

APRIL 21, 2008 EMAIL

From: "Howard Blankenship" <hblankenship@natca.com>
Subject: FW: ODP: One Year Sustained Period
Date: April 21, 2008 3:01:45 PM CDT
To: "'Bryan Zilonis'" <bzilonis@natca.com>
▶ 1 Attachment, 346 KB

Z,

Right after I sent you the other email, I get this from McCrarey.

HB

From: Carol.E.McCrarey@faa.gov [<mailto:Carol.E.McCrarey@faa.gov>]
Sent: Monday, April 21, 2008 2:44 PM
To: bill.feldman@faa.gov
Cc: Howard Blankenship
Subject: Re: ODP: One Year Sustained Period

I believe ER will be putting out guidance. At this point in time the FAA has decided that a failure to maintain an acceptable level of performance in those areas noted in the ODP will result in the employee being removed for negligence. As the employee just demonstrated that he or she could perform as expected then the failure to do so must be the result of intentionally not performing as expected. Since negligence is a conduct issue, the employee removed under these circumstances will lose their retirement and will not be entitled to unemployment benefits.

I looked at the letter below and I believe you need only remove the paragraph at the end that specifically references the 1 year sustainment period.

Carol McCrarey
AHL-300
(202) 267-7583

Bill Feldman/ACE/FAA
ACE-010, Human Resource Management
Office

To "Howard Blankenship" <hblankenship@natca.com>
cc
Subject Re: ODP: One Year Sustained Period [Link](#)

04/21/2008 03:27 PM

GUIDANCE AND ADVICE MEMORANDUM (GAM) No. 8

ADDRESSING UNACCEPTABLE PERFORMANCE –
EMPLOYEES COVERED UNDER NATCA AIR TRAFFIC AGREEMENT

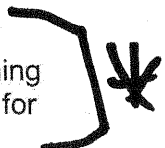
This GAM is issued for guidance and advice purposes to the Labor and Employee Relations Specialists in the Human Resource Management Divisions in the regions and centers.


This GAM rescinds the original issued on 08/01/06

BACKGROUND

An accepted practice throughout the Federal government is to require an employee to sustain acceptable performance for one-year after successful completion of a performance improvement period (PIP) or at the FAA, an Opportunity to Demonstrate Performance (ODP). If the employee's performance returns to an unacceptable level within this one-year sustainment period, the agency may initiate non-disciplinary action to remove the employee for unacceptable performance from the position without placing the employee on another ODP. The employee whose performance improves during an ODP, but then deteriorates after the ODP, is commonly referred to as a "roller coaster" employee.

WILL THE 2006 NATCA CONTRACT ALLOW FOR A PERFORMANCE-BASED ACTION?

While the contract language does not make this clear, during mediation to finalize the 2006 Contract, the parties agreed that the one-year sustainment period would not apply to bargaining unit employees. In light of this, FAA will not be able to take non-disciplinary removal actions for unacceptable performance unless the employee fails the ODP. Instead, the current and successful long-standing practice of removing unsatisfactory ATC's will continue to be taken for cause using negligent or careless performance or inattention to duty. See referenced cases below and particularly the elements necessary to prove your case. 

Be advised, arguments may be raised by NATCA representatives that we cannot take these types of action based on a March 14, 2008 letter to NATCA stating that the NATCA bargaining units would not be covered under HRPB ER-4.2, Maintaining Discipline. NATCA had objected to the wording in ER-4.2 that pertains to removing employees for negligent performance. However, NATCA was put on notice that FAA will continue to take removal actions for negligent/careless performance or inattention to duty. 

HOW TO HANDLE THE "ROLLER COASTER" EMPLOYEE

It serves no useful purpose to continually place an employee under the terms of an ODP each time the employee's performance slips to an unacceptable level. Nor does an ODP lasting six months to one year make any sense. The alternative to providing the employee another ODP for the same outcome and expectation is to take a conduct-based action. The Table of Penalties includes a charge for "negligent or careless work performance that results in injury or danger of injury to either the individual involved or to others." The first offense provides for a suspension up to removal and a second offense recommends removal.

As a general rule, Controllers receive enhancement training, are decertified then receive remedial training prior to being placed under the terms of an ODP. These training efforts and a prior ODP may be used as aggravating factors since the employee was on notice about the unsatisfactory performance, had been given assistance, and ultimately improved their performance to an acceptable level proving that they can perform the function successfully. The training and ODP can also show a lack of rehabilitation, which would certainly help support that a removal or demotion is warranted. Although the use of discipline may carry some disadvantages such as possible penalty mitigation, the ability to take immediate action and avoid additional ODPs outweigh the disadvantages under most circumstances.

Managers have the option of placing an employee under the terms of an ODP or pursue formal discipline. If the manager opts for the ODP option, and should the employee improve, then subsequently becomes deficient again, the manager should initiate a conduct-based action. There is nothing that requires an ODP for unsatisfactory performance, so the manager has the option of starting with a negligent based action after the employee was warned of the poor performance, although having the training record and a successful ODP on the record may make for a stronger case.]*

As a reminder, Air Traffic Controllers who are removed for cause, such as negligent or careless performance or inattention to duty, are not eligible for a discontinued service retirement (DSR) that would be afforded to employees who are removed for the non-disciplinary reason of unacceptable performance. See Title 5, Part III, Subpart G, Chapter 83, Subchapter III § 8336, Immediate Retirement, which reads:]*

(e) An employee who is voluntarily or involuntarily separated from the service, except by removal for cause on charges of misconduct or delinquency, after completing 25 years of service as an air traffic controller or after becoming 50 years of age and completing 20 years of service as an air traffic controller, is entitled to an annuity.]*

REFERENCES

- Julie Brehmer (102 FMSR 7052, 6/25/02; Arbitration #732 1/24/01). The Federal Circuit upheld the arbitrator's decision to sustain the removal action. The arbitrator did not find that FAA violated the CBA when it utilized an adverse action to address the ATCS performance issues. The Employee was provided skill enhancement training, was decertified and then received remedial training. The ATCS was never placed under the terms of an ODP. The Union argued that relying on performance older than one-year violated the contract. The arbitrator did not find that relying on three instances of performance deficiency within an 18 month period violated the contract.
- Kenneth L. Hawkins (MSPB, SF-0752-01-0501-I-2, 03/29/02). Demotion affirmed by the MSPB for "failure to maintain satisfactory performance." This ATCS had several performance deficiencies resulting in remedial training and ultimately an ODP. Hawkins successfully completed the ODP only to have an operational error (OE) two months after completion of the ODP. No prior discipline.
- Floyd Tipton (Arbitration #769, 02/24/03). Removal sustained for being careless and inattentive to his duties. Tipton cleared a Cessna Citation Jet for a final approach and authorized an airport maintenance vehicle onto the same runway at the same time. The

arbitrator found that the employee received remedial training, successfully completed an ODP and had prior discipline of a 60-day suspension for falsification of records.

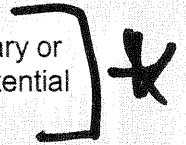
- Jerome McArthur (Arbitration #879, GETS 7274, 04/28/06). 30-day suspension sustained for careless work performance. The arbitrator considered that the employee was decertified and received remedial training. After another performance incident, the employee successfully completed a 120 day ODP. The arbitrator agreed that it was not necessary to require another ODP or additional training when the employee was involved in two more performance deficiencies. Nor did the arbitrator believe that immunity would apply to the errors.
- Edward Milbradt (Arbitration #888, GETS 7277, 06/19/06): 14-day suspension upheld. The deciding official dropped two specifications out of seven, and decided on a 14-day suspension in lieu of the proposed 30-day suspension. The arbitrator found that FAA could rely on performance deficiencies even though the employee had received remedial training and the FAA was not obligated to offer an ODP prior to pursuing discipline. The arbitrator sustained the suspension for the 2 OE's and 3 performance deficiencies committed within a nine month period.
- Michael Ferguson (Arbitration #892, GETS 13025, 07/6/06). Removal mitigated to seven month suspension (time off between removal and arbitration decision). The ATCS was removed for "negligent work performance that results in the danger of injury to the flying public." The arbitrator found that the ATCS evidenced four instances of careless work performance between February 2003 and February 2005. The employee was decertified, received remedial training and was placed under the terms of an ODP, which he successfully completed. The arbitrator did not agree with NATCA's contention that the OE's prior to the ODP could not be used since this action was not taken under the terms of Article 20, but under Article 10. However, the arbitrator's analysis of the Douglas Factors resulted in his determination that removal was excessive, but he did find the employee to be negligent enough to not award back pay.

The Arbitrator explained that for the agency to prove a charge of careless or negligent performance of duties, the agency must establish by preponderance of the evidence that:

- a. the employee engaged in conduct touching upon his/her role as an employee;
- b. the employee was on notice of the obligation to perform in a certain, acceptable manner;
- c. the employee engaged in conduct which violated the policy or standard of behavior;
- and,
- d. the conduct evidenced at least a lack of due care.

The Arbitrator also included Black's Law Dictionary definition of negligence as "a failure to use such care as a reasonably prudent and careful person would use under similar circumstances. The doctrine of negligence rests on the duty of every person to exercise due care in its conduct toward others for which injury may result." Therefore, when pursuing a negligence case, it is important that the case file clearly show that the agency has met its burden.

Based on the above, it is clear that precedence has been established to initiate disciplinary or adverse action for negligent or careless work performance when there is imminent or potential danger to life and/or property.



POC: Candi Cavanagh, AHL-100 (202.267.8857)