

Grievance Number : 73044

ARBITRATION OPINION AND AWARD

In the Matter of the Arbitration

between

FEDERAL AVIATION ADMINISTRATION

and

NATIONAL AIR TRAFFIC CONTROLLERS
ASSOCIATION (AFL-CIO)

Case No. NC-08-73044- [REDACTED]

ISSUE:

Discipline: Inappropriate
Statements/Behavior [REDACTED]

Impartial Arbitrator

Philip Tamoush

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Hearing Held

September 16, 2008
[REDACTED]

Record Closed

November 2, 2008

Award Issued

December 13, 2008

Appearances

For the Agency:

Walter W. Schuster
Eletha Hicks-Moffatt
Labor Relations Specialists
15000 Aviation blvd
Lawndale, CA 90261

F10-8248WP
Rcvd 10-19-11

For the Union:

John Paiva
Kevin Sills
Advocates
1325 Massachusetts Avenue NW
Washington, DC 20005

ISSUES

The parties stipulated to the following statements of the issues in this matter:

1. Whether the 2003 CBA (Green Book) or the 2006 CBA (White Book) is the controlling contract between the parties.
2. Whether the FAA's 30-day suspension of [REDACTED] was for such cause as will promote the efficiency of the service. If not, what shall the remedy be?

RELEVANT WRITTEN DOCUMENTS

I. AGREEMENT

Article 10 – Disciplinary/Adverse Actions

Section 3. Disciplinary/adverse actions shall not be taken against an employee except for such cause as will promote the efficiency of the service. Any action taken by the Agency shall e supported by a preponderance of the evidence. (Joint Exhibit 1B, Green Book, Sept 2003)

II. CONTRACT

Article 10 – Disciplinary/Adverse Actions

Section 3. Unless otherwise specified in this Agreement, disciplinary/adverse actions taken against an employee, whether conduct or performance based, will be in accordance with FAA Personnel Management System, Chapter III, Paragraph 3 dated March 28, 1996. (Joint Exhibit 1A, White Book, June 5, 2006)

III. STANDARDS OR CONDUCT (JX-6)

Incorporated herein by reference.

IV. TABLE OF PENALTIES (JX-7)

Incorporated herein by reference.

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BACKGROUND AND SUMMARY OF FACTS

This matter involves the appeal of [REDACTED] Air Traffic Control Specialist, and represented by his Union, the National Air Traffic Controllers Association, of his 30-day suspension

for violation of Standards of Conduct. The matter could not be resolved in grievance discussions and it proceeded to arbitration before the undersigned, jointly selected by the parties.

More specifically, the Grievant is an experienced Air Traffic Control Specialist, currently retired, working at the ██████████ Air Traffic Control Tower. On September 26, 2007, he was involved in two separate incidents of alleged inappropriate behavior. In one case he was heard by his supervisor, Mr. ██████████ and others, to say, "Goddammit!" as a reaction to an issue he had with another Controller. Later that same morning, Mr. ██████████, in discussing breaks with his supervisor, Mr. ██████████ stated, "I don't give a shit about training!" There is no dispute with regard to the Grievant's statements made in the presence of his supervisor.

After an investigation of the statements made by Mr. ██████████ and in light of previous disciplinary actions for similar inappropriate behavior resulting in a 10-day suspension and a 30-day suspension, the ██████████ Air Traffic Manager issued a notice of removal (termination) to Mr. ██████████ on November 1, 2007. Mr. ██████████ responded on November 27, 2007 (Joint Exhibit 11), protesting the proposed removal. As a result of that, and other discussions, his manager decided to reduce his proposed termination to a 30-day suspension. ██████████ filed a formal grievance appealing the discipline on January 7, 2008.

It should be noted also that as part of a settlement of his immediately prior 30-day suspension, his manager reduced a proposed termination at that time to 30 days, conditioned on his attending an anger management course. The Grievant did attend the anger management course and accepted the 30-day suspension.

CONTENTIONS OF THE PARTIES

The arbitration hearing in this matter was recorded and the transcript is incorporated herein by reference. In addition, the parties filed post-hearing briefs dealing with both the threshold procedural issue, as well as the merits of the issue, both of which are also incorporated herein. The following is a brief summary of the contentions of the parties.

Management contends there is no doubt that the 30-day suspension is warranted. Mr. ██████ has not made good on his promises to maintain his temper and to apply what he learned in the anger management class. ██████ does not dispute the statements he made, but only offers excuses of his frustration at the incidents. The Grievant is familiar with the Standards of Conduct, which require that employees maintain proper behavior. Mr. ██████' history of offenses certainly justified the removal decision, and, of course, the 30-day suspension. There is nothing in the record of this case that would justify eliminating the 30-day suspension or reducing it. ██████ had an opportunity to bring his conduct into conformity with FAA standards, and did not do so. The grievance should be denied.

With regard to the threshold issue, it is clear that the 2006 contract is the controlling document in terms of Labor-Management relations. While NATCA had filed various appeals relative to the unilateral implementation of the 2006 contract, it has lost such appeals at every level. The most final decision was issued by the United States District Court for the District of Columbia on October 23, 2008, wherein NATCA's appeal and suit against the Federal Service Impasses Panel was dismissed. That decision, only recently issued, states in conclusion:

"Plaintiff's motion for summary judgment will be denied and defendant's motion to dismiss will be granted."

That decision of the United States District Judge confirms the FAA position that the 2006 Agreement applies now.

The Union contends that the 30-day suspension should be removed. The events of September 26, 2007 do not rise to the level of discipline imposed and has been exacerbated by Mr. ██████ failure to deal with what are commonplace work situations. The first outburst by Mr. ██████ dealt clearly with a malfunction and problem of radar controls equipment. There was no problem with relationships between the Grievant and his fellow employees, and Mr. ██████ merely overreacted to the situation.

With regard to the incident later in the day relative to taking breaks, clearly Mr. ██████ was deprived of his normal break rotation. He responded to Mr. ██████ excuse that training schedules required a different break location in a normal manner. Again Mr. ██████ exaggerated and elevated the level of his reaction inappropriately. Both incidents were elevated by Mr. ██████ to major investigations, not worthy of what actually occurred. The Air Traffic Manager then was given a record of the incidents that was way out of line. Other employees have not been disciplined in the same manner.

With regard to the threshold issue, there is nothing in the record that should preclude the grievance from being heard under the 2003 or 2006 contract. As has been written in texts on the subject, grievances, especially on discipline issues, can be processed without regard to which contract applied since the grievance procedure itself continues in effect. The Union has filed lawsuits relative to its dispute with the Agency that it had no authority to implement unilaterally the 2006 Agreement. That matter must be settled before the 2006 contract can be given effect over the 2003 Agreement. The grievance should continue to be processed as a valid grievance.

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DISCUSSIONS, FINDINGS & CONCLUSIONS

With regard to the threshold issue, it appears from the record produced by the Agency that District Judge Rosemary M. Collyer's decision on October 23, 2008 disposes of the issue. Judge

Collyer dismissed NATCA's suit against the FSIP. Her decision (Civil Action #08-481(RMC)) disposes of the issue. For the time being, unless further appeals occur, the 2006 Contract is the controlling document.

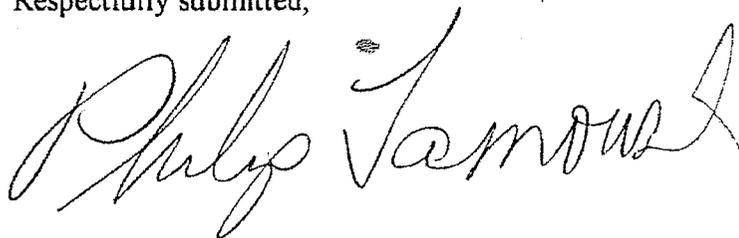
Regardless of the undersigned's opinion stated above, he would indicate that the grievance in this case is not procedurally defective because of the effect of the 2006 Contract prevailing over the 2003 Agreement. The parties are referred to the classic and definitive book *How Arbitration Works* by El Kouri & El Kouri, 5th Edition, pages 154—162, with extensive discussion on why grievances, especially those dealing with employee discipline, challenging the implementation of the Agency's Standards of Conduct and Table of Penalties can and should continue in effect. They should be processed as legitimate grievances for the reasons enunciated there. Here the grievance is not challenging a specific contractual section of the Agreement, with the exception of the efficiency of the service and that language is found in both agreements.

With regard to the merits of the case, the 30-day suspension will be sustained and the grievance denied. Here ██████████ had violated all of the common tenets of decorum and appropriate behavior. Had this been a one-time-only event, it would be simple to decide that a mere admonishment to "knock it off" in the future would have been appropriate, acceptable, and certainly have been implemented by ██████████. Instead, ignoring his past discipline for the same behaviors and his commitment to the Agency, he again violated the rules. Management need not tolerate so many continuing violations of standards of conduct.

AWARD

The grievance is denied. [REDACTED] was disciplined for such cause as will promote the efficiency of the service

Respectfully submitted,

A handwritten signature in cursive script that reads "Philip Tamoush". The signature is written in black ink and is positioned below the text "Respectfully submitted,".

Philip Tamoush

December 13, 2008
Torrance, California

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