



May 17, 2023

Daniel R. Broadwell
Assistant Corporation Counsel
City of Chicago, Department of Law
30 North LaSalle Street, STE 1040
Chicago, IL 60602

Re: Chicago Department of Aviation/Conway/5-1260-19-012

Dear Counselor,

Please be advised that the initial phase of the investigation into the above-referenced discrimination complaint is complete. **Based on information gathered thus far, the Occupational Safety and Health Administration (OSHA) has determined there is reasonable cause to believe that the Chicago Department of Aviation (Respondent) has violated the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. §42121 (AIR-21), and that the preliminary promotion of Mike Conway (Complainant) to the position of Assistant Chief, Airport Operations Supervisor is warranted.** Please be advised that OSHA's investigation of this matter is ongoing. This letter is sent prior to the issuance of Findings and a Preliminary Order and does not constitute a final determination by the agency of a finding of violation.

This letter notifies Respondent of the substance of the relevant evidence supporting the allegations developed during the course of the investigation thus far and offers the opportunity to submit any additional information Respondent wishes to be considered while OSHA continues to review this matter. **All timely submitted, relevant information will be fully evaluated before OSHA issues its Findings and Preliminary Order in this case.**

As a preliminary matter, Respondent was served notice of the complaint on or around November 5, 2018, by certified mail tracking number 7015 0640 0004 7829 1095, formally acknowledging receipt of this complaint on November 30, 2018. After being notified of this complaint, Respondent was provided an opportunity to submit a written statement and other relevant documents explaining or defending Respondent's position. On January 7, 2019, and on subsequent dates, our office received written responses and supporting documentation from Respondent. Respondent was also afforded an opportunity to meet with the Investigators, to submit information related to this complaint, and to make available individuals who also had relevant information. On September 13, 2021, September 15, 2021, February 7, 2022, February 8, 2022, February 9, 2022, February 15, 2022, and April 5, 2022, Respondent made relevant managers available for witness interviews and in tandem provided contact information for non-management witness employees.

OSHA's investigation thus far indicates that there is reasonable cause to believe that the Respondent has violated AIR-21 as follows:

On October 16, 2018, Complainant filed a complaint of retaliation with OSHA, alleging that he had received notification of a 5-day suspension that day, due to his protected activities. Complainant continued to update OSHA in a timely manner on subsequent adverse actions as soon as he became aware of them, including his loss of wages, overtime, denial of promotion, and 15-day suspension. The complaint was filed within 90 days of the first alleged adverse action, with updated timely notices for subsequent adverse actions and is thus timely filed.

Respondent is a covered employer under AIR-21 as a contractor of an air carrier. Complainant, working for Respondent at Midway Airport as an Airport Operations Supervisor II and as an applicant for a position as an Assistant Chief, Airport Operations Supervisor, is a covered employee of a covered company.

There is evidence Complainant engaged in activity protected under AIR-21. Complainant first engaged in protected activity on February 17, 2018, when he objected to Deputy Commissioner Costas Simos directing him to report runway conditions as “Clear/Dry” when they were actually “Clear/Wet.” Complainant, distressed by receiving that direction, contacted his Manager, David Kaufman, and also spoke to the managing official on duty that day, Airport Manager Terrence Thomas. Complainant relayed his concerns and to Thomas, he appeared “overwrought” that he was forced to report wet conditions as dry. When Respondent’s senior leadership did not appear to take further action, Complainant again raised the issue personally with Simos and Kaufman on or around February 19, 2018. On March 16, 2018, Complainant realized Southwest Airlines pilots were calling in runway conditions as “clear/dry” whereas they were “clear/wet.” Complainant contacted the Chief Pilot, a member of the management team of the air carrier Southwest, to discuss his concerns. The Chief Pilot advised Respondent’s management of this exchange. Evidence indicates that on **September 11, 2018**, Complainant filed complaints related to safety and misreporting of runway conditions with the City of Chicago Inspector General, Chicago’s Department of Human Resources, and the Federal Aviation Administration.

Complainant also engaged in protected activity when he filed a complaint of retaliation with OSHA on October 19, 2018, and again on December 4, 2018, when Complainant reported an all-field downgrade to wet conditions in accordance with FAA procedures (one-third or more of each runway). Complainant continued to engage in protected activity through 2019, when he participated in the FAA, OIG, and OSHA investigations.

Respondent does not dispute its knowledge of any of these protected activities, though it does dispute that Complainant’s actions of December 4, 2018, were protected, as this formed the basis for subsequent disciplinary actions.

Complainant was subject to several adverse actions over the course of approximately two years, beginning on **September 5, 2018**, when he was verbally counseled. On October 16, 2018, Complainant was informed of a pending 5-day suspension that was issued on November 7, 2018. The 5-day suspension was unpaid. Both the counseling and the 5-day suspension were ostensibly for an incursion, or unauthorized entry onto a runway. On December 11, 2018, Complainant’s airfield access privileges were removed, and he was again counseled. After this event, Complainant was no longer eligible for the substantial overtime he had been receiving. Complainant was subject to further adverse action on July 23, 2019, when he was suspended for 15 days, according to Respondent, **for two infractions**, the first on December 4, 2018, in “delivering an assessment of all runway conditions” [in changing them to clear/wet instead of clear/dry] during a “dynamic weather event” [while it was raining] “while only driving one of the runways.” Respondent’s notice of suspension noted that it was also for incidents on January 28, 2019, and February 1, 2019, when Complainant “joined an escort without prior authorization

from [Managing Deputy Commissioner, Erin] O'Donnell", though evidence indicates Complainant had no such requirement and he had permission from the escort and his manager to perform this duty as required. The 15-day suspension was unpaid. On September 22, 2019, Complainant became aware that Respondent had not appropriately increased his pay in line with others in his position for the duration of 2019, a process that could only properly have been halted if Complainant had been placed on a Performance Improvement Plan (PIP), which had not been issued. Complainant was subject to another adverse action on August 24, 2020, when he was not selected for a promotion that he would have received based on his seniority, had he made the "selected candidate list."

Within 38 days of Complainant's disclosures to Human Resources, the City's OIG, and the FAA, Respondent issued Complainant a 5-day suspension for a minor incursion he had already received comparable counseling for on September 5, 2018. Within 12 days after formally acknowledging receipt of Complainant's whistleblower complaint under AIR-21, Complainant was restricted from his airfield position, removing his ability to continue to engage in the same protected activity of correctly downgrading runway conditions. This restriction also served to remove Complainant's ability to earn overtime.

There is evidence Respondent held animosity towards Complainant because of his protected activities. Evidence indicates that Simos informed Complainant on February 20, 2018, that Complainant's protected activity could impact Simos' job and pension. On March 19, 2018, Simos issued a new directive to employees, including Complainant, that they do not contact the Chief Pilot's office without his approval, thereby limiting their ability to engage in protected activity. On December 11, 2018, Respondent removed Complainant's red badge due to an incident in which Complainant followed FAA guidance and Respondent's policy by downgrading airfield conditions to wet after observing precipitation over at least one-third of each runway. Evidence indicates Respondent issued a 15-day suspension to Complainant based primarily on his protected actions of December 4, 2018. All parties agree Respondent's removal of Complainant's red badge further limited Complainant's airfield access. This also limited his ability engage in protected activity.

Evidence indicates that Thomas, in his role as a selecting official for the Assistant Chief, Airport Operations Supervisor position (and the on-site airport manager who had taken no further action with Complainant's original disclosures) specifically noted Complainant spent too much time discussing his protected activity during his August 4, 2020, interview as part of the reason Complainant was moved to the not-for-hire category. Evidence indicates that had Costas not replaced the original hiring official with Thomas, the responsible manager who was required to formally answer to the FAA about Complainant's disclosures, Complainant would have been placed on the "selected candidate list," and thus promoted.

There is evidence Complainant was disparately treated. For instance, Respondent issued Complainant a 5-day suspension for a low-level incursion when Complainant focusing on the runway in use mistakenly crossed through an intersection without permission, claiming he was focused on the next intersection. The Federal Aviation Administration classified this incursion as a Class D incursion. However, the same management team reviewed a more severe incursion earlier that the same year and did not suspend the employee involved in that incident. The employee involved in the more serious Class C incursion was given only counseling and retraining. In addition, other management teams suspended employees for criminal or improper conduct, but Complainant's conduct was not comparable to the conduct that led to those suspensions.

Respondent deviated from its usual practice when it issued the 5-day suspension. According to Complainant's disciplinary record, General Manager of Airport Operations, David Kaufman had already counseled complainant verbally about the incident on September 5, 2018, and Respondent's policy was not to issue a suspension if it had already addressed misconduct through a verbal counseling.

Respondent also removed Complainant's red badge for a minor runway incursion and for engaging in protected activity in correctly calling a runway downgrade from dry to wet. In making this decision, O'Donnell claimed that she removed Complainant's badge primarily due to his allegedly egregious behavior of December 4, 2018, in downgrading airfield conditions from clear/dry to clear/wet during a rainstorm, stating she had to do this "because he was so unsafe, it was beyond any comprehension that I had". However, OSHA's investigation established through a witness interview of O'Donnell on April 5, 2022, and documentary evidence regarding employee badge actions, that Respondent's decision makers have not permanently removed any other red badge from an employee at this airport, even in more severe runway incursions.

Afterwards, Respondent gave Complainant specific instructions on a recorded line on what he was allowed to do without a red badge. Complainant followed his managers' instructions and his assignments in order to maintain his position. After Respondent reviewed this recorded directive, Respondent still disciplined Complainant for following the instructions to perform required duties, when he joined a convoy. While Respondent disciplined Complainant for joining the convoy as his duties required, Respondent did not discipline Complainant's manager or convoy supervisor for allowing him to do so.

Respondent also withheld Complainant's yearly step and rate increase for 2019 without a valid reason, later claiming it was due to an error. This continued for 4 months after Respondent was notified of the error.

These circumstances are sufficient to raise the inference that Complainant's protected activities were a contributing factor in the decisions to issue Complainant 5-day and 15-day suspensions, remove his airfield access, restrict his overtime pay, disallow his yearly step and rate increase, and remove him from the "selected candidate list" of applicants for the promotion to Assistant Chief, Airport Operations Supervisor. Given Complainant's seniority, his presence on that list would have resulted in his promotion to that position.

Respondent has not demonstrated by clear and convincing evidence that it would have taken the same unfavorable personnel actions in the absence of Complainant's protected activities. Therefore, the evidence supports a finding in favor of Complainant. Accordingly, 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.

Pursuant to 29 C.F.R. 1979.104(e), Respondent is hereby notified of the opportunity to submit rebuttal evidence. Any evidence Respondent submits will be considered. Respondent may submit a written response; meet with OSHA officials, and present statements from rebuttal witnesses. Please note Respondent has **ten (10) business days** from receipt of this notice to present any rebuttal evidence. If Respondent cannot present the rebuttal evidence within ten business days, we may arrange a mutually acceptable date, but Respondent must contact us within the ten-day period to do so. If we are not persuaded by the rebuttal evidence, or if Respondent declines to submit additional evidence, OSHA will issue the Secretary's Findings and a Preliminary Order of promotion.

Respondent is also invited to seriously consider an informal resolution of this complaint. Any offer which Respondent proposes will be referred to the Complainant. If you have any questions, please contact Regional Supervisory Investigator Nate Terwilliger at (872) 600-0171 or by email to Terwilliger.Nathan@dol.gov.

Sincerely,

A handwritten signature in blue ink that reads "Denise Keller". The signature is written in a cursive style with a large initial "D".

Denise Keller
Assistant Regional Administrator

Enclosure: Evidentiary Materials