

JUN 9 1980

File: 166-2-8412

THE PUBLIC SERVICE STAFF RELATIONS ACT
BEFORE THE PUBLIC SERVICE STAFF RELATIONS BOARD

*File Hilary
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BETWEEN:

W.T. WARNER,

Grievor,

- and -

TREASURY BOARD
(Department of Transport),

Employer.

*copy Bel
of file
Grievance T. Warner
Albert Coast*

DECISION

Before: S.J. Frankel, Board Member and Adjudicator

For the Grievor: J. Nalleweg

For the Employer: H.A. Newman, Counsel

*BL
9/6/80*

*no grievance
on file ylh
PART 7
CODE 402/79*

Heard at Vancouver, B.C. on April 23 & 24, 1980.

~~DISMISSED~~
DISMISSED AFTER NUMEROUS
CASES OF BEING LATE FOR WORK
AND NOT REPORTING TO CHIEF

DECISION

1. This is a reference to adjudication pursuant to paragraph 91(1)(b) of the Public Service Staff Relations Act. The Grievor, Mr. W.T. Warner, was at the material time an air traffic controller (AI-1) stationed at the Vancouver Harbour Control Tower, Vancouver, B.C. By letter dated September 27, 1979, signed by J.O. Murphy, Acting Regional Manager, Air Traffic Services, Pacific Region, Mr. Warner was advised as follows (Exhibit E-1):

On September 22, 1979, you:

- a) failed to report for duty as scheduled at 0645 a.m., resulting in the Vancouver Harbour Control Tower being closed during published hours of operation;
- b) did not report for work throughout your scheduled shift (0645-1628 PDT);
- c) failed to advise the Chief of Vancouver Harbour Control Tower of your absence and reasons thereof;
- d) refused to comply with Chief's direction, relayed through duty controller, that you should contact him as soon as possible.

This action left the Harbour Control Tower without control services, and the aircraft departing and landing areas without advisory service for approximately two hours.

As a result of this conduct, and your recent record of unreliability, this Region can no longer tolerate your continuing employment as an Air Traffic Controller. Therefore, I am

- a) suspending you without pay for a period of ten (10) working days, September 28th, 1979 through October 15th, 1979 inclusive, which is the maximum permitted under Regional authority; and
- b) forwarding to Headquarters, through the Regional Administrator, a recommendation that you be suspended indefinitely pending a decision on an accompanying recommendation that you be discharged from the Public Service.

If you feel that this decision is unwarranted, you have the opportunity of presenting a grievance in the established manner within twenty-five (25) days of receipt of this notice.

2. The suspension of Mr. Warner was subsequently extended to November 15, 1979 (Exhibit E-2) "pending the examination of the recommendation made to discharge you from the Public Service." The suspension was again extended to November 28, 1979 (Exhibit E-3). A letter dated November 21, 1979, signed by the Deputy Minister, Transport Canada (Exhibit E-4), informed Mr. Warner that he was being discharged:

Under the authority delegated to me in accordance with Section 106 of the Public Service Terms and Conditions of Employment Regulations made pursuant to Section 7 of the Financial Administration Act, you are hereby advised that you are discharged from the Department of Transport effective 0001 hours, November 29, 1979. This action is being taken as a result of a serious incident which occurred on Saturday, September 22, 1979, and in consideration of your previous record, as well as the fact that all attempts by management to correct your conduct have not resulted in any improvement.

Mr. Warner filed a grievance against the discharge on December 11, 1979 in which he alleged "Excessive discipline and wrongful dismissal following the incident of September 22, 1979." The corrective action requested was "Reinstatement with back-pay, all benefits, and no loss of seniority."

3. At the hearing counsel for the employer adduced evidence through three witnesses - Mr. J.R. Dubois, Chief of the Vancouver Harbour Tower; Mr. G.W. Strahl, at the material time Acting

Superintendent of Air Operations, ATS, Pacific Region; and Mr. R.G. McDonald, Staff Relations Officer, Pacific Region, Department of Transport. The grievor's representative chose not to call any witnesses.

4. The evidence regarding the incident of September 22, 1979, is not in dispute. An air traffic control service for the Vancouver Harbour was started in June 1976. For about two years the service operated from a trailer on Dead Man's Island in Stanley Park, but in September 1978 it was moved to a permanent location at the top of a building, known as "Granville 200." The new installation has an operational glassed-in area (the "cab") some 550 feet above ground level. The Vancouver Harbour Control Tower controls the take off and landing of float-equipped aircraft using the Vancouver Harbour, and the flight of other aircraft "transiting" through its "positive control zone" - within a radius of three nautical miles from the tower and below an altitude of two thousand feet. All of its control operations are under Visual Flight Rules (VFR). The positive control zone of the tower at the Vancouver International Airport coincides with the boundaries of the Harbour Tower control zone. If the question of precedence should arise it is the airport tower that would take over. All aircraft operating under Instrument Flight Rules (IFR) come under the control of the Vancouver Area Control Centre. Any VFR traffic operating in the Vancouver Harbour positive control zone outside of the published hours of the Harbour Tower operations would be in contravention of existing air regulations.

5. The Harbour Tower is in service seven days a week all year round. The peak season for aircraft movements subject to its control is between April 1 and September 30 when the tower is open from 7:00 a.m. until "official night", i.e. one half hour after sundown. The winter

season runs from October 1 to March 31 and the hours are from 7:30 a.m. until official night. The operating hours of the tower are published in the "Water Supplement" to the VFR Handbook and are also published in the applicable NOTAMs (notices to airmen). During the summer season aircraft movements controlled by the Harbour Tower average between two hundred and two hundred and fifty a day. The complement of the tower is made up of a Chief (Mr. J.R. Dubois, AI-3) and five air traffic controllers classified at AI-1. The chief's duties are essentially supervisory and administrative and his hours of work are from 8:00 a.m. to 4:30 p.m. on a shift schedule of four days on and three days off. The work of the five controllers is organized in overlapping shifts which are rotated amongst them. Under summer hours the first shift begins at 6:45 a.m. and ends at 4:28 p.m. The start of the overlapping shift depends upon the time of official night. Thus in September 1979, from September 1 to September 6, the overlapping shift began at 10:13 a.m. and ended at 7:56 p.m., whereas from September 21 to September 28 the overlapping shift began at 9:30 a.m. and ended at 7:13 p.m. What is to be noted here is that the air traffic controller who opens the tower in the morning is the only controller on duty for at least two hours. Similarly, only one controller is normally on duty from 4:28 p.m. (summer hours) until closing time at official night.

6. Saturday, September 22, 1979, was a day off for Mr. Dubois, the Tower Chief. Mr. Warner, who had been employed in the Vancouver Harbour air traffic control unit since August 1977, was scheduled to go on duty at 6:45 a.m. Mr. Dubois testified that at 8:30 a.m. that morning he received a call at his home from a supervisor in the Vancouver International Airport Tower reporting that he had been advised by a pilot of an aircraft that there appeared to be no one in the Harbour Control Tower. Dubois immediately called the tower and received no answer. He checked the work schedule (a copy of which he had at home)

and saw that Warner was supposed to be on at 6:45 a.m. However Warner had no telephone and there was no way of reaching him. Upon rechecking the schedule Mr. Dubois saw that Messrs. Nalleweg and Taylor were listed to go on duty at 9:30 a.m. He telephoned Nalleweg, told him about the situation and asked him to proceed to the tower immediately, which Nalleweg agreed to do. He also asked Nalleweg to instruct Warner, should he call in, to telephone Dubois at his home. Between 9:00 and 9:30 a.m. Dubois spoke to Nalleweg who was already at the tower; there was still no word from Warner. Dubois was satisfied that with Nalleweg and Taylor on duty the tower would remain operational for the balance of the day. He heard nothing from Warner on Saturday.

7. Dubois was back in his office on Monday, September 24, but Warner was not scheduled to return to duty until Thursday, September 27. Mr. Taylor, who had worked with Nalleweg on Saturday, told Dubois that Warner had in fact called the tower at about 5:00 p.m. on Saturday and was instructed to get in touch with Dubois. According to Dubois, Taylor had told him that Warner's answer to this instruction was that he would speak to the Chief when he returned to work. Warner, however, telephoned Dubois on Monday afternoon at about 3:00 p.m. He said that he had been unable to report for duty on Saturday because his car had broken down "in the bush." When he was asked why he had not telephoned Dubois on Saturday after having been advised to do so by Taylor, he replied that he "thought it really didn't matter." Dubois told him that the matter of his failure to report was a serious one and that he would be hearing further about it. Dubois prepared a full report of the incident and forwarded it to Mr. Strahl.

8. On Thursday September 27, at about 9:30 a.m., Mr. Warner, accompanied by his union representative Mr. Nalleweg appeared for a disciplinary interview in Mr. Dubois' office. The employer's

representatives at the meeting were Mr. Dubois, Mr. G.W. Strahl and Mr. R. McDonald. The meeting was chaired by Mr. Strahl and lasted about an hour. Dubois testified that his role at the meeting was essentially to answer questions and to corroborate certain points with respect to Warner's absence from the tower on the previous Saturday.

9. The following documents were introduced through Mr. Dubois:
Exhibit E-6 - A disciplinary letter dated October 26, 1978 and signed by J.S. Melvin, Regional Manager, Air Traffic Services. The letter advised Warner of a suspension for the period October 27 to November 17, 1978 for the following reasons:

- Unauthorized absence from work,
- Being late for work,
- Reporting for duty under the influence of some substance contrary to paragraph 2121.3 of the Air Traffic Control Manual of Operations.

Exhibit E-7 - A letter of reprimand dated July 24, 1979 stating in its first paragraph:

You have failed to report for work on the 0645-1628 hrs shift on three separate occasions this year as follows:

- 27 May, 1979.
- 26 June, 1979.
- 20 July, 1979.

The letter of reprimand also contained the following warning:

Your unreliability in this regard cannot be tolerated and any future incident of this type could result in very serious consequences for yourself. In view of the seriousness of the situation it is expected that you will take whatever steps are necessary to avoid a re-occurrence.

Exhibit E-8 - An employee appraisal report dated November 3, 1978, in which reference is made to Mr. Warner's unreliability. (It was pointed out that while this appraisal report may be part of Mr. Warner's personal file it does not constitute part of his disciplinary record.)

10. The cross-examination of Mr. Dubois was conducted by Mr. Nalleweg who, because he had had no previous experience in representing a grievor at adjudication, was allowed a great deal of leeway. The cross-examination focused on three areas not directly related to the incident of September 22, 1978. The first purported to show Warner's competence as an air traffic controller. Exhibit G-1, an appraisal report dated July 19, 1977, rated Mr. Warner satisfactory under the various headings of "position requirement" and "personal suitability." Exhibit G-2 was a progress report on airport training ("check out") which rated Mr. Warner as meeting the standards of the job. Counsel for the employer interjected to say that Mr. Warner's performance as an air traffic controller was not in issue; it was his failure to be on the job when required. The second area probed by Mr. Nalleweg purported to show that the Harbour Tower was not all that critical for air safety. Exhibits G-3, a memorandum referring to the use of washroom facilities when a controller is on duty alone, and Exhibit G-7, an air navigation order "respecting the operation of aircraft in VFR flight in positive control zones", dated November 20, 1978, were introduced in support of this position. The third area of his questioning introduced Exhibits G-4, G-5 and G-6, extracts of the unit log showing that other controllers had been late. Mr. Nalleweg also asked Dubois whether, knowing that Warner had difficulty getting up early, he had considered putting him on a steady late shift. Dubois replied in the negative stating that it would not be the way to run an equitable system of shift rotation.

11. Mr. Strahl's testimony centered on the disciplinary interview which he chaired on September 27. He told Warner what the purpose of the interview was and indicated that it would give him an opportunity to explain his unauthorized absence on Saturday, September 22. He was asked directly why he had not taken up his duties on Saturday and he replied that he had "slept in." When Warner was confronted with the fact that he had told Dubois on Monday (and apparently Taylor on Saturday) that his car had broken down, his response was that he thought he had used that excuse too often in the past and that he had really slept in. Warner was also unclear as to when he had first telephoned on Saturday to say that he was not coming in. He thought it was between 10:30 and 11:00 a.m., but he did not contradict Dubois who said that his information was that Warner had not telephoned until about 5:00 p.m. Warner explained that he had difficulty waking up early in the morning and that alarm clocks seemed to be of no great help to him.

12. Following the interview Messrs. Strahl, Dubois and McDonald reviewed Warner's record and prepared a report to J. Murphy, the Acting Regional Manager. Mr. Strahl had a further discussion with Murphy and they came to the conclusion to recommend that Warner be discharged. Strahl testified that it was clear to him that Warner was not responding to the lesser disciplinary measures that had been taken against him and that the failure (or inability) to report for duty on time was unacceptable from a person who has responsibility for "initiating a service."

13. Mr. R. McDonald, the Staff Relations Officer who participated in the meeting of September 27 and prepared the recommendation for Warner's discharge that was transmitted to Regional Administration, testified that the two disciplinary notices - Exhibits E-6 and E-7, were on Warner's personal file at the material time.

14. Mr. Nalleweg, representing the grievor, decided not to call any witnesses. It was pointed out to him that he was incurring some risk for his client since, if he had any intention to seek mitigation of the disciplinary penalty, the onus was on him to adduce evidence in support of such a submission. Nalleweg nevertheless chose not to lead any evidence of his own.

15. In his submission, counsel for the employer stated that the facts related to the alleged disciplinary offence on September 22, 1979 were straightforward and were not in dispute. Warner failed to report for duty at 6:45 a.m. and did not show up at all on Saturday, September 22. He did not advise the Tower Chief of his absence nor did he even offer an honest explanation when he was asked for one the following Monday when he spoke to Dubois on the telephone. He admitted at the meeting of Thursday, September 27, that he had simply overslept; no extenuating circumstances were suggested. The possible ramifications of Warner's dereliction from duty were serious. Until the time that the tower was staffed by Nalleweg, between 9:00 and 9:30 a.m., aircraft in the Vancouver Tower Positive Control Zone were deprived of a service they had a right to expect. This was a service that had been introduced in 1976 to enhance the safety and security of aircraft movements in the Vancouver Harbour. The fact that Dubois had to be notified by the Vancouver International Airport Tower that the Harbour Tower was not operating when it should have been could only have had an adverse effect on its reputation.

16. It was further argued that the incident of September 22, seen in the context of the grievor's record, can be characterized as a "culminating incident" justifying the "ultimate saction" of discharge. Indeed, considering the serious consequences that could have resulted from the failure to provide scheduled air traffic control service, the

grievor might have been open to discharge even on the basis of this single incident. Mr. Nalleweg's efforts to "establish" that the absence of tower operations on the morning in question represented no real threat to safety do not even deserve to be refuted. The tower was deemed necessary by the Department of Transport and Warner's duty was to initiate its operations on September 22, 1979. He failed in this duty and provided no reasonable excuse for this failure. Disciplinary action was thus justified. Counsel referred to the following extract from Brown and Beatty, Canadian Labour Arbitration, at page 293:

Where an employer has uniformly enforced its rules and policies and has not acted discriminatorily, it is beyond dispute that an employee who is absent from work on one or more occasions without permission, without justifiable excuse, or without having provided his employer with adequate notice, may properly be disciplined, and in certain instances even discharged.

There was no evidence that the employer had acted in a discriminatory fashion.

17. Counsel referred to the grievor's "dismal record of unreliability." He was put on notice by the letter of reprimand (Exhibit E-7) that there could be very serious consequences if there were a recurrence of an incident of this type. No evidence was adduced through the grievor, even at this late date, that might suggest that there was an extenuating explanation for the incident of September 22. It can only be inferred that the grievor was not called as a witness because it would have proved unfavourable to his case. Counsel referred to Brown and Beatty (supra) at page 376ff. which sets out various factors that go to the mitigation of a disciplinary penalty. In the present case there is no evidence whatsoever of extenuating factors, or even of the rehabilitative potential of the grievor. He also cited two Board cases in which the penalty of discharge was upheld for failure

to report for duty - Kikilidis (File 166-2-3180 to 3182) and Higgins (File 166-2-3578).

18. Mr. Nalleweg, representing the grievor, argued that Warner's discharge was for his "repeated" failure to open the tower on time, September 22 being a specific case. It was his position that the seriousness of a single infraction of this kind is relatively minor and that the issue of safety had been exaggerated. He had attempted to show, through his cross-examination of Mr. Dubois, that alternative procedures were available to aircraft if the Harbour Tower was not in operation. He agreed that the tower operation provided an added margin of safety, but it was not absolutely essential.

19. Referring to the grievor's record, Mr. Nalleweg argued that the disciplinary action on October 26, 1978 (Exhibit E-6), was not directly relevant to the discharge action following the incident of September 22, 1979. In the notice of October 26 the penalty of suspension was related to three alleged infractions that were not of equal gravity. One cannot infer from this notice that the penalty of suspension was connected with Warner's alleged failure to open the control tower on time. In effect, Warner was left to make his own judgment as to the relative seriousness of the various infractions listed in that notice. In addition, the disciplinary notice of October 26 did not warn the grievor of the consequences of further "specific" infractions. Mr. Nalleweg also referred to the various performance reports which indicate Warner's adequacy as an air traffic controller.

20. The grievor's representative then directed his attention to the problem of Warner's "lateness." According to him the records showed that Warner had received an oral reprimand for his lateness of

July 4, 1979 and had received a written reprimand dated July 24, 1979. He suggested that the record did not warrant the severity of the penalty following the incident of September 22, 1979. [RE SKF MANUFACTURING OF CANADA LTD. AND INTERNATIONAL ASSOC. OF MACHINISTS, LOCAL 901, (1975) 9 L.A.C.(2d), 139.] He argued further that if we move from the two cases of discipline for lateness (i.e. July 4 and July 24), the next step in a system of progressive discipline might have been a suspension but certainly not a discharge. He also argued that the letter of July 24, 1979 was not clear with regard to the consequences that would flow from a re-occurrence of lateness. Warner should have been told directly that the next incident could lead to discharge.

21. Finally, in Mr. Nalleweg's submission, Warner's discharge attests to a loss of patience by his superiors. It was an overly harsh response to the particular incident. Warner would have responded and would have improved his conduct if he had been given a less severe penalty. Mr. Nalleweg referred to the Department of Transport Personnel Manual and to RE GALCO FOOD PRODUCTS LTD. AND AMALGAMATED MEAT CUTTERS AND BUTCHERS WORKMEN OF NORTH AMERICA, LOCAL P-1105, (1974) 7 L.A.C.(2d), 350, for the proposition that the primary objective of discipline should be corrective and not punitive. In his view, the grievor could be rehabilitated and his training and skills as an air traffic controller would not be lost. He concluded that there were grounds for mitigating the penalty by substituting a short period of suspension for the discharge.

22. I cannot, on the basis of the evidence and submissions, arrive at a conclusion that is essentially different from the one urged upon me by counsel for the employer. The grievor did not report for duty on September 22, 1979 and he failed to advise his supervisor (Mr. Dubois) that he would not be at his post. When he finally

telephoned Mr. Dubois on Monday, September 24, he lied about the reasons for his absence on Saturday. The record shows that Mr. Warner had been disciplined before for recurring incidents of unauthorized absence or lateness. The disciplinary notice of October 26, 1978, suggests that the severe penalty of a 10-day suspension was assessed for a series of incidents culminating in Warner's reporting for duty "under the influence of some substance..." The letter of reprimand dated July 24, 1979, specifies three incidents of failure to report for the 0645-1628 hrs shift. I do not see how Mr. Nalleweg's implied argument about the weight to be given to the grievor's disciplinary record is helped by his reference to RE SKF MANUFACTURING etc... (supra). Mr. Warner's record is clear. He had been formally disciplined for specified misconduct and could have filed grievances. He apparently did not do so. The notion of "culminating incident" does not necessarily imply a pattern of successive incidents and penalties, each more severe than the preceding one. It is rather the cumulative weight of past disciplinary offences that determines whether the "final" offence may be judged to be the "culminating" one.

23. As for mitigating the penalty of discharge, no evidence was adduced that would lead me to find extenuating factors that could account, even in part, for the grievor's behaviour. The arbitral jurisprudence is unequivocal about the onus on the grievor to establish such factors. Counsel for the employer referred me to the clear-cut statement in Brown and Beatty (supra) at page 378:

It is, however, of cardinal importance to note that in any grievance in which the employee ultimately challenges the propriety of the penalty imposed, it is incumbent on him to affirmatively prove the existence of such mitigating factors.

At one point during his cross-examination of Mr. Dubois, Mr. Nalleweg sought to question him about the nature of the medical assessment of

of Warner that was set out as a condition in the disciplinary notice of October 26, 1978. I did not allow this line of questioning on the grounds that this disciplinary notice was filed as part of the record and speaks for itself. Mr. Nalleweg was not prevented, however, from adducing evidence from his own witnesses that might be relevant to Warner's medical condition if he thought it could support an argument for mitigating the penalty of discharge. He decided not to call any witnesses and must abide by the consequences of this decision.

24. The failure to report for duty, particularly the duty to initiate a service that is designed to provide greater safety for aircraft in a given positive control zone, is a serious matter. When there is no reasonable excuse for this failure to report - and no excuse for not communicating with one's supervisor - it becomes a serious disciplinary matter. When it is another one in a series of similar incidents for which disciplinary penalties had already been assessed, it is not unreasonable to consider it a culminating incident for which the penalty of discharge is justified.

25. For the foregoing reasons this reference cannot succeed and must be dismissed.

For the Board,

S.J. Frankel,
Board Member and
Adjudicator.

OTTAWA, May 26, 1980.

