

result, OPM issued the appellant a negative suitability determination in March of 1983, finding him ineligible for Ground Controller positions because of his conduct involving illegal activities in connection with his employment with PATCO.

The presiding official determined that OPM had failed to establish a nexus between the appellant's conduct and his ability to perform effectively as a Ground Controller with the Air Force. This finding was based upon the following factual determinations: (1) the appellant was not a federal employee during the 1981 air traffic controllers' strike; (2) the appellant was a private citizen exercising his constitutional right to strike against the federal government; (3) the appellant, as a private citizen, did not strike against the federal government; (4) the appellant had not applied for a position working with the Federal Aviation Administration ("FAA") employees; and (5) OPM failed to show that the appellant would have contact with FAA employees. The presiding official also considered, as mitigating factors in the appellant's favor, the amount of time which had passed since the strike occurred, and the appellant's past satisfactory performance as an air traffic controller while employed with the Department of Transportation before resigning his Government employment to become a PATCO officer.

In its petition for review, OPM contends that the presiding official misinterpreted the applicable regulations of 5 C.F.R. § 731.202(b) and (c) which form the basis for its suitability

determinations. OPM further argues that the presiding official erred in his finding that no nexus existed between the appellant's criminal conduct and the efficiency of the service. We agree. The petition for review is hereby GRANTED under 5 U.S.C. § 7701(e)(1).

The appellant's criminal contempt conviction arose as the result of his activities as the Regional Vice-President of PATCO during the August 1981 national strike by air traffic controllers employed by the Federal Aviation Administration. The appellant had been named in his capacity as a PATCO official as one of the subjects of a TRO issued on August 3, 1981, by Judge Samuel P. King of the U.S. District Court for the District of Hawaii. Within the TRO, the appellant was directed to inform the strikers in his region to return to work and to cease all striking activities. The appellant defied the TRO and a subsequent bench trial before Judge King resulted in a conviction and fine of \$500.00.

In reply to OPM's determination to disqualify him from Ground Controller positions in the competitive Federal service, the appellant asserted that, although he was convicted of criminal contempt, he was not guilty of the charge; that the TRO was too broadly stated and compliance was not possible because he had no control over the strikers' actions; and that his limited resources prevented him from taking further action regarding his conviction. The appellant further contended that, as a

private citizen, he was asserting his constitutional right to strike.

The regulations of OPM concerning suitability determinations provide that it may deny an applicant examination or deny an eligible appointment if it determines that "this action will promote the efficiency of the service." 5 C.F.R. § 731.201. They provide, further, that the determination should be based on:

(1) Whether the conduct of the individual may reasonably be expected to interfere with or prevent effective performance in the position applied for or employed in; or

(2) Whether the conduct of the individual may reasonably be expected to interfere with or prevent effective performance by the employing agency of its duties and responsibilities.

5 C.F.R. § 731.202(a). "Criminal conduct" may be considered as a basis for disqualification under 5 U.S.C. § 2302(b)(10) and 5 C.F.R. § 731.202(b)(2).

The appellant's defiance of the TRO, which directed him to instruct the air traffic controllers in his region to continue working and to cease their illegal strike activities, evidenced a total disregard of and disrespect for the law. As a PATCO official, the appellant had the ability to alter significantly the course of the strike in his region but, rather than obey the law, he chose to violate it and encourage federal employees to do the same.

The Board therefore finds that the appellant's conduct demonstrated an inability to operate within prescribed rules


and regulations which would, as OPM determined, affect his ability to function effectively as a Ground Controller and impair the Department of the Air Force's ability to trust his judgment and ability to follow orders. See 5 C.F.R. § 731.202. We conclude that the requisite nexus has been established and that supported its decision to rate the appellant ineligible by ponderant evidence under 5 U.S.C. § 7701(c)(1)(B).

Accordingly, the initial decision dated September 8, 1983, is hereby REVERSED and OPM's determination that the appellant was ineligible for Ground Controller positions under 5 C.F.R. § 731.202(b) because of his "criminal conduct" is SUSTAINED.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

Appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:


Stephen E. Manrose
Acting Clerk of the Board

Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing OPINION AND ORDER were sent by certified mail this _____ to:

Charles Campbell
P.O. Box 51
Elizabeth Colorado 30107

by regular mail service to:

Joseph A. Morris, General Counsel
Elizabeth S. Corey, Agency Attorney
U.S. Office of Personnel Management
1900 E Street, N.W.
Washington, D.C. 20415

Office of Personnel Management
Appellate Policies Branch
1900 E Street, N.W., Room 7459
Washington, D.C. 20415

by hand to:

Office of the Special Counsel
Merit Systems Protection Board
1120 Vermont Avenue, N.W.
Washington, D.C. 20419

(Date)

Stephen E. Manrose
Acting Clerk of the Board