Thomas J. Nowel
Arbitrator and Mediator
Cleveland, Ohio

#1112

IN ARBITRATION PROCEEDINGS PURSUANT TO
AGREEMENT OF THE PARTIES

In The Matter of a Controversy Between:	)	Grievance No.
	)	31-13-20120402-
Ohio Civil Service Employees Association,	)	0010-01-14
Local 11 AFSCME, AFL-CIO	)	
	)	Grievance No.
	)	31-13-20120402-
and	)	0011-01-14
	)	
	)	ARBITRATION
Ohio Department of Transportation,	)	OPINION AND
Aviation Division	)	AWARD
	)	
Re: John Milling Termination	)	DATE:
Eric Smith Termination	)	February 15,
	)	2013

APPEARANCES:
Timothy Rippeth and Sandi Friel, Advocates for OCSEA, Local 11, AFSCME; Colleen Ryan, Advocate for the Ohio Department of Transportation; and Jessie Keys for the Ohio Office of Collective Bargaining.

INTRODUCTION

This arbitration arises pursuant to a collective bargaining agreement between the State of Ohio and the Ohio Civil Service Employees Association, Local 11 AFSCME. The parties are in disagreement regarding the termination of employment of John Milling and Eric Smith who were employed as Aviator 2 at the Ohio Department of Transportation in Columbus, Ohio. The Grievants were terminated on March 30, 2012 by the Employer. The Union states that the termination of the Grievants was not for just cause. Mr. Milling and Mr. Smith grieved the terminations on March 30, 2012, and the Employer denied the grievances on May 15, 2012. The Union requested that mediation be waived, and the grievances were moved to arbitration.

The Arbitrator was selected by the parties, pursuant to Article 25 of the collective bargaining agreement, to conduct a hearing and render a binding arbitration award. Hearing was held on two dates, September 13, 2012 and January 11, 2013 at the aviation facility of the Ohio Department of Transportation in Columbus, Ohio. The parties agreed to hear both matters as one arbitration case. At hearing, the parties were afforded the opportunity for examination and cross examination of witnesses and for the introduction of exhibits. The Arbitrator was escorted on a tour of the aviation facility by the parties on two occasions and viewed the aircraft that is the subject of this matter. The parties stipulated that the grievances were properly before the Arbitrator.

ISSUE

The parties stipulated to the following issues to be decided by the Arbitrator. "Was the Grievant, John Milling, removed for just cause, if not, what shall the remedy be? Was the Grievant, Eric Smith, removed for just cause, if not, what shall the remedy be?"

JOINT STIPULATIONS

1. John Milling's date of hire: 11/6/1989.
2. Eric Smith's date of hire: 6/15/1992.
3. John Milling's date of termination: March 30, 2012.
4. Eric Smith's date of termination: March 30, 2012.
5. In April 2009, as a result of attending ground school for the P68, John Milling and Eric Smith first raised the issue to management about safety in the P68.
6. The P68 has been in service at ODOT since late 1988 and has over 3,000 hours of flight time.

WITNESSES

TESTIFYING FOR THE EMPLOYER:
James Bryant, Aviation Administrator
Kevin L. Rogge, Aviation Manager
Nick Nicholson, Deputy Director of Human Resources, ODOT
Michael C. Flynn, Assistant Director of Field Operations
Jackie Keaton, Retired Pilot
John Carpico, Aviator 2
Mark Groves, Aviator 2
Andrew Dull, Aviator 2

TESTIFYING FOR THE UNION:
John Milling, Grievant
Eric Smith, Grievant

GRIEVANCES

The Grievance of John Milling reads as follows. "Contract article(s) allegedly violated. 24.01, 24.02, 24.07, and any other that apply. John was terminated unjustly as of 3-30-12. Remedy sought. Reinstatement to employment and to be made whole including all lost wages and benefits."

The Grievance of Eric Smith reads as follows. "Contract article(s) allegedly violated. 24.01, 24.02, 24.07, and any other that apply. Eric was terminated unjustly as of 3-30-12. Remedy sought. Reinstatement to employment and to be made whole including lost wages and benefits."

RELEVANT PROVISIONS OF AGREEMENT

Article 24 – Discipline

24.01 – Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse. Abuse cases which are processed through the Arbitration

step of Article 25 shall be heard by an arbitrator selected from the separate panel of abuse case arbitrators established pursuant to Section 25.04. Employees of the Lottery Commission shall be governed by ORC Section 3770.021.

24.02 – Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

a. One (1) or more oral reprimand(s) (with the appropriate notation in employee's file);

b. One (1) or more written reprimand(s).

c. One (1) or more working suspension(s). A minor working suspension is a one (1) days suspension, a medium working suspension is a two (2) to four (4) day suspension, and a major working suspension is a five (5) day suspension. No working suspension greater than five (5) days shall be issued by the Employer. If a working suspension is grieved, and the grievance is denied or partially granted and all appeals exhausted, whatever portion of the working suspension is upheld will be converted to a fine. The employee may choose a reduction in leave balances in lieu of a fine levied against him/her.

d. One (1) or more day(s) suspension(s). A minor suspension is a one (1) day suspension, a medium suspension is a two (2) to four (4) days suspension, and a major suspension is a five (5) day suspension. No suspension greater than five (5) days shall be issued by the Employer.

e. Termination.

Disciplinary action shall be initiated as soon as reasonably possible, recognizing that time is of the essence, consistent with the requirements of the other provisions of the Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process. The deduction of fines from an employee's wages shall not require the employee's authorization for withholding of fines.

If a bargaining unit employee receives discipline which includes lost wages, the Employer may offer the following forms of corrective action:

1. Actually having the employee serve the designated number of days suspended without pay;

2. Having the employee deplete his/her accrued personal leave, vacation, or compensatory leave banks of hours, or a combination of any of these banks under such terms as may be mutually agreed to between the Employer, employee, and the Union.

24.07 – Prior Disciplinary Actions

All records relating to oral and/or written reprimands will cease to have any force and effect and will be removed from an employee's personnel file twelve (12) months after the date of the oral and/or written reprimand if there has been no other discipline imposed during the past twelve (12) months.

Records of other disciplinary action will be removed from an employee's file under the same conditions as oral/written reprimands after twenty-four (24) months if there has been no other discipline imposed during the past twenty-four (24) months.

The retention period may be extended by a period equal to employee leaves of fourteen (14) consecutive days or longer, except for approved periods of vacation leave. Employees who are terminated and subsequently returned to work without any discipline through arbitration, shall have the termination entry on their Employee History on Computer (EHOC) stricken.

BACKGROUND

The Grievants, John Milling and Eric Smith, held Aviator 2 positions with the Ohio Department of Transportation, Division of Aviation. The employment of both individuals was terminated on March 30, 2012 based on violation of policies "2B, Disobedience/Refusal of an order or assignment by a superior, and 2C, failure to follow policies of the Director, District or offices" (Jt. Exb. 3a and 3b).

The subject matter of this case involves an aircraft, which is owned by the Employer, Partenavia P68 Observer. For purposes of this Award, the aircraft will be referred to as the P68.

Grievant Milling has been a pilot for forty-seven years and had been employed by ODOT for twenty-three years since 1989. His flying experience includes crop dusting, flight instructor at Ohio State University, safety coordinator, Operations Manager at Ohio State University flight school and employment involving accident litigation.

Grievant Smith has been a pilot for forty years and had been employed at ODOT for nearly twenty years. His experience prior to ODOT included employment as a pilot at Midway Airlines and work as a flight instructor.

Over the past five years, the Employer has sold a number of aircraft which were owned by the Department and reduced the number of pilots on staff. Initially Department pilots were assigned to a specific aircraft, but, with the reduction in staff and equipment, the Employer determined that it would be necessary that all pilots possess the capacity to operate all aircraft based on operational need.

The Grievants had not been assigned to fly the P68, an aircraft designed to observe ground features. They had generally operated aircraft designed to transport people. The Employer instructed the Grievants to participate in ground school for the P68 in 2009. During initial ground school sessions, the Grievants found that the controls of the P68 hit their legs and inner thighs. Grievant Milling notified the Aviation Manager, Kevin Rogge, on April 20, 2009 by email that he felt the controls were not "free and correct" and therefore created a safety concern (Jt. Exb. 7a). At a later time Grievant Smith expressed similar concerns. He wrote and signed a statement as a part of his annual performance evaluation indicating that, based on his size, he did not have "full and unrestricted movement of flight controls" when in the pilot seat of the P68 (Union Exb. 2). Grievant Milling again expressed concern regarding his ability to operate the P68 in a safe manner when he was assigned to ground school in November, 2009 (Jt. Exb. 7c).

The Grievants drafted a statement to Nick Nicholson, Deputy Director of Human Resources, on January 3, 2011 indicating their safety concern over the flight controls not being "free and correct" when they would be assigned in the future to operate the P68. They requested that an FAA inspector observe the controls with pilots in the aircraft. The Grievants recommended that the FAA answer the

following query. "Is there full and unrestricted movement of the aircraft controls with (Eric Smith, John Milling) at the controls of the ODOT aircraft N856H?" (Jt. Exb. 7 e). Aviation Manager Rogge drafted and sent a communication to the FAA regarding the safety concerns of the Grievants (Jt. Exb. 5 a i). The Grievants expressed dissatisfaction regarding the inability to assist in the drafting of the communication to the FAA. The letter referenced the restricted movement of the controls as they touched the legs of the pilots and requested that an assessment be conducted. Manager Rogge followed up with an additional communication to the FAA which included comments made by the Grievants. An initial response from the FAA stated that an unsafe condition did not exist, but, if the pilot was too large, he should not fly the aircraft (Jt. Exb. 5 c). This assessment was made without observation of the Grievants in the P68. The Grievants submitted a request to HR Manager Nicholson that a representative of the FAA "as an unbiased third party expert," observe them in the cockpit to assess their safety (Union Exb. 6).

Following the initial response from the FAA, Manager Rogge informed the Grievants that they would be expected to fly the P68 in the future (Jt. Exb. 7 h). HR Manager Nicholson stated that there was nothing more his office could add to the discussion. The Grievants therefore contacted a representative of the FAA directly on May 19, 2011 and requested an on-site observation and assessment (Union Exb. 8). The Grievants were then informed that Aviation Manager Rogge would conduct an assessment with the Grievants in the cockpit of the P68. The Grievants indicated their intention to cooperate with Mr. Rogge's assessment but also reiterated their

request for an independent observation by the FAA (Jt. Exb. 7 j). The observation and assessment by Mr. Rogge was not conducted.

Walter Hutchings, Manager of the FAA Aircraft Evaluation Group, responded to the inquiries of the Grievants on June 8, 2011. His communication (Union Exb. 11) was as follows.

> *We have coordinated this issue with the Small Airplane Directorate and concur with their response. Additionally we would add that the FAA approved Airplane Flight Manual for this airplane requires a flight control check as part of the before takeoff procedure. In accordance with that procedure the pilot(s) are required to check that the flight controls are "free and correct." Our interpretation of "free" is that the flight controls are not inhibited and full travel of the flight controls can be achieved. In the event that the pilot can not achieve full travel of the flight controls during the required before takeoff check, then in-flight operation of the aircraft would be unsafe and should not be attempted.*

The Grievants forwarded the Hutchings response to management. The FAA then communicated on July 25, 2011 its intention of conducting a ground test of the P68 with pilots in the cockpit (Jt. Exb. 5 e). The FAA conducted the ground test on August 16, 2011, and results were forwarded to Aviation Manager Rogge on September 23, 2011 (Jt. Exb. 5 f i). The report indicated that the concerns of the Grievants were validated and stated that the pilot in command had the authority to determine the safety of flying the P68. The Grievants were not observed in the cockpit by the FAA and were not present during the assessment process. Manager Rogge was not present during the ground test.

The FAA then sent a follow-up communication to ODOT on January 30, 2012 which stated that the P68 was safe to fly and that "this condition does not create an unsafe condition" (Jt. Exb. 5 h i). The notice stated further that "the P68 Observer

can be safely operated throughout the entire flight envelop with an average sized pilot." The FAA stated that it did not plan any further action regarding the P68. James Bryant, Aviation Administrator, then sent a communication stating that the matter had been resolved and training in the P68 should commence (Jt. Exb. 7 l). The Grievants sent a communication to Mr. Hutchings on February 23, 2012 indicating their further concern regarding the various communications between the FAA and ODOT (Union Exb. 13).

The Grievants were in contact with a Union representative and filed grievances pursuant to the safety provision of the collective bargaining agreement on March 8, 2012 (Jt. Exb. 2 a 1, 2 a 2, 2 a 3). The Union had not generally been involved with the matter until this time.

On March 8, 2012, Aviation Manager Rogge drafted a memo entitled "Documentation of Direct Order for Job Assignment to the Partnevia P68 – N856H." The memo was directed to each of the Grievants and stated the following. "On March 8, 2012 at 2:40 P. M. I Kevin Rogge, personally informed John A. Milling by Direct Order the Job Assignment including the associated flight and ground training for the Partnevia P68 Observer – N856H. Failure to comply with this Direct Order may result in disciplinary action including suspension or removal." The same memo was drafted and presented to Eric Smith (Jt. Exb. 4 e i and 4 e ii). The Grievants were directed to sign the memo, and they complied with the directive. In addition, each Grievant wrote the following statement at the bottom of the signed memo. "I consider the operation of this aircraft with me at the controls to be unsafe due to the fact that I do not have full and unrestricted movement of the flight controls." The

Grievants had been verbally instructed to provide Manager Rogge with a verbal commitment by the end of the work day, March 8, 2012, that the would train on and fly the P68. When Manager Rogge left for the day at 4:40 pm, the Grievants had not spoken with him.

The P68 was not operable on March 8, 2012 as the engines on the aircraft were being replaced.

The Grievants were placed on administrative leave on March 9, 2012 and pre-disciplinary hearings were conducted on March 21, 2012. The employment of the Grievants was terminated on March 30, 2012 for violations of "Directive WR-101, 2B- Disobedience/Refusal of an order or assignment by a superior, and; 2C – failure to follow policies of the Director, Districts or offices" (Jt. Exb. 3 a and 3 b).

Aviation Manager Kevin Rogge has been a pilot since 1982 and has flown the P68. Other ODOT pilots have flown the P68. Manager Rogge grounded the P68 for a period of time due to the issues raised by the Grievants and sent photographs of the controls to Vulcanair in Orlando, Florida for guidance regarding the safety concerns of the Grievants (Jt. Exb. 7 b). The representative from Vulcanair indicated that their organization had not experienced similar problems.

POSITION OF THE EMPLOYER

The Employer states that the Grievants, John Milling and Eric Smith, were terminated for just cause based on a refusal to comply with a direct order by supervision. The Employer states that it has the burden of proof regarding the just cause aspect of this case, but the Union has the burden to prove that the operation of

the P68 by the Grievants was unsafe. The Employer argues that the Union failed to prove this aspect of the matter.

The Employer states that the Grievants violated Work Rule 2B, Disobedience/Refusal of an order or assignment by a superior and Work Rule 2C, failure to follow policies of the Director, Districts or offices. The rule violations allow for termination of employment for first offense.

The Employer argues that the matter should also be decided based on the standard that a refusal to work must involve an imminent danger of death or serious physical harm that a reasonable person would conclude is dangerous or life threatening.

The Ohio Public Employment Risk Reduction Program, (PERRP) has incorporated Federal OSHA standards including employee refusal to work issues. The Ohio Administrative Code has incorporated federal occupational safety and health standards. Public employees in Ohio may refuse a work assignment "in good faith." The employee must reasonably believe that there is imminent danger and that the reasonable person would find that the work assignment could lead to death or serious injury. The regulation also permits the Employer to discipline or terminate an employee who fails to meet the conditions set forth for refusal. The regulations require that an employee follow certain reporting procedures. The Employer argues that the Grievants clearly did not follow established PERRP reporting procedures when they refused to operate the P68.

The Employer states that it was necessary for all ODOT pilots to have the ability to fly all department aircraft following the sale of equipment and reduction in

force. Manager Rogge conducted ground school training for the P68 and observed the Grievants in the cockpit of the aircraft in 2009. Following the initial ground school training, the Grievants objected to operating the P68. The Employer, at this point, accepted the concerns and did not discipline the Grievants. The Employer did not require the Grievants to operate the aircraft but instead attempted to work through their concerns. The Employer states that Manager Rogge made numerous attempts to address the concerns of the Grievants. He contacted VulcanAir, the manufacturer, and communicated with the Florida Wildlife Department which utilizes the P68. The response to these inquiries indicated that the P68 was safe to operate even in light of the controls being in contact with the legs of pilots. The Employer responded to the request of the Grievants for an independent review by contacting the FAA. The Grievants stated that they were not given an opportunity to provide input in the communication to the FAA, but the Employer argues that their specific wording was incorporated in Manager Rogge's communication to the agency.

The Grievants' concern revolves around the concept of the "full and unrestricted" standard, but the Employer argues that the "free and correct" standard is applicable in this matter. The Employer states that the FAA references the "free and correct" standard and stated that an unsafe condition does not exist even in light of the controls touching a pilot.

The Grievants expressed their disagreement that they were not involved in the FAA assessment of the P68, but the Employer argues that the FAA determines the manner in which an assessment is conducted. The Employer has no control over

the process utilized by the FAA which chose to not include the Grievants in the evaluation. The Employer states that the FAA did not indicate that the P68 was unsafe to operate following the test and assessment. The Employer states that the FAA consulted with a number of authorities including the manufacturer and the European Aviation Safety Agency. The conclusion verified that the control system does not exhibit an unsafe condition, and there was no adverse service history, safety concerns or accidents as a result of the interference issue. The Employer states that the FAA, in its January and February, 2012 notices to the Department, indicated that the P68 was safe to operate. The Employer argues that the Grievants never stated that the P68 was not airworthy.

The Employer states that, after almost three years of accommodating their concerns, it gave a direct order to the Grievants regarding ground school training and operation of the P68 on March 8, 2012. The written order placed the Grievants on notice that failure to comply could result in disciplinary action including termination of employment. The Employer argues that the Grievants clearly understood the consequences of refusal, and each signed the notice. In addition, by verbal order, the Grievants were ordered to acknowledge compliance by the end of the work day of March 8, 2012. The Employer argues that, by leaving the work site without verbal compliance, the Grievants clearly indicated their refusal to comply with the direct order. The Employer states that the Grievants were counseled by Assistant Director Flynn of the necessity to comply and grieve later. The Grievants ignored this critical advice.

The Employer states that the Grievants relied on FAA regulation 91.3 which indicates that the "pilot in command" makes the final determination to operate an aircraft based on safety concerns or other relevant issues. But the Employer argues that, while this is a legitimate concept, a pilot is not exempt from disciplinary action if such decisions are not based on sound judgment or not made in good faith. The contention of the Grievants, that they are the final authority regarding the operation of the P68 and therefore are exempt from Employer action, lacks merit. The Employer states that pilots Keaton, Carpico, Groves and Doll operate the P68 without incident. They compare in body height and weight to the Grievants. The Employer argues that the bottom line in this matter was that the Grievants wished to continue as transportation pilots and plotted to avoid non-transportation missions.

The Employer argues that the Union's contention, that the filing of a safety grievance precludes an order to train on and operate the P68, is erroneous. The Employer had already spent three years investigating the safety of the P68. The Employer argues that it had already complied with the intent of the collective bargaining agreement and acted from the beginning as if a safety grievance had been filed.

The Grievants had been assigned exclusively to transportation missions prior to management's decision to train all pilots to fly all aircraft and be available for all department assignments. The Employer argues that their assertion regarding the safety of operating the P68, a non-transportation aircraft, was not made in good faith. Instead the Grievants hoped to avoid non-transportation assignments. The

Employer argues that the Union and Grievants failed to produce proof that the P68 was unsafe based on their physical stature. The principle of progressive discipline must not be applied based on the direct refusal to respond to the order of the Employer. The Employer states that the appropriate penalty for refusal of the order by the Grievants is termination of employment. The Employer requests the Arbitrator to deny the grievances of John Milling and Eric Smith in their entirety and sustain their terminations of employment.

POSITION OF THE UNION

The Union argues that the termination of employment of John Milling and Eric Smith was not for just cause. The Union states that the Employer has been focused on the airworthiness of the P68, but that is not the issue. The FAA stated that it is safe for an average sized pilot to fly the P68. The Grievants are not average sized pilots. They were clear throughout the three year dispute that it was not safe to fly the P68 based on their physical stature. The inability of the Grievants to achieve free and correct movement of the controls made it unsafe for them to pilot the aircraft. The Union states that the FAA confirmed that the P68 was airworthy but also indicated that, if the pilot was too large to operate the controls, he should not fly the aircraft. The Union argues that the Employer has ignored this aspect of the case. FAA rule 91.3 allows the pilot in command to determine if the aircraft is safe to operate. The Union argues that the Employer's argument to the contrary lacks merit.

The Union states that, to date, the Grievants have never been observed in the cockpit of the P68 by management or a neutral party. It has not been possible therefore to confirm the concerns of the Grievants. The Union argues that, even during the two day arbitration hearing, the Grievants could have been observed in the cockpit when the parties and Arbitrator observed the P68 on two occasions. This did not occur.

The Union states that the Grievants have a record of eighty-seven years of safe flying between them. They clearly possess the experience to determine an unsafe flying condition, but, the Union argues, the Employer has dismissed their experience and concerns.

The Union argues that the Employer does not have the authority to force the Grievants, as pilots in command, to ignore FAA rule 91.3. This regulation dictates that the pilot in command is the final authority regarding any unsafe condition. The Employer has placed the Grievants in an untenable situation. Follow ODOT dictates and lose pilot license for ignoring 91.3, or comply with 91.3 and lose employment. The Union argues that the Employer was obligated to work with the Grievants as follows. "Let me see you in the plane. Let's check out the basis of your decision. Write a report to explain your decision." (Union's post hearing brief, page 4) The Union states that, at one point, the ODOT safety representative, Mike Tomesek, stated, in 2010, that, if the Grievants were of a physical stature that did not permit the safe operation of the P68, they should remain on the ground, but as the matter progressed, the Employer ignored this timely advice.

The Union states further that the Grievants flew a number of Ohio Governors to various locations in the state. The Union poses the hypothetical argument. What would the Governor think about flying in an aircraft that the pilot determined as unsafe?

The Union states that the charge against the Grievants is based on the refusal of a direct order. But, the Union argues, the Grievants never refused a direct order and, in fact, were careful during the three year dispute to never state that they would refuse to operate the P68. They stated their position consistently that an unsafe condition existed, but the Grievants never refused a direct order of management. The March 8, 2012 memo to the Grievants stated that they had been informed of a direct order. The Union states that there was no scheduled flight training on the P68, and the Grievants were not assigned to fly a mission in the P68. The Grievants did not refuse to attend a scheduled flight training, and they did not refuse an assignment to fly the P68. The aircraft had no engines. The memo stated that failure to comply with the direct order may result in discipline including removal, and the Grievants were terminated. The Union argues that they did not refuse a direct order. The Union goes on to argue that the Grievants were not insubordinate, but that the Employer used this ploy to override FAA rule 91.3.

The Union states that the Employer argues that the actions of the Grievants is based on their desire to only fly transportation flights. The Union argues that the testimony of Mark Groves dispelled this assertion when he testified that all ODOT pilots prefer transportation to observation flights.

The Union requests the Arbitrator to grant the grievances of John Milling and Eric Smith; restore lost wages and benefits including PERS; cover medical expenses incurred; and allow for the purchase of paid-out leave time. The Union asks that the Grievants and Union be made whole.

DISCUSSION

The parties to this dispute agree that the P68 is airworthy. The Union argues that it is not safe for the Grievants to operate the P68 because the controls are not free and correct as they touch their legs and thighs when seated in the cockpit. Although both Grievants attended the initial stage of ground school for the P68 in 2009 and Grievant Milling flew as second seat, neither have flown the aircraft as pilots in command. Due to a reduction in aircraft and staff, the Employer decided that all ODOT pilots should have the capacity to fly all Department aircraft. The Grievants had been assigned to transportation flying previous to management's decision. Initially the Employer accepted the concern of the Grievants as good faith. At the urging of the Grievants, the Employer contacted the FAA. The FAA made a number of responses regarding the P68, some which supported the concerns and positions taken by the Grievants and others which indicated that the Grievants could safely operate the aircraft in light of the controls not being completely free and unrestricted. From the start, the Grievants requested that they be observed in the cockpit by a neutral third party, presumably the FAA. It is troubling that this never occurred. When the FAA finally tested and observed the P68 at the ODOT hanger, the Grievants were not instructed or invited by management to be present. In

addition, Manager Rogge was not present. The Employer argues that it cannot control FAA testing procedures. But Manger Rogge could have been present, and he could have assigned the Grievants to be present as well. Common sense would dictate that this two year long dispute, at the point that the FAA arrived at the facility, could have been resolved had top management and the Grievants been present for the observation and assessment. There is no evidence that the FAA specifically excluded the Grievants or Mr. Rogge from being present during the assessment. The Employer was aware of the date and time the FAA was to arrive at the ODOT hanger. Had the Grievants been observed in the cockpit by the FAA representative and a determination made that it was safe for them to operate the P68, the dispute may have been resolved. Instead the parties have been left with a number of conflicting statements from the FAA. But this is not the question to be resolved in this arbitration case. The parties stipulated that the issue to be decided by the Arbitrator is whether the termination of the Grievants was for just cause.

The FAA communication to the Employer of January 30, 2012 stated that the P68 was safe to fly and the conditions described by the Grievants did not create an unsafe condition. The notice stated further that the aircraft could be safely operated by an average sized pilot. The FAA stated that it would not engage in any further action regarding the P68 owned by ODOT. The Employer then stated that training on the P68 would commence. The Grievants sent an additional communication to the FAA expressing concern over what they perceived as contradictory advice from the agency. The Grievants proceeded to contact a Union representative and filed grievances pursuant to the safety provision of the collective bargaining agreement

on March 8, 2012. On March 8, 2012 Aviation Manager Rogge drafted a memo entitled "Documentation of Direct Order for Job Assignment to the Partnevia P68 – N856H." Mr. Rogge stated to the Grievants that they were required to submit to ground training on the P68 and then operate the aircraft. He demanded their verbal commitment to do so by the end of the work day, March 8, 2012. The memo was a confirmation that a verbal direct order had been given to each of the Grievants. The Grievants signed the memo, as directed, and wrote on the bottom that it was unsafe for them to operate the aircraft due to the flight controls. Manager Rogge testified at hearing that he left the facility for the day at 4:40 pm, and neither Grievant had made contact with him to confirm or reject the verbal order he had given. Mr. Rogge interpreted this non-response as confirmation that they refused his direct order to train in and operate the P68. The termination of employment process then commenced the next work day.

Evidence indicates that the P68 was inoperable on March 8, 2012. The engines had been removed from the aircraft. The order of Manager Rogge is defective for a number of reasons. First, it was a verbal order. The memo only confirmed what had been his verbal order to the Grievants. Verbal orders are often unclear and open to interpretation. The demand that the Grievants respond verbally by the end of the work day is also open to interpretation and confusion especially in light of the fact that the P68 was inoperable. Manager Rogge left for the day two hours following his conversation with the Grievants. Second, the Grievants were, in fact, not presented with a direct order. Manager Rogge demanded to know what the Grievants would do in the future. He did not order them to participate in

ground training that day; nor did he order them to operate the aircraft on that day or any other specific day. There was no direct order, and therefore the Grievants did not refuse a direct order. There is no evidence that the Grievants ever refused a direct order to train on the P68 or fly the aircraft at any time during the nearly three year dispute. The Union's argument in this respect is meritorious.

Arbitrator Nels Nelson in Consolidated Coal Co., 77 LA 927 932 (1981) commented on an insubordination case.

> *In the instant case the grievant is accused of insubordination – one of those offenses for which immediate discharge may be appropriate. However, in order to support a charge of insubordination an employer must show that the instructions were clear; that they were understood to be an order; and that the supervisor stated the penalty for failure to comply. . . . Insubordination involves a refusal to carry out an order – a positive act of defiance.*

In the instant case, the verbal order was not specific to date and time the Grievants were expected to operate the P68. It was common knowledge that the P68 sat in the hanger with no engines. It wasn't possible for the Grievants to disobey a direct order to operate the aircraft. And such order should not have been delivered verbally which only opens to interpretation and debate. In any event, the Grievants signed the memo confirming the order. They did not engage in an act of defiance.

Arbitrator Harold E. Moore in El Paso County Sheriff's Department, 117 LA 1304 1307 (2002) commented on a case of insubordination.

> *The quantum of proof required of an Employer to sustain a charge of insubordination is much higher than many other charges of misconduct by an Employee. The Employer must show that the Employee committed the act or the omission of which he/she is being accused. It also must be shown that the rule or conduct expected of the Employee is reasonable and related to the*

Employer's business interest. The Employer must show that the rule has been communicated to the Employee, that the Employee understood it, or that the offense is so serious that an Employee could be expected to know his conduct is improper and would warrant punishment.

In the instant case the Grievants did not refuse to train on or operate the P68. The order was vague. Although the memo of confirmation indicated that discipline including suspension or removal could result for non-compliance, there was no direct order, and the memo did not state that failing to make verbal communication by the end of the work day could result in termination of employment which is what then occurred as they were placed on administrative leave the following day, March 9, 2012. Evidence indicates that the termination of employment of the Grievants was inevitable at this point.

Arbitrator Ed W. Bankston in Mid America Packaging, 111 LA 129 131 (1998) made the following observation in a case of insubordination.

Where the discharge is challenged, management must be able to show that: (1) the order or instruction was clearly expressed; (2) the employee was made aware of the possible consequences of failure or refusal to comply. . . .The requirement is for 'very clear instructions' and 'even more explicit statements about the penalty for failure to comply.'

In the instant case the order was not clearly expressed. It was prospective. What was expected sometime in the future. The fact that it was a verbal order clouds the matter even further. Manager Rogge's memo did not state that failure to communicate compliance to him before he left for the day could result in termination of employment. This makes the sustaining of the terminations problematic.

The Employer argues that, although the "pilot in command" is authorized to make a decision regarding the operation of an aircraft, there are consequences to these determinations if made in bad faith or in error. This contention is meritorious, but the Grievants were never in a position to refuse to operate the P68. Over a period of nearly three years, management appropriately worked with the Grievants and accepted their concerns in good faith as both are seasoned pilots with significant flying experience and long tenure at ODOT. There is no evidence that they were ever ordered to operate the aircraft.

It is also problematic that the verbal order was communicated to the Grievants on the day they filed a grievance pursuant to the safety provision of the collective bargaining agreement. The Employer's argument, that management had thoroughly investigated the concerns of the Grievant without the filing of a safety grievance, is accurate. But management was still obligated to make a response to the grievances which were submitted on March 8 if only to document or summarize the steps which had been taken to date to determine the safety of the aircraft. Time was not a factor as the P68 was inoperable at the time the grievances were filed.

The Employer has argued that the Grievants had been transportation pilots for many years and were opposed to any other assignments following the decision by the Employer to train all pilots to fly all departmental missions. Although witness Andrew Doll testified that the Grievants told him that they preferred transportation flights, there is no conclusive evidence that their challenge regarding their safety in the P68 was based on a ploy to delay their assignments to fly other aircraft.

The Employer's argument, that other ODOT pilots of similar height and weight compared to the Grievants have safely and regularly operated the P68, is duly noted. It is unfortunate that neither the Grievants nor Manager Rogge were present at the facility when the FAA inspected and assessed the P68. The fact that other pilots of similar height and weight have safely operated the P68 would weigh in the Employer's favor if either of the Grievants had invoked FAA rule 91.3 and refused assignment to operate the aircraft or if the parties would have fully processed the safety grievances which were initiated by the Grievants and Union.

The frustration of the Employer is understandable. Due to reduced equipment and staff, the goal of all pilots flying all ODOT missions makes good business sense. The dispute regarding the Grievants' safety in the P68 had continued for nearly three years. FAA responses have been contradictory and open to various interpretations. The Grievants were charged with violation of Work Rule 2B which states, "Disobedience/Refusal of an order or assignment by a superior." The Grievants were not disobedient as they were not presented with a clear, unambiguous and specific order or assignment. They were also charged with violation of Work Rule 2C which states, "Failure to follow policies of the Director, Districts, or offices." There is no evidence that the Grievants violated specific policies of the Employer. The Employer violated Article 24, Section 24.01, when the employment of John Milling and Eric Smith was terminated. The terminations of employment of the Grievants were not for just cause. The grievances of the Union

are sustained. The Grievants are to be made whole for loss of wages, benefits, PERS credit and seniority less interim earnings including unemployment compensation if applicable. Arbitrator will retain jurisdiction for thirty days for purposes of remedy only.

AWARD

The terminations of employment of the Grievants were not for just cause. The grievances of the Union are sustained. The Grievants are to be made whole for loss of wages, benefits, PERS credit and seniority less interim earnings including unemployment compensation if applicable. The Arbitrator will retain jurisdiction for thirty days for purposes of remedy only.

Signed and dated this 15th Day of February, 2013 at Cleveland, Ohio.

Thomas J. Nowel
Arbitrator

CERTIFICATE OF SERVICE

I hereby certify that, on this 15th Day of February, 2013, a copy of the foregoing Award was served upon Colleen Ryan, Advocate for the Ohio Department of Transportation; Timothy Rippeth and Sandi Friel, Advocates for OCSEA, Local 11 AFSCME; and Jessie Keys and Alicyn Carrel, Office of Collective Bargaining, by way of electronic mail.

Thomas J. Nowel
Arbitrator