OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20424-0001

EDWARDS AIR FORCE BASE, CALIFORNIA

Respondent

and

Case No. SA-CA-20642

SPORT AIR TRAFFIC CONTROLLERS ORGANIZATION (SATCO)

Charging Party

Major David L. Frishberg For the Respondent
Stefanie Arthur, Esquire For the General Counsel
Rex Campbell For the Charging Party
Before: BURTON S. STERNBURG Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. Section 7101, et seq., and the Rules and Regulations issued thereunder.

Pursuant to an amended charge first filed on July 9, 1992, by Sport Air Traffic Controllers Organization (SATCO), (hereinafter called the Union), against the Department of the Air Force, Edwards Air Force Base, California, (hereinafter called the Respondent), a Complaint and Notice of Hearing was issued on October 30, 1992, by the Acting Regional Director for the San Francisco, California Regional Office, Federal Labor Relations Authority. The Complaint alleges that the Respondent violated Sections 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute, (hereinafter called the Statute), by virtue of the actions of supervisor Robert Coates in unilaterally implementing a new policy requiring unit employees to hold a second class medical certificate as a condition of employment without first giving the Union timely notice and affording it the opportunity to bargain over the impact and manner of implementation of the change.

A hearing was held in the captioned matter on February 9, 1993, in Los Angeles, California. All parties were afforded the full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. Counsel for the General Counsel and Counsel for the Respondent submitted post hearing briefs on May 3, 1993, which have been fully considered.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

The Union has been the exclusive representative of a unit of employees at the SPORT[(1)] Military Radar Unit (MRU) at Edwards Air Force Base, California, since July 9, 1990. There are 14 air traffic controllers and two electronic technicians in the unit represented by the Union. At the time of the events underlying the instant complaint, Mr. Robert Coates was the Chief of the MRU and Mr. Lonnie Mitchell and Mr. Curtis Ranz, both of whom were supervisory air traffic control specialists, were first line supervisors.

Prior to 1988, the air traffic controllers working at the MRU were classified as GS-301-11 mission controllers. In 1988, as a result of a classification appeal the mission controllers were reclassified as GS-2152-12 air traffic controllers. At the time of the reclassification, the employees were required to pass a physical examination in order to qualify for the GS-2152-12 air controller position. The employees who were then working as mission controllers took and passed the physicals in July and August 1988.

The Qualification Standards for Air Traffic Control Series GS-2152 issued by OPM sets forth the physical requirements for Air Traffic Controllers. The section on Retention Requirements reads as follows:

> The physical requirements in this section apply to: (1) air traffic control specialists in the center and terminal specializations who are actively engaged in the separation and control of air traffic; (2) immediate supervisors of air traffic control specialists actively engaged in the separa-tion and control of air traffic; and (3) air traffic control specialists in the station specialization who regularly perform flight assistance services as described under *Description of Work*.
>
> Employees occupying the type of positions described above are required to requalify in a medical examin-ation given annually, usually during the employee's month of birth. Controller's incurring illness, injury, or incapacitation at any time between the annual examinations are required to be medically cleared before return to air traffic control duty. . . .
>
> Those who are found to be not physically or emotion-ally qualified for air traffic control duties at any time will be subject to reassignment to a position for which they are fully qualified, retirement for disability if eligible, or separation from the service.

Following the reclassification, a new position descrip-tion was prepared which provided, among other things, that the incumbent "be able to meet the physical requirements set forth in AFR 160-43 and AFR 160-104".[(2)] According to Mr. Rex Campbell, who was the Union President at the time, the physical examinations required by the Air Force Regulations are at least as stringent as those required for an FAA

second class medical certificate. Further, according to the uncontroverted testimony of Mr. Campbell, it was he who prepared the new position description for management's approval and it was also he who was responsible for including the requirement for the physical examination in the position description. He inserted the language with respect to the physicals because he wanted to make sure that the controllers working at the MRU qualified for air traffic controller retirement which, under a pending bill, gave the controllers better retirement benefits than other civil service employees. There is no evidence in the record which indicates that he conveyed his reasons for including the physicals in the new job description to management.

In January 1991, a new position description was issued for the air traffic controllers working in the MRU which did not require the medical examinations called for in AFR 160-43 and AFR 160-104. When Mr. Campbell asked Mr. Coates, Chief of the MRU, about the change in the position description, Mr. Coates told him that he had removed the requirement for a physical exam since the MRU was a military radar unit and the controllers working therein were not required to have a second class medical certificate.

Following negotiations during the period October 1990 and January 1991 the parties reached agreement on a collective bargaining agreement which became effective February 26, 1991. Article 17 entitled Medical Certification of the collective bargaining agreement provides as follows:

> Section 1. The Employer agrees that waivers to the medical certificate shall be granted on purely medical determinations.
>
> Section 2. All medical examinations required by the employer shall be scheduled on duty time. There will be no reimbursement for travel or parking for examinations scheduled for Edwards AFB. In the event that the Edwards AFB medical facility is not available for scheduled medical examinations as determined by management, then travel and parking fees will be authorized in accordance with Volume 2, of the Joint Travel Regulations.
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> Section 3. The medical certificate to be issued upon satisfactory completion of the medical examination shall be a Federal Aviation Adminis-tration (FAA) second class medical certificate. The yearly medical examination given shall meet the standards required for retaining an FAA second class medical certificate.

According to the testimony of Mr. Campbell, who negotiated the collective bargaining agreement on behalf of the Union, Article 17 does not require an employee to take an annual physical or make a second class medical certificate a requirement of the job. It does, however, according to Mr. Campbell, require the Respondent to give any employee who requests it an FAA second class physical as opposed to just a routine physical by the Air Force. Further, according to Mr. Campbell, the requirement in AFR 160-43 for a physical examination is not applicable to the air traffic controllers working at the Edwards Air Force Base MRU because the unit air traffic controllers are not authorized to provide air traffic control services. In order to work in a facility that provides air traffic control services, the FAA must certify the facility. The Air Force does not have such authority. One of the distinguishing features between the work done by controllers at a certified air traffic facility and those controllers working at an MRU is that the former provide instructions for the separation of aircraft. Mr. James Smith, a rank and file air traffic controller, corroborates the foregoing testimony of Mr. Campbell.

In contrast to the foregoing testimony of Mr. Campbell and Mr. Smith, Mr. Lonnie Mitchell, a supervisory air traffic control specialist and a first line supervisor, testified that the air traffic controllers working in the MRU met the definition of those air traffic controllers who were covered by both the Air Force and FAA regulations and were required to pass a yearly second class physical. He further testified that the air traffic controllers working at the MRU do in fact provide instructions for the separation of air craft. Finally, Mr. Mitchell acknowledged that the MRU was a military radar unit and not a certified FAA certified air traffic control facility, that MRU's are prohibited by FAA regulations from providing air control services, that the Air Force is bound by FAA regulations and that any separation of air craft performed by MRU personnel occurs only in special use air space on aircraft released to them by an air traffic control facility.[3]

In January 1992, Mr. James Smith, an air traffic controller employed in the MRU at Edwards AFB, took his annual physical. Subsequently, on February 5th he was informed by the flight surgeon that the tests indicated that he had diabetes and as a consequence his second class medical certificate was being suspended. The flight surgeon instructed Mr. Smith to see his own doctor for confirmation of the diagnosis and forwarded the test results to the FAA in Oklahoma City. At a later date the FAA contacted Mr. Smith and gave him information with respect to the tests he had to take for purposes of determining whether he could be requalified.

Following his visit to the flight surgeon on February 5, 1992, Mr. Smith informed Mr. Coates, Chief of the MRU, that he his second class medical certificate had been suspended. Mr. Coates immediately assigned Mr. Smith to handle "plot boards" and removed him from working the radar scope which was the primary function of the MRU.

Around June 1982 Mr. Smith became fed up with working only the "plot board" and spoke to Mr. Campbell, the Union President, about getting back to the work associated with the radar scope. Thereafter, Mr. Campbell arranged a meeting with Mr. Coates on June 1, 1992 to discuss the matter. The meeting was attended by Mr. Coates and Mr. Mitchell for Respondent and Mr. Campbell, Mr. Smith and Mr. James Blair, the Union's Secretary-Treasurer, for their Union. According to Mr. Campbell, whose testimony is corroborated by Mr. Smith and Mr. Blair, he opened the meeting by inquiring of Mr. Coates why Mr. Smith was not working the radar scope. Mr. Coates replied that it was because Mr. Smith had failed his second class medical exam. Mr. Campbell then reminded Mr. Coates that he had told them in the past that a second class medical certificate was not a requirement of the job and had in fact removed it from the position description. Mr. Coates acknowledged taking such position in the past and then stated that he was changing the conditions of employment and that as of now the unit employees would have to possess a second class medical certificate in order to work in the MRU. Mr. Campbell asked Mr. Coates to put the change in writing and Mr. Coates stated that he would. However, he did not do so. Mr. Mitchell denies that Mr. Coates stated that he was changing a condition of employment. According to Mr. Mitchell, Mr. Coates, in reply to a question from Mr. Campbell, stated that Mr. Smith could return to radar work only after he has passed a second class physical examination.

Mr. Mitchell further testified that it had always been the policy of Respondent to remove any unit employee from radar work when he failed to obtain a second class medical certificate. Upon a satisfactory showing that an employee's physical defect had been cured or brought under control the employee would then receive his medical certificate and be returned to radar work. In support of his position Mr. Mitchell named another employee (Burt Jones) who had failed his physical and been removed from radar work until such time as his physical deficiency had been cured or brought under control. Finally, he contradicted the testimony of Mr. Blair concerning another employee (Mr. Cooper), who Mr. Blair alleged had been allowed to continue

performing radar work after flunking his second class physical examination. According to Mr. Mitchell, who was Mr. Cooper's first line supervisor, Mr. Cooper was put on the "plot board" until such time as it was determined that the medication he was taking would control his hypertension.[(4)]

Mr. Smith was cleared by the flight surgeon to return to the radar scope in September 1992. His second class medical certificate was renewed on November 30, 1992.

According to Mr. Coates, the Union received no notification prior to the June 18th meeting that the Respondent intended to make the second class medical certificate a requirement of the job.

Conclusions

The General Counsel takes the position that Respondent violated Sections 7116(a)(1) and (5) of the Statute by virtue of the action of Mr. Coates in unilaterally changing conditions of employment by requiring the air traffic controllers working in the MRU to maintain a second class medical certificate. In support of this position the General Counsel points out that the record evidence supports the conclusion that since the MRU is a military radar unit and not a certified air traffic facility its employees were not required to take an annual physical examination. Further, according to the General Counsel, although the air traffic controllers working in the MRU did in fact take yearly physicals, the taking of such physicals was strictly on a voluntary basis. Thus, it is the General Counsel's position that the annual physicals called for in the collective bargaining agreement were a perk and not a required condition of employment.

Respondent takes the position that the air traffic controllers working in the MRU are subject to the Air Force and FAA regulations, both of which require that air traffic controllers hold a second class medical certificate in order to direct air traffic. Further, according to Respondent, the record evidence supports the conclusion that the air traffic controllers working in the MRU always were grounded when they failed the physical required for a second class medical certificate. Accordingly, Respondent urges a finding that there was no change in the conditions of employment of the air traffic controllers working in the MRU.

Both parties, in addition to presenting a number of witnesses, have submitted various regulations, contractual provisions, position descriptions, qualification standards, etc., in an attempt to support their respective positions concerning the necessity or non-necessity to hold a second class medical certificate in order to perform radar activities in the MRU. Thus, we have the Qualification Standards for Air Traffic Control Series GS-2152 issued by OPM, AFR 160-43, (AFCS GS-2152), and Article 17 of the collective bargaining agreement supporting Respondent's position that yearly physicals leading to a second class medical certificate were always required in order to perform radar work in the MRU.[(5)] The General Counsel on the other hand, aside from relying on the testimony of Mr. Campbell, cites the FAA Handbook which states in Chapter 13 that MRUs are not Air Traffic Controller Facilities and are not to provide air traffic controller services to aircraft unless the aircraft has been released to the MRU by an Air Traffic Control Facility.

Having observed the demeanor of the witnesses while on the witness stand and analyzed their respective testimony, I credit the testimony of Mr. Mitchell that it had always been the policy of Respondent to remove unit employees from radar work upon their failure to obtain a second class medical certificate. Respondent's

Exhibit 7, a letter to a unit employee notifying him that he was temporarily suspended from MRU duties "involving flying" pending a further medical evaluation supports his testimony.

Additionally, support for the above conclusion is found in the Qualification Standards for Air Traffic Control Series GS-2152 issued by OPM which requires the air traffic controllers to pass a yearly physical examination. Having been reclassified to GS-2152, the unit employees thus became subject to the GS-2152 Qualification Standards issued for the position by OPM[(6)].

Finally, I am troubled by the fact that Mr. Smith waited some five to six months from the date that he was removed from radar work before seeking reinstatement to such position. If this had been a unique occurrence, i.e. first time a unit employee had been removed from radar work for failing a physical, I question the delay in filing a complaint based thereon. The delay in filing, would appear to support Mr. Mitchell's testimony that failure to pass the physical was always grounds for the removal of a unit employee from duties associated with the radar screen.

Accordingly, based upon the foregoing considerations, I find that the removal of a unit employee from radar work for failing a yearly physical was not a change in an existing condition of employment. In such circumstances, it is hereby recommended that the Authority issue the following order dismissing the complaint in its entirety.

ORDER

It is hereby Ordered that the Complaint in Case No. SA-CA-20642 should be, and hereby is, dismissed in its entirety.

Issued, Washington, DC, November 18, 1993

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BURTON S. STERNBURG

Administrative Law Judge

Dated: November 18, 1993

Washington, DC

1. "SPORT" is an acronym for Space Positioning Optical Radar Tracking. MRU and SPORT are used interchangeably to refer to the military radar unit at Edwards Air Force Base.

2. Prior to 1987 AFR 160-43 required that air traffic controllers possess a valid FAA Class II medical certificate to remain facility rated. In 1987 the aforementioned language was deleted and in place thereof the air traffic controllers were required to take "a USAF physical annually" and a "complete physical examination every two years."

3. Chapter 13 of the FAA Handbook which is entitled Military

Radar Unit Duties, Responsibilities, and Procedures provides in pertinent part as follows:

13-1 Military Radar Unit (MRU)

MRUs are not commissioned ATC facilities. There-fore, they shall not be authorized nor requested to provide air traffic control service. Military command and control functions, including traffic advisories will be provided to participating military aircraft operating within airspace which has been released to the unit by the appropriate ATC facility.

4. According to Mr. Mitchell, Respondent has been giving the yearly physicals since 1988. Mr. Mitchell is responsible for scheduling the annual physicals and making sure that the air traffic controllers are physically fit. If an air traffic controller failed the physical, he would "take appropriate action, as [he] did in the letter to Mr. Jones". The letter to Mr. Jones, which was received in evidence as Respondent's Exhibit 7, temporarily suspended Mr. Jones from any MRU duties

"involving flying" pending "further medical evaluation".

5. Although Mr. Campbell contends that the language of Article 17 of the collective bargaining agreement makes the physical examination a perk rather than a requirement for the job, a literal reading of Section 1 of Article 17 appears to belie such an interpretation since it anticipates that every employee will possess a medical certificate unless a waiver is given "on purely medical determinations". If medical certificates were not required, as Mr. Campbell contends, then one must question why there is any mention of a waiver.

6. To the extent that one may differ with the weight accorded by the undersigned to the OPM Standards applicable to AFCS

GS-2152 and Article 17 of the collective bargaining agreement, I would still find, irrespective of the existence of such standards or contractual provision, that the existing practice in the MRU was to remove any unit employee from duties associated with the radar screen upon the failure of the employee to obtain a qualifying medical certificate.