Office of Administrative Law Judges

U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, D.C.
Respondent

and

NATIONAL AIR TRAFFIC
CONTROLLERS ASSOCIATION, AFL-CIO
Charging Party

Case No. BN-CA-05-0222

Gail M. Sorokoff
Philip T. Roberts
For the General Counsel

John T. Brophy
For the Respondent

Marc S. Shapiro
For the Charging Party

Before: PAUL B. LANG
Administrative Law Judge

DECISION

Statement of the Case

This case arises out of an unfair labor practice charge that was filed on March 9, 2005, by the National Air Traffic Controllers Association, AFL-CIO (Union or NATCA) against the U.S. Department of Transportation, Federal Aviation Administration, Washington, D.C. (Respondent); an amended charge was filed on May 4, 2005. On February 10, 2006, the Regional Director of the Boston Region of the Federal Labor Relations Authority (Authority) issued a Complaint and Notice of Hearing in which it was alleged that the Respondent committed an unfair labor practice in violation of §7116(a)(1) and (2) of the Federal Service Labor-Management Relations Statute (Statute) through the action of Peter Pellicani, an Operations Manager, who ordered a security guard to escort Dean Iacopelli, the President of Union Local N90 (Local N90), out of its facility. It was further alleged that the aforesaid action was taken because Iacopelli had been engaged in protected activity.

A hearing was held in New York, New York on April 27, 2006. [1] The parties were present, along with counsel, and were afforded the opportunity to present evidence and to cross-examine witnesses. This Decision is based upon consideration of all of the evidence, including the demeanor of witnesses, and of the post-hearing briefs submitted by the parties.

Positions of the Parties

General Counsel

The General Counsel maintains that, shortly before Pellicani ordered Iacopelli to be escorted out of the Respondent's facility, Iacopelli had approached him to discuss the assignment of overtime to members of the bargaining unit. After Pellicani had terminated the discussion, Iacopelli left the area to attend a meeting. Pellicani thereupon had Iacopelli summoned, at which time Pellicani ordered a guard to escort Iacopelli from the premises. All of this occurred while Iacopelli was engaged in protected activity as a Union officer.

According to the General Counsel, the coercive effect of Iacopelli's expulsion from the TRACON was magnified by the fact that at least 10 members of the bargaining unit saw Iacopelli being escorted out of the building. Furthermore, the incident was described in mandatory briefings which were given to all Air Traffic Controllers (ATCs) employed by the Respondent and also was described on the Respondent's web site which is accessible by all of its employees and by the general public. Therefore, the General Counsel maintains that, as a remedy, the Respondent should be ordered to cease and desist from discriminating against Iacopelli and any other Union representative for engaging in protected activity. The General Counsel also maintains that an appropriate notice should be posted throughout the New York TRACON and that the notice should be made part of the mandatory briefing at all of the Respondent's facilities where the report of the underlying incident was part of the mandatory briefing.

Union

The Union supports the position of the General Counsel, but maintains that the notice posting should be extended to all of the Respondent's facilities throughout the country to which bargaining unit employees are assigned.

Respondent

The Respondent maintains that Iacopelli engaged in inappropriate conduct and used inappropriate language to Pellicani who was his supervisor. Iacopelli's actions and language were deliberate and were not the result of a spontaneous emotional outburst. In addition,

1. The record was held open until May 1, 2006, for the submission of Joint Exhibit 5.

the Respondent argues that, at the time of the incident, Iacopelli was not engaged in protected activity as defined by the Statute.

The Respondent further maintains that, even if Iacopelli had been engaged in protected activity, his behavior constituted flagrant misconduct, thus justifying his involuntary removal from the work place. Furthermore, the Respondent contends that Pellicani's action was justified and that he would have taken the same action even if Iacopelli had not been engaged in protected activity.

Preliminary Issue

The General Counsel requests that I take official notice, pursuant to §2429.5 of the Rules and Regulations of the Authority, of the Respondent's report of the incident upon which this case is based, a copy of which is attached to her post-hearing brief. That report is part of Appendix 5, entitled "Reports of Intimidation & Insubordination", to "New York Terminal Radar Approach Control (TRACON) Operational Assessment (March 2 - May 6, 2005)" which was issued by the Respondent on June 2, 2005, and is to be found at the Respondent's website.

Official notice is broader than judicial notice. Official notice may be taken, not only of public records and generally accepted facts, but also of matters within an agency's area of special expertise, *Union Electric Co. v. F.E.R.C.*, 890 F.2d 1193, 1202 (D.C. Cir. 1989). The Respondent's website and its contents are available to the general public and fall within the definition of "public records". Furthermore, Iacopelli testified without challenge that a report of the incident was included in the Respondent's website. Therefore, I will take official notice of the incident report and will afford it appropriate weight and consideration.

Findings of Fact

The Respondent is an agency within the meaning of §7103(a)(3) of the Statute. The Union is a labor organization as defined in §7103(a)(4) of the Statute; Local N90 is an agent of the Union for the purpose of representing employees of the Respondent who are employed at its facility in Westbury, N.Y. and who are part of a unit which is represented by the Union and which is appropriate for collective bargaining. At all times pertinent to this case Dean Iacopelli was the President of Local N90 and Peter Pellicani was the Operations Manager at the Respondent's New York facility.

The Local Agreement

At all times pertinent to this case the parties had an informal local agreement or understanding regarding facility staffing numbers and a procedure for call-in overtime. That agreement was as stated in the minutes of a New York TRACON Facility Gatekeeper Meeting which was held on September 28, 1995; the minutes were signed by representatives of the Respondent and the Union (Tr. 26, 27; GC Ex. 2). Paragraph 2 of the agreement provides, in pertinent part, that "overtime backup agreed to using 8/94 staffing numbers. . . Any deviation from facility policy must be agreed upon at the area level. . ." Paragraph 3 provides, in pertinent part, that:

> Every effort shall be made to maintain these staffing minimums except when mutually agreed upon by the area supervisor and designated NATCA area representative. . . . Any disagreement on use of resources should be elevated immediately to the next level. If no other option is available or agreed upon, overtime shall be used to meet minimum numbers.

The Incident of March 5, 2005

The incident upon which this case is based occurred on March 5, 2005, at which time Iacopelli and Pellicani were working in the New York TRACON. [2] The TRACON is a facility in which ATCs monitor and direct air traffic in and out of various airports in the area. [3] It is undisputed that the incident took place at the supervisor's position at which Pellicani was seated (Jt. Ex. 5) [4]. Iacopelli testified without challenge that there was no line of sight from the positions of the nearest ATCs to Pellicani's position (Tr. 58). [5]

The incident occurred during the 3:00 p.m. to 11:00 p.m. shift. At approximately 3:30 p.m. Iacopelli became aware that only five ATCs would be available for the next shift rather than the normal staffing level of eight. While Iacopelli was waiting to meet a bargaining unit employee regarding an unrelated representation issue he overheard a discussion which James Russo,

2. TRACON stands for terminal radar approach control (Tr. 19).

3. The layout of the facility is shown in Joint Exhibits 2 and 5; Joint Exhibit 5 is an enlargement of Joint Exhibit 2.

4. The notation "OS" marks the position of the Operations Supervisor, "P" stands for Pellicani and I stands for Iacopelli (Tr. 37, 38).

5. The positions of each ATC in the JFK Sector is marked on Joint Ex. 5 by a "X" (Tr. 46).

who is a crew steward and Iacopelli's subordinate in the Union, was having with Archie Blount, the Operations Manager, and Pellicani about the staffing for the next shift. Russo allegedly turned to Iacopelli and stated that he was "elevating" the matter to him because the management representatives did not want to make a decision (Tr. 35-37). [6] At that point Iacopelli asked Pellicani what he planned to do about the next shift. Pellicani stated that he would address the matter later. Iacopelli insisted that the decision had to be made at that time and again Pellicani stated that he would do so later in the shift. Finally, after repeated exchanges of the same sort, Pellicani stated that the conversation was over and Iacopelli left the area to confer with the employee he had been waiting for (Tr. 39, 40). Although there is a factual dispute as to whether Iacopelli used profanity, the uncontroverted evidence indicates that Iacopelli persisted in continuing the discussion of manning levels for the oncoming shift even though Pellicani told him that he was not ready to make a decision and would do so later that day (Tr. 96).

Pellicani's description of the March 5 incident is at odds with that of Iacopelli. Pellicani testified that, at some point in the conversation, Iacopelli uttered the phrase "fuck you, I don't give a fuck" (Tr. 96). Iacopelli denied using such language and testified that Pellicani put his finger in his face; Pellicani denied making that gesture. Iacopelli further testified that he told Pellicani that he did not appreciate the gesture, after which he (Iacopelli) walked away.

Louis Vengilio is an ATC who was assigned to the flight data position in the New York TRACON on March 5. His duties required him to deliver computer-generated paper strips to racks alongside the radar positions where other ATCs were in direct communication with aircraft; he did not wear a headset. As such, Vengilio was moving around the area in the vicinity of the supervisor's position when the incident occurred. [7] Vengilio testified that he only heard portions of the conversation between Pellicani and Iacopelli. He denied hearing profanity from Iacopelli but stated that he saw Pellicani waving his finger in Iacopelli's face (Tr. 69-78).

After Iacopelli had left the area Pellicani called for a security guard and summoned Iacopelli back to the Operations Room. At that point he informed Iacopelli that he was placing him on administrative leave for the remainder of the shift and that the security guard would escort him off of the premises. [8] Iacopelli stated that he wanted to retrieve his coat; he then walked through the TRACON with the security guard within the view of ten or more bargaining unit employees. [9] After Iacopelli had retrieved his coat the guard remained with him until he had gotten into his automobile and driven off of the parking lot. [10]

Pellicani later determined that there would be a need for one overtime position during the next shift. When he was informed that Iacopelli was entitled to that overtime position he authorized the offering of the position to Iacopelli. Iacopelli accepted and worked overtime during the next shift.

Both Iacopelli and Pellicani testified that they each spoke in normal tones. Pellicani stated that Vengilio was the only other person who could possibly have heard the conversation (Tr. 106) and Vengilio testified that he only heard parts of it (Tr. 72). It was only when Iacopelli walked through the TRACON with the guard that any other employee could have become aware that something unusual had occurred.

Upon consideration of the evidence, I find as a fact that, at the end of Iacopelli's conversation with Pellicani, he uttered the profanity as described by Pellicani. This finding is based upon Iacopelli's use of similar language during a tape recorded telephone conversation with Pellicani on the day before (Tr. 33). Furthermore, it would have made no sense for Pellicani to have had Iacopelli expelled if he had merely walked away after Pellicani had told him, in effect, that their conversation was over.

The Respondent has suggested that Iacopelli and Vengilio are "biased, prejudiced and interested witnesses", thereby rendering their testimony unworthy of belief. If that is so, that characterization would apply equally to Pellicani whose actions on March 5 gave rise to the unfair labor practice charge upon which the Com-

6. Russo's position is indicated by a "R" and Blount's by a "B" on Joint Exhibit 5 (Tr. 38).

7. Vengilio affixed a series of "V" notations on the diagram of the TRACON to mark the area in which he had been performing his duties (Tr. 71).

8. It is undisputed that Iacopelli was paid for the entire shift.

9. Iacopelli's path from the Operational Supervisor's work station to the coat rack is designated by a broken line on the TRACON diagram (Tr. 44, 45).

10. The General Counsel and the Union have repeatedly emphasized the fact that Iacopelli was escorted by an armed security guard. While this is true, it is also a fact that all of the security guards are armed (Tr. 80). There is no evidence that the guard who escorted Iacopelli was equipped differently than the others or that he brandished his weapon at Iacopelli.

plaint is based. Suffice it to say that, in weighing the evidence, I have taken into account the apparent motivation, attitude and demeanor of each of the witnesses.

Discussion and Analysis

The Evidentiary Standard

In *Letterkenny Army Depot*, 35 FLRA 113, 118 (1990) (*Letterkenny*) the Authority established the elements of proof of a charge of unlawful discrimination. In order to prevail, the General Counsel must first establish that the employee against whom the adverse action was taken had been engaged in protected activity and, secondly, that consideration of the activity was a motivating factor in the adverse action. Once the General Counsel has presented a *prima facie* case of discrimination according to the *Letterkenny* criteria, the Respondent may show by a preponderance of the evidence that there was a legitimate nondiscriminatory justification for the adverse action and that the action would have been taken even in absence of the protected activity. In determining whether the General Counsel has presented a *prima facie* case, consideration will be given to the record as a whole, *Department of the Air Force, Air Force Materiel Command Warner Robins Air Logistics Center, Robins Air Force Base, Georgia*, 55 FLRA 1201, 1205 (2000).

When the alleged discrimination concerns adverse action in response to protected activity, a necessary part of the Respondent's defense is that the conduct at issue constituted flagrant misconduct or otherwise exceeded the bounds of protected activity. If the conduct exceeds the bounds of protected activity, it loses protection under the Statute and can be the basis for discipline or other adverse action. If the Respondent fails to show that it had legitimate reason for the disputed action, the second prong of the General Counsel's burden of proof under *Letterkenny* (whether Respondent proved that it would have taken the same action in the absence of the protected activity) need not be addressed, *U.S. Department of the Air Force, Aerospace Maintenance and Regeneration Center, Davis Monthan Air Force Base, Tucson, Arizona*, 58 FLRA 636 (2003) (*Davis Monthan*).

The Nature of Iacopelli's Activity

Section 7102 of the Statute provides that, among the protected rights of employees, is the right:

> (1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials . . . .

It is undisputed that Iacopelli's purpose in approaching and speaking to Pellicani was to resolve the question of assigning overtime so as to fill expected vacancies in the oncoming shift. It is also obvious that the number of ATCs assigned to a shift will affect the workload of individual ATCs. The assignment of overtime and the workload of employees are conditions of employment according to the two criteria set forth in *Antilles Consolidated Education Association and Antilles Consolidated School System*, 22 FLRA 235, 237 (1986); each of the issues pertain to ATCs who are bargaining unit employees and each has a direct connection with the work situation of those employees. According to §7103(a)(4) of the Statute, one of the purposes of a labor organization such as the Union is "dealing with an agency concerning . . . conditions of employment". That fact, plus the fact that the local agreement contemplated discussion between the Respondent and the Union concerning staffing levels and the necessity for overtime, leaves no doubt that Iacopelli was engaged in protected activity as defined by §7102(1) of the Statute.

The Respondent asserts that Iacopelli was not engaged in protected activity because Pellicani had already stated that he was not prepared to make a decision about overtime until later. According to the Respondent, Iacopelli "inserted himself" into the conversation that Russo was having with the Respondent's representatives.

As shown above, the parties had a local agreement or understanding regarding manning levels and call-in overtime. In *U.S. Department of Labor, Employment and Training Administration, San Francisco, California*, 43 FLRA 1036, 1039 (1992) the Authority held that protected activity includes the assertion of rights under a collective bargaining agreement. The Respondent has cited no legal authority in support of the far-fetched proposition that a union representative's activities on behalf of bargaining unit members loses its protected status because an agency representative does not choose to address the union's concerns at that time or because the efforts of the union representative may not be prudent or necessary. [11] Issues of manning levels and the timely notification of the availability of overtime were of legitimate concern to the Union. As a Union officer,

11. This case does not raise the issue of whether Pellicani was obligated to discuss the overtime issue with Iacopelli at that time or whether Iacopelli's language would have justified the termination of the discussion. Nor does the outcome of this case turn on the merits of the Union's position.

Iacopelli was entitled to raise those issues with the Respondent through Pellicani.

The Respondent argues that to characterize Iacopelli's actions as protected activity would be to justify every instance of "rude, abusive and disruptive behavior." The Respondent then goes on to concoct a bizarre scenario whereby Iacopelli would have followed Pellicani into the men's room and demanded that he make a decision as to overtime. The simple answer to that argument is that a determination of flagrant misconduct is dependent on the facts of each case. See *Department of Defense, Defense Mapping Agency Aerospace Center, St. Louis, Missouri*, 17 FLRA 71, 81 (1985) (*Defense Mapping*), a case cited by the Respondent in its post-hearing brief.

The Nature of Iacopelli's Conduct

Iacopelli's protected activity would not render him immune from discipline or other adverse action if his actions amounted to flagrant misconduct, *U.S. Air Force Logistics Command, Tinker Air Force Base, Oklahoma City, Oklahoma and AFGE Local 916* (Owen, Arbitrator), 34 FLRA 385, 388 (1990). The evaluation of allegedly flagrant misconduct is dependent upon the facts of each case, *Defense Mapping*. However, in *U.S. Department of Veterans Affairs Medical Center, Jamaica Plain, Massachusetts*, 50 FLRA 583, 587 (1995), the Authority cited with approval the holding in *Dreiser & Krump Mfg. Co., Inc. v. NLRB*, 544 F.2d 320, 329 (7th Cir. 1976) that protected activity remains protected unless it is found to be, "so violent or of such serious character as to render the employee unfit for further service." The Authority has also held that statements made on behalf of a union do not fall outside the protection of the Statute merely because they are offensive. Such statements are grounds for discipline only when they are blatantly offensive (such as racial epithets) or made with a reckless disregard for the truth, *Federal Aviation Administration, Honolulu, Hawaii*, 53 FLRA 1762, 1772 (1998).

The Respondent has correctly cited *Defense Mapping* as setting forth the factors to be considered in determining the existence of flagrant misconduct. Each of those factors will be applied to the circumstances of this case.

Place and subject matter of discussion. Although the incident occurred in an open area, Pellicani himself testified that no one but Vengilio was in a position to overhear his conversation with Iacopelli (Tr. 106) and Vengilio testified that he only heard part of it (Tr. 71). There is no evidence that the operations of the TRACON were in any way disrupted or that any other employee, besides those who observed the aftermath of the incident when Iacopelli was escorted to the coat rack and out the door by the security guard, even knew of it. As shown above, the subject matter of the discussion was within the scope of the Union's legitimate concerns and was within the Respondent's duty to bargain. This factor does not support the Respondent's position.

Whether the outburst was impulsive or designed. Although the evidence is somewhat unclear on this point, my impression is that Iacopelli became frustrated by Pellicani's refusal to make a decision about overtime in spite of Iacopelli's insistence that Pellicani do so. While Pellicani's conduct did not justify the use of profanity, the weight of the evidence is that Iacopelli had not planned his outburst. [12] This factor does not support the Respondent's position. [13]

Whether the outburst was provoked by the employer's conduct. While Iacopelli might have been annoyed by Pellicani's response to his inquiry about overtime, there was insufficient provocation to justify the use of profanity. This factor supports the Respondent's position.

The nature of the intemperate language or conduct. Pellicani's testimony indicates that Iacopelli's burst of profanity was short and was delivered in a normal tone of voice. The undisputed evidence is that it was not heard by any other employee and that there was no disruption of operations. This factor does not support the Respondent's position.

In considering the above factors as well as all other evidence as to the surrounding circumstances, I have concluded that Iacopelli's language and conduct did not amount to flagrant misconduct. Consequently, his actions as a Union officer did not fall outside of the protection of the Statute.

The Respondent's Affirmative Defense

Because Iacopelli was engaged in protected activity and was not guilty of flagrant misconduct, the Respondent's action against him was not justified. Therefore, as set forth by the Authority in *Davis Monthan*, it is not necessary to determine whether he

12. There is a minor issue of fact as to whether Pellicani put his finger near Iacopelli's face. That gesture, if it actually occurred, would not have justified the use of profanity.

13. While the Respondent is correct in its assertion that respect for "robust debate" is a central tenet of the policy regarding protected activity, it has cited nothing to suggest that such debate is a necessary element of protected activity.

would have been put on administrative leave if he had not been engaged in protective activity. Accordingly, the Respondent's affirmative defense is ineffective.

The Respondent has attempted to justify Pellicani's removal of Iacopelli from the TRACON by comparing Pellicani's actions to acts of violence by agency representatives which were found by the Authority to have been improper in other cases. The apparent point of that comparison is that Pellicani's action was a moderate and reasoned response to a situation which threatened to escalate. Contrary to that proposition, Pellicani testified that Iacopelli's conduct was not typical of him and it is undisputed that the incident was over immediately after Iacopelli uttered the profanity. Therefore, there was no credible threat of escalation.

Pellicani's lack of anti-Union animus is also of no consequence. It is Pellicani's unambiguous conduct rather than his attitude toward the Union that is at issue here.

The Remedy

Both the General Counsel and the Union have urged that Iacopelli's name be included in the order and notice. However, the incident report of which I have taken official notice does not mention either Iacopelli or Pellicani by name. Therefore, general language as to the prohibition of discrimination on account of protected activity is deemed to be sufficient. In addition, the posting of a notice at locations other than the New York TRACON is not considered to be necessary. The policies and purposes of the Statute will be effectuated by the posting of the notice at the New York TRACON along with a report of the issuance of the order and the posting of the notice reported in the mandatory briefing in the same manner as the Respondent promulgated information as to the incident of March 5.

For the reasons stated I have concluded that the Respondent committed an unfair labor practice in violation of §7116(a)(1) and (2) of the Statute by causing Dean Iacopelli to be placed on administrative leave and escorted out of the New York TRACON because of his protected activity. Accordingly, I recommend that the Authority adopt the following Order:

ORDER

Pursuant to §2423.41(c) of the Rules and Regulations of the Authority and §7118 of the Federal Service Labor-Management Relations Statute (Statute), it is hereby ordered that the U.S. Department of Transportation, Federal Aviation Administration, Washington, DC (Respondent) shall:

1. Cease and desist from:

(a) Discriminating against any representative of the National Air Traffic Controllers Association, AFL-CIO (Union) by placing him or her on administrative leave or by causing him or her to be removed from any of the Respondent's facilities because he or she has engaged in activities protected under the Statute.

(b) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Rescind and expunge any reference to the incident of March 5, 2005, from the personnel record of the Union representative who was placed on administrative leave and removed from the New York TRACON on that date.

(b) Post at the New York TRACON copies of the attached Notice on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the New York TRACON Air Traffic Manager and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced or covered by any other material.

(c) Include a report of the issuance of this Order and of the posting of the attached Notice in the mandatory briefing of its employees by the same method and for the same length of time that it included a report of the incident of March 5, 2005, in the mandatory briefing of its employees.

(d) Pursuant to §2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director of the Boston Region of the Authority, in writing, within 10 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, June 14, 2006.

Paul B. Lang
Administrative Law Judge

NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the U.S. Department of Transportation, Federal Aviation Administration, Washington, DC violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT discriminate against any representative of the National Air Traffic Controllers Association, AFL-CIO (Union) by placing him or her on administrative leave or by causing him or her to be removed from any of our facilities because he or she has engaged in activities protected under the Statute.

WE WILL NOT, in any like or related manner, interfere with, restrain or coerce our employees in the exercise of their rights assured by the Statute.

WE WILL rescind and expunge any reference to the incident of March 5, 2005, from the personnel record of the Union representative who was placed on administrative leave and removed from the New York TRACON on that date.

WE WILL include a report of the issuance of the Order in this case and of the posting of this Notice in the mandatory briefing of our employees by the same method and for the same length of time as we included a report of the incident of March 5, 2005, in the mandatory briefing of our employees.

_____
(Agency)

Dated: _____ By:_____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Boston Regional Office, whose address is: Federal Labor Relations Authority, Thomas P. O'Neill, Jr., Federal Building, 10 Causeway Street, Suite 472, Boston, MA 02222, and whose telephone number is: 617-565-5100.