a reclined position, feet up on a trash can with her eyes closed because she had a headache. (Tr. 48, Er. Ex. 4)

Controllers are briefed annually on the FAA's Standards of Conduct which include that on performing assigned duties they are to be physically fit as needed by job requirements and in a mentally alert condition to perform the duties of their position. (Tr. 67-68, Jt. Ex. 8, Er. Ex, 8)

Grievant's Testimony:

Flight Controllers working nearby the Grievant stated they did not observe the Grievant sleeping nor hear the WATTS line ring. (Tr. 102, 105, 117, 131) One was ten feet in front of the Grievant and to her left. (Tr. 106) Another worked 20 feet away. (Tr. 116)

The Grievant said she relieved on the Flight Data position after her break around 9:30 or 9:40 a.m. on September 27. She made sure all the strips were empty. She had a very bad headache, having had migraines. Her doctor and her physical therapist advised that she needed to cut down on stress. She needed to relax her neck, which had damage, to relieve her headaches. She leaned her chair back and closed her eyes to relax because of a bright light at the Flight Data position. (Tr. 112) Because she could hear strips printing out, the printer being very loud, and the phone ringing, and because she had caught up on her duties, she thought there was no problem. (Tr. 112) She had been sitting in a similar position with a headache on a couple of other occasions. (Tr.

Human Resources (Tr. 57) for determining discipline. (Er. Ex. 5) Later she examined penalties for similar infractions and a table of penalties. In her view it was reasonable to consider removal but she had the option of proposing a lesser discipline. (Tr. 56) In doing so she considered reports to her and confirming conversations with Managers (Tr. 74, 77), not having spoken to the Grievant or co-workers who worked on the shift that day. (Tr. 73)

In her review of *Douglas* factors ██████████ found the nature of the offense aggravating because of sleeping in a safety-related position which was well known to be an offense by employees, the Grievant having signed for conduct and discipline briefings. (Tr. 62) She considered the Grievant as not dependable because of past abuse of leave problems and she had no sick leave on the books. She was required to work mentally and physically to be able to do the job. She had a letter of reprimand and had proven to be completely undependable, "the message" of past discipline not getting through. (Tr. 63) She considered the offense notorious because of incidents at other centers, but knowledge of this incident did not get out of the building. (Tr. 84-85) According to ██████████ the Grievant would come to work tired and would frequently want to go home. (Tr. 62) She had an operational error four days later where two aircraft came too close together but that did not figure into the discipline in this case. (Tr. 61, 94) The Grievant was required by FAA order to inform Management or the Flight Surgeon of any health problems between periodic exams. (Tr. 65)

In considering the Table of Penalties she considered No. 15, "Failure to perform duties while sleeping or exhibiting a sleep-like state when the employee occupies a position where safety" as opposed to some other offense. (Jt. Ex. 8) [REDACTED] view was that the Grievant was sleeping. [REDACTED] did not know of any duties the Grievant failed to carry out. (Tr. 81)

According to [REDACTED] the Grievant violated FAA document 4.1, on which she was briefed yearly, in that she was not in a mentally alert condition to perform her duties of her position. (Tr. 68) [REDACTED] did not know, until reading the NACTA response, that the Grievant claimed to be suffering from chronic headaches. (Tr. 82-83) That response made a difference, according to [REDACTED] because it stated that the Grievant was complying with her doctor's orders, even though no evidence of a doctor's directive was provided. [REDACTED] then changed her proposed discipline from removal to the 10-day suspension. (Tr. 94)

POSITION OF THE PARTIES:

Position of the Employer:

That Management witnesses saw the Grievant asleep and confirmed their observations in their post-incident statements; that the Grievant did not claim she had a headache or was ill when she was awakened; that it was not possible for the Grievant to perform her duties from how she was seated; that the Grievant admitted that her eyes were closed; that all required factors were carefully considered; that Union witnesses

were not in a position to observe the Grievant who admitted she was in a sleeping position for five to 10 minutes.

Position of the Union:

That the Employer did not prove by a preponderance of the evidence that the Grievant was sleeping; that Employer witnesses could not say for sure that she was sleeping; that the Grievant had closed her eyes to alleviate her migraine headache; that while the Union does not condone closing eyes but no duties when unattended; that a thorough investigation was not completed since the deciding official did not talk to the Grievant or other potential eye witnesses; that *Douglas* factors were not properly considered; that ██████ was obviously not happy with the Grievant and determined to make an example of her; that a fair and balanced discipline should be arrived at so that the grievance should be sustained or the 10 day suspension mitigated to a lesser penalty.

DISCUSSION:

Offense Proven:

The Employer, accusing the Grievant of sleeping or exhibiting a sleep-like state, is required to prove that to establish that her discipline was for cause to promote the efficiency of the service. It based that conclusion on statements from Ford and Simmons.

Ford made her observation from the Supervisor's desk but, despite what she said she saw, turned the matter completely over to ██████. Accordingly, ██████ could not,

by walking off, corroborate what ██████ saw and heard. In his post-incident statement made out the same day he noted that ██████ did not even accuse the Grievant of being asleep but ██████ told him her position "was neither professional nor acceptable." While he did note that the Grievant "appeared to awake from a sleep like state" he did not note what he testified to almost three years later, that he had to call her name twice before she finally reacted. (Er. Ex. 3)

Nonetheless, two admissions by the Grievant show that she was at least in a "sleep-like state" when observed, first that when ██████ called her name she said she would get up and walk around as she did. Had she not been in a sleep-like state, she could simply have asked ██████ what he wanted or made some other reply, rather than the defensive statement that she would essentially clear her head by walking around. Her later testimony that walking around to collect obsolete slips does not change this conclusions since if that was a duty she could have done that rather than sit as she did.

Secondly, she admitted she exhibited a sleep-like state for five to ten minutes, even though, apparently, several co-workers as well as her Supervisor did not observe her then. Leaning back, eyes closed, feet up for that period of time is such an exhibition as charged.

Appropriate Discipline:

The discipline in this case, under either Party's submission of the issue, requires that it be appropriate to promote the efficiency of the service. Here, according to

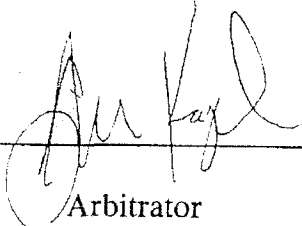
██████████, however she thought of the Grievant and what she believed the Grievant's offense to be, eschewed removal in favor of the lesser 10-day suspension on undocumented claims of the Grievant following doctor's orders.

The Union maintains that while this discipline would not be for cause as required, the record does support it. Even taking into account that there was no claim that the Grievant imperiled safety due to the sporadic nature of the duties at Flight Data, which were safety-related, the fact was that the Grievant, with a headache serious enough to prevent her from being attentive to her duties, did not take the proper steps to alert Management to her condition. While the Grievant had been under pressure to be reliable in terms of her attendance requirements, if in fact she had physician orders to deal with on-the-job headaches as she did, she was obligated to provide those to supervision and she had not. She did not testify how her condition would be alleviated at other positions she would occupy on her shift without disclosing it to the Employer. Under all of the circumstances of this case, the onus of what occurred fell on the Grievant who could have, and was obliged to have, taken steps to deal with her condition if it existed as she maintained.

Given that ██████████ claims that she did not take the incident that allegedly occurred four days later concerning planes coming too close together into consideration the Employer met its obligations with respect to the discipline of the Grievant.

DECISION:

The grievance is denied.



Arbitrator

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NEUTRAL DISPUTE RESOLUTION

July 9, 2007

Melinda Kim
NACTA
1325 Massachusetts Ave., NW
Washington, DC 20005

Kevin Gray
FAA
15000 Aviation Blvd., AWP-16
Lawndale, CA 90261

Re: NACTA and FAA, [REDACTED] 10-day suspension, NC-WP-05-0187-
[REDACTED]

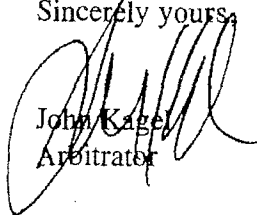
Dear Counsel:

Enclosed please find a signed copy of the decision in the above matter.

Also enclosed is my invoice in this matter.

I greatly appreciate your cooperation in this case.

Sincerely yours,


John Kagel
Arbitrator

encs:

Law Offices of

JOHN KAGEL

Neutral Dispute Resolution

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medarb@attglobal.net

Invoice

DATE	NUMBER
7/9/2007	1892

TO
Kevin Gray FAA 15000 Aviation Blvd., AWP-16 Lawndale, CA 90261

SERVICES	AMOUNT
Employer's one-half, NACTA and FAA, [REDACTED] 10-day suspension, NC-WP-05-0187-[REDACTED]-3	1,670.00
Employer's one-half, expenses	373.77
Tax ID No. 770439762	Total 2,043.77

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