U.S. Department of Labor

Occupational Safety and Health Administration
230 South Dearborn Street, Room 3244
Chicago, Illinois 60604
(312) 353-2220

MAY 2 3 2017

Jonathan McGory
Assistant Director of Law
Department of Law
City of Cleveland
601 Lakeside Avenue, Room 106
Cleveland, OH 44114

Re: City of Cleveland-Cleveland Hopkins International Airport/Ali/5-1680-15-060

Mr. McGory:

This is to advise you that we have completed our investigation of the above-referenced complaint filed by Abdul-Malik Ali (Complainant) against your client, the City of Cleveland-Cleveland Hopkins International Airport (Respondent) on March 6, 2015, under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. §42121 (AIR21). In brief, Complainant alleges that he was reassigned to a demeaning and menial job on February 19, 2015, had his benefits reduced, and was officially accused of being drunk, in reprisal for his continual objections to violations of Air Carrier Safety regulations that culminated in his email to his new supervisor and subsequent interview with a Federal Aviation Administration (FAA) inspector, both on February 18, 2015.

Following an investigation by a duly-authorized investigator, the Secretary of Labor, acting through his agent, the Regional Administrator for the Occupational Safety and Health Administration (OSHA), Region V, finds that there is reasonable cause to believe that Respondent violated the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. §42121 and issues the following findings:

Secretary's Findings

Respondent is the 49 C.F.R. Part 139 certificate holder of Cleveland Hopkins International Airport (CLE), within the meaning of 49 U.S.C. §40102(a)(2), in that it undertakes by any means, directly or indirectly, to provide air transportation. Respondent, as a Part 139 certified airport, is required to participate in yearly, along with unannounced, FAA inspections, and to implement FAA-mandated plans relating to air carrier safety. Airport Operating Certificates serve to ensure safety in air transportation. To obtain a certificate, an airport must agree to certain operational and safety standards and provide for such things as firefighting and rescue equipment, along with airfield maintenance standards, such as clean and slip-free runways. Respondent additionally serves in a contractor status with the various air carriers that operate

flights out of its airport. Respondent is an air carrier and contractor within the meaning of 49 U.S.C. §40102(a)(2).

Complainant is an employee within the meaning of 49 U.S.C. §42121. In the course of his employment, Complainant served as Manager of Field Maintenance for Respondent. Complainant and Respondent are, therefore, covered by AIR21.

Complainant alleged that he was removed from his position and demoted on February 19, 2015, in reprisal for his continued complaints to management and the FAA regarding inadequate staffing, as mandated by an agreement between Respondent and the FAA, and Respondent's lack of sufficient deicing supplies. On March 6, 2015, Complainant filed a complaint with the Secretary of Labor alleging that Respondent retaliated against him in violation of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. §42121. As this complaint was filed within 90 days of the alleged adverse action, it is deemed timely.

Complainant was employed by Respondent beginning in 1990 and was promoted to Director of Field Maintenance in or around 2003. When he took over the maintenance section, it was having difficulties, and he dramatically improved field maintenance operations. Complainant met his performance goals for the period from 2011 to 2014.

On February 4, 2014, Complainant emailed his supervisors, indicating that he urgently needed purchase orders returned, so that he could order deicing chemicals for an anticipated winter storm, for which 6-10 inches of snow were forecasted over the next two days. When Complainant did not receive a response from his supervisors, and because he had been given permission to order deicing chemicals in emergency situations, Complainant ordered $208,000 in deicing chemicals, as he did not have adequate chemicals on hand for the anticipated storm. Although Complainant notified his senior managers that he was first placing the order and then again that he had placed the order, none objected to his actions at the time. Additionally, Complainant's actions were consistent with Respondent's policy, which allow orders to be placed in emergencies, although such orders are considered "confirming" incidents, which require specific approval by, and can generate special scrutiny from, the Cleveland City Council.

On June 4, 2014, Complainant was informed that he was being investigated regarding his ordering deicing chemicals on February 4, 2014. Complainant provided a written response to Respondent along with accompanying emails, explaining why it was necessary to order the supplies on an emergency basis and that he had received permission to place orders in such circumstances. Nonetheless, on August 26, 2014, Complainant was given a 14-day suspension and placed on a performance improvement plan (PIP) due to his ordering deicing materials on February 4, 2014.

During the fall of 2014, Respondent cooperated with the FAA to develop a Snow and Ice Control Plan (SICP). This SICP, which was agreed-upon by the FAA and Respondent, established mandatory staffing levels for airfield snow removal, based on the amount of snow and ice that was forecasted.

On November 10, 2014, Complainant became aware of a tentative agreement between the FAA and Respondent for the new SICP. Complainant emailed his direct supervisor, Jeff Gordon, Deputy Commissioner for Maintenance, and Fred Szabo, Commissioner of Operations, stating that Respondent would not be able to comply with the staffing levels required by the new SICP, unless employees worked overtime. Szabo responded that Respondent was not going to change the SICP, since the FAA had already approved it. However, Complainant continued to express concerns, and over the next week, provided examples demonstrating how Respondent would not be able to satisfy the SICP-mandated staffing levels.

On November 25, 2014, Respondent, in response to Complainant's concerns, requested approval from the FAA to modify the SICP to more accurately reflect the staffing that the field maintenance section could actually provide. The FAA approved this modification. However, Complainant believed staffing levels required by the modified SICP were also unobtainable, given Respondent's current resources. Complainant continued to bring his concerns regarding Respondent's inability to provide staffing mandated by the SICP to his managers, as well as Respondent's human resources department.[1]

Between January 5, 2015, and February 14, 2015, there were five winter storms that caused significant snowfall and ice accumulation over seven days, which required Respondent to activate the SICP. On each of these seven days, Respondent failed to satisfy the SICP's minimum staffing requirements for at least one of three daily shifts. Due to Respondent's lack of available staff and insufficient quantities of deicing chemicals during this period, there were 12 flights that attempted to land at CLE, but were re-routed to other airports due to unsafe landing conditions. The FAA classifies these events as "diversions" and takes them seriously. As a policy, the FAA, sends an airport certificate holder a letter of investigation for every diversion caused by runway conditions. The airport must provide a response, explaining the diversion to the FAA.

For example, on February 12, 2015, one inch of snow was forecast, which pursuant to the SICP, triggered a snow code "green," the lowest of three elevated staffing levels. Szabo, who had the authority to place the airport into "green" status, did not do so. As a result, Complainant could not request additional staffing, and the accumulating snow caused an aircraft to experience NIL[2] braking on the taxiway, which caused it to "cross the line[3]" when an outbound aircraft had been cleared for takeoff. This incident triggered a MOR Alert[4] with the FAA. The following day, the FAA contacted Respondent to ask why the airport was not in a snow code "green," based on the forecast, and requested a full response including available staffing.

---

[1] Hiring was conducted by Human Resources, and Complainant had no authority over his department's yearly budget level; as such staffing was out of Complainant's operational control.
[2] The lowest of six tiers (one tier below "poor") of current runway conditions as reported by active pilots indicating bad or no braking action; a report of which immediately closes the runway until remediation.
[3] This refers to the action of crossing into an active flight path.
[4] When Air Traffic Control Services determines that pilot actions affected the safety of operations, per FAA Order JO 7210.632, the incident must be reported to the FAA.

On February 18, 2015, Complainant learned that Eric Turner would be replacing Gordon as his supervisor on or around March 1, 2015. That morning, Complainant emailed Turner regarding his staffing concerns within the department. Complainant stated:

> *The winter shifts are designed and scheduled around meeting the FAA Part 139 Subpart D requirements, AC 150 series Airport Winter Safety & Operations demand and the new ACM color code requirements for staffing... I never had the staffing numbers promised...This winter we will never meet the color codes in the ACM unless overtime is approved each time and that hasn't happened...*

Complainant's email also identified the twelve diversions that had occurred to date, and explained that the diversions had occurred due to runways being closed for snow removal, which was taking twice as long as it had in the previous four years due to lack of staffing. Turner read this email that same day and discussed it with Gordon.

That same day, an FAA inspector conducted an inspection of the airport during the daytime hours. The FAA inspector spoke to multiple managers and employees. From approximately 3:00 p.m. until 4:00 p.m., Complainant met privately with the FAA inspector and expressed his concerns regarding staffing levels within Complainant's department and Respondent's failure to comply with the SICP. Complainant provided the FAA inspector a copy of the email he had sent that day to Turner. Upon reviewing the email, the FAA inspector expressed serious concerns about Respondent's staffing levels, stating, "this is unbelievable."

In response to this new information, the FAA inspector spoke to other managers regarding Complainant's allegations of inadequate staffing and received additional information that confirmed Complainant's allegations. The FAA inspector also informed Complainant that he would be conducting an inspection of airfield maintenance operations at 3:00 a.m. the following morning. Complainant intended to participate in that inspection as the responsible manager.

Concurrently, at 2:29 p.m. the airport declared a snow code "yellow" bringing additional staff online, due to a forecast for approximately 1-2 inches of snow.[5] At approximately 3:45 p.m., Gordon held a work order management meeting with Ricky Smith, Director of Airports. Complainant did not attend this meeting as it began while he was still speaking to the FAA inspector. Complainant normally left work at 3:30 p.m., and his department was sufficiently staffed for the limited snow forecast. Complainant had also decided that it was more important to be back at 3:00 a.m. the following morning to be present for the FAA inspection. Complainant's managers Szabo and Turner were aware he was meeting with the FAA Inspector at this time and they acknowledged that he might not attend the entire meeting. At least one other manager, Robert Henderson who subsequently replaced Complainant as the Director of Field Maintenance, was also not at this meeting. Complainant's managers, including Gordon, made no effort to contact Complainant during or immediately after this meeting.

That night, at approximately 6:20 p.m., Smith met with Gordon and Szabo, who advised Smith that there was some snow forecast for that evening, and that a snow code "yellow" had been

[5] While the SICP provides that a forecast of 1-2 inches of snow is a green code, Smith and Szabo stated that they were putting their best foot forward due to the FAA presence on site that day.

declared, resulting in an elevated level of staffing. Smith learned of Complainant's actions that day in meeting with the FAA and not attending the staffing meeting, and had Gordon call Complainant at approximately 6:30 p.m. to order Complainant to return to work. This was the first time after his leaving the airport at around 4:00 p.m. that any manager had attempted to contact Complainant. Complainant returned this call within one minute, and informed Gordon that he could not drive back to the airport at that time, because he had consumed two beers and did not believe he should drive. Additionally, Complainant advised Gordon that the FAA inspector would be inspecting the airfield at 3:00 a.m. the following day and that he needed to be present for that. Gordon relayed information between Complainant and Smith, and over the course of several short phone conversations within the next 15 minutes, Gordon told Complainant not to come to the airport at that time *or later that night for the FAA inspection*, and to just come in to Szabo's office first thing the next morning instead. As such, Complainant after communicating his intent to participate in an FAA inspection was directed to not make his planned and protected disclosures regarding inadequate staffing with the FAA inspector that night. Complainant, pursuant to orders from his supervisors, did not participate in the FAA inspection, as he had intended to do.

After these phone conversations that evening, Smith decided that he wanted to fire Complainant, in part, because he had ostensibly failed to follow the chain of command that day when he reported his concerns directly to the FAA inspector. However, the Human Resources Chief, Jenette Saunders, convinced Smith to simply reassign Complainant, as the ostensible performance concerns related to Complainant's supervisory skills, not his productivity. That evening, Smith and Saunders drafted a memo, reassigning Complainant, which Smith signed. The letter stated:

> *Effective immediately, you are being reassigned...and will no longer have responsibility for the management of the Airfield Maintenance Section... Your decision...(to) render yourself unreachable for a couple of hours, and become intoxicated... represent significant lack of judgement and commitment to your responsibility as a manager.*
>
> As part of the rationale for the reassignment, the letter stated:
>
> *[Y]ou advised the Deputy Commissioner that the Federal Aviation Administration (FAA) Certification Inspector planned to return to CLE by 3:00 a.m. the next day... Your repeated refusal to follow the chain of command, policy and procedures has caused your superiors, coworkers, and employees to lose confidence..."*

The memo provided no explanation for the accusation that Complainant had refused to "follow the chain of command," other than the reference to notifying Gordon about the FAA inspection the following morning.

On the following day, February 19, 2015, Complainant met with Szabo in his office, and was handed the reassignment memo. Szabo informed Complainant that he would be reporting to the Manager of Field Maintenance (his former position),[6] that he would not have any management

[6] Though he was soon directed to report to Eric Turner, Deputy Commissioner for Maintenance and Support.

authority, and that a new manager would be chosen.[7] Szabo also informed Complainant he was losing his city vehicle, which Complainant had been permitted to use for commuting, as well as personal use, and that he would have to submit daily status reports to his manager. Additionally, Complainant was assigned the daily tasks of counting the trash and recycling canisters at the airport.

Subsequent to Complainant's reassignment, Respondent continued to fail to meet staffing levels mandated by the SICP. On February 21, 2015, a "yellow" code was declared, due to weather conditions. Two of three daily shifts failed to meet staffing levels mandated by the SICP. Additional failures to meet staffing levels continued to occur. As a result, Respondent was responsible for an additional 16 diversions between February 21, 2015 and March 31, 2015, an increased rate of 33% after Complainant was no longer the Manager of Field Maintenance. Despite these events, Henderson remained the Manager of Field Maintenance.

On March 6, 2015, Complainant contacted OSHA and filed a complaint that he had been retaliated against in violation of AIR21.

On March 27, 2015, the FAA sent a letter to Complainant, stating that the FAA had investigated his "air carrier safety allegations," and that the investigation "substantiated that a violation of an order, regulation or standard of the FAA related to air carrier safety had occurred." On September 14, 2015, the FAA issued Respondent civil penalties of $735,000, for violations of FAA regulations. These violations included Respondent's failure to comply with the staffing levels required by the SICP on 19 different dates, including dates that Complainant had identified in his February 18, 2015 email.

There is evidence to support a causal nexus between Complainant's protected activity and Respondent's adverse actions.

The evidence indicates that Complainant's 14-day suspension and placement on a PIP in August of 2014 was retaliation for activity protected by AIR21. Complainant placed an emergency order of deicing chemicals in order to comply with FAA requirements directly related to air safety. Complainant followed applicable City policy and chain of command communication requirements, yet was still disciplined. Complainant did not file a timely complaint with the Secretary regarding this adverse action. However, Respondent's contention that Complainant's reassignment in February 2015 was motivated in part by this earlier conduct only further establishes the causal connection between Complainant's protected activity and Respondent's decision to reassign Complainant.

Regarding Complainant's timely complaint that he was removed from his position and demoted on February 19, 2015, in reprisal for his continued complaints to management and the FAA regarding inadequate staffing, a causal connection is also established. Respondent made the decision to remove Complainant from his position, demote him, and revoke his privilege to use a City-owned vehicle mere hours after learning that he had emailed his new supervisor regarding concerns of ongoing violations of FAA regulations, that he had met privately with an FAA

[7] Henderson, who also failed to attend the February 18, 2015 meeting, was later made the new Manager of Field Maintenance.

inspector regarding these concerns, and that he was planning to participate in an FAA inspection the following morning.

There is evidence of animus. Respondent's written discipline and statements from employees indicate that one of the main reasons Respondent was upset with Complainant was because of its perception that Complainant did not "follow the chain of command" in reporting his concerns. However, Respondent has not identified any instances in which Complainant failed to follow the chain of command, other than engaging in protected activity by raising concerns related to air safety with his managers and the FAA. And contrary to Respondent's statements, Complainant had in fact previously attempted to follow the chain of command with respect to these violations of FAA requirements, without success.

There is evidence of disparate treatment. Complainant missed the manager meeting on February 18, 2015, and Respondent has indicated that he was the only manager disciplined. However, Complainant was not the only manager to miss the meeting. Indeed, the other manager to miss the meeting was then given Complainant's job. Additionally, Respondent provided no evidence supporting its assertion that Complainant was expected to remain on site when he went home at the end of his normal day, in order to be rested enough to return at 3:00 a.m. the following morning. Respondent also presented no evidence that other employees have similarly been disciplined for missing meetings.

Respondent contends that Complainant had a long history of performance issues over the course of his 12 years as the maintenance manager and that it removed him from his position due to his failures on February 18, 2015 to attend a meeting, return phone calls during and after that meeting, and his decision to instead go home and consume alcohol during a snow event, which according to Respondent, required his presence at the airport. Additionally, Respondent contends that these actions, as well as Complainant's ostensible failure to follow the chain of command, despite having previously been counseled, demonstrated that he was an ineffective leader.

Respondent's defense can be tested. As discussed above, the most recent "performance issue" one year prior, for which Complainant had been disciplined, was related to prior protected activity.

Respondent's contention, through interviews, that Complainant was reassigned due in part to his continued failure to follow the chain of command when he reached outside the normal command structure with his complaints regarding violations of SICP staffing levels supports a merit finding. Further supporting this finding, Respondent, upon learning that Complainant had already spoken to the FAA inspector and that he intended to do so again the following morning, directed Complainant to not go in to speak to the FAA for his scheduled 3:00 a.m. visit.

Regarding his actions of February 18, 2015, evidence indicates that Complainant was given permission to speak to the FAA during the normally-held meeting, that Complainant's managers were not upset with Complainant for not attending the meeting, and that another manager also missed the meeting and was not disciplined. Additionally, there is strong evidence to refute Respondent's claim that Complainant was called during and directly after the meeting. The evidence shows that Complainant returned the first call made to him by Respondent within one

minute, *and that this call did not happen until approximately two hours after the meeting had ended.*

Finally, evidence indicates that Complainant had left the airport over-staffed for the limited amount of snow scheduled to fall, that he intended to return at 3:00 a.m. the following morning to accompany the FAA inspector's planned inspection, and that Complainant's senior managers did not consider the amount of snow scheduled to fall on that day to be a snow emergency.

Respondent was informed by due process letter on February 14, 2017, (United Parcel Service #1ZX1058Y0190896340), which included the relevant evidence from the case file, and stated that "based on the initial phase of OSHA's investigation, it is reasonable to believe that Complainant's protected activities were a contributing factor in the adverse personnel actions." Respondent was given 10 business days in which to respond, and was granted an extension until March 15, 2017 in which to provide additional evidence to support its position.

On March 15, 2017 Respondent indicated that given its desire to explore settlement,[8] it "therefore does not wish to provide a response or additional rebuttal evidence." As such, Respondent did not make any further declarations or submissions to materially influence the Secretary's initial finding.

Complainant has established that his protected activities were a contributing factor in the adverse personnel actions taken against him, and Respondent has failed to establish by clear and convincing evidence that it would have taken the same adverse actions in the absence of Complainant's protected activity.

OSHA finds that there is reasonable cause to believe that Respondent violated AIR21 and issues the following order:

Order

1. Upon receipt of this Secretary's Finding and Preliminary Order, Respondent shall immediately reinstate Complainant to his former position. Such reinstatement shall include all rights, responsibilities, seniority, privileges, and benefits that Complainant would have enjoyed had he never been reassigned. Such reinstatement is not stayed by an objection to this order.

2. Respondent shall pay Complainant $10,000 for pain and suffering stemming from his loss of position as a manager and public humiliation in reassignment to count trash and recycling cans daily.

3. Respondent shall pay Complainant compensatory damages in the amount of $10,600 for economic loss from the loss in benefit of the Dodge Durango city vehicle he was required to relinquish.

[8] No known settlement offer has yet been made.

4. Respondent shall pay Complainant's attorney reasonable attorney fees in the amount of $75,198.

5. Respondent shall expunge Complainant's personnel records and any other related records of any adverse references relating to Complainant's reassignment. Respondent shall ensure that the facts and circumstances related to this complaint are not used against Complainant in any future promotional opportunities with Respondent and that no negative references relating to the facts and circumstances related to this complaint are provided to any prospective future employer.

6. Respondent shall post a copy, for no less than 60 consecutive days, of the Notice to Employees included with this Order in all areas where employee notices are customarily posted at Respondent's main office. Respondent shall also transmit a copy of the Notice to Employees to all employees by email.

Respondent and Complainant have 30 days from the receipt of these Findings to file objections and to request a hearing before an Administrative Law Judge (ALJ). If no objections are filed, these Findings will become final and not subject to court review. Objections must be filed in writing with:

Chief Administrative Law Judge
Office of Administrative Law Judges
U.S. Department of Labor
800 K Street NW, Suite 400
North Washington, D.C. 20001-8002
Telephone: (202) 693-7300, Fax: (202) 693-7365

With copies to:

Subodh Chandra
Don Screen
The Chandra Law Firm, LLC
1265 W. 6th Street, Suite 400
Cleveland, OH 44113

Ken Nishiyama Atha
Regional Administrator
U.S. Department of Labor-OSHA
230 S. Dearborn Street, Room 3244
Chicago, IL 60604

Mary Ann Howe, CFE
Assistant Regional Administrator
Whistleblower Protection Program
U.S. Department of Labor-OSHA
230 S. Dearborn Street, Room 3244
Chicago, IL 60604

In addition, please be advised that the U.S. Department of Labor does not represent any party in the hearing; rather, each party presents his or her own case. The hearing is an adversarial proceeding before an ALJ, in which the parties are allowed an opportunity to present their evidence for the record. The ALJ who conducts the hearing will issue a decision based on the evidence and arguments, presented by the parties. Review of the ALJ's decision may be sought from the Administrative Review Board, to which the Secretary of Labor has delegated responsibility for issuing final agency decisions under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. §42121. A copy of this letter has been sent to the Chief Administrative Law Judge along with a copy of your complaint. The rules and procedures for the handling of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. §42121 cases can be found in Title 29, code of Federal Regulations Part 1979 and may be obtained at www.whistleblowers.gov.

Sincerely,

Mary Ann Howe

Mary Ann How CFE
Assistant Regional Administrator

Enclosures: Posting Notice

cc: Don Screen, Complainant's Representative
Chief Administrative Law Judge, USDOL
Whistleblower Protection Program Manager, FAA