

Failure to
Follow Instructions/
Insubordination

Hello NWP Members and Reps;

Welcome to LR Chronicles number 25. There are times in everyone's career, where we receive instructions or orders from a management official. An employee in the FAA is required to follow those instructions or orders from a superior official or face the ramifications of disobeying those instructions or orders. In this edition of the LR Chronicles, I will discuss the many nuances of failure to follow instructions or orders. Additionally, I will provide and discuss some of the relevant case law, so that you can see how this situation has been decided by third Parties.

There are numerous laws, rules, and regulations, as well as our own collective bargaining agreement (CBA) that address this very important topic. Additionally, the Federal Labor Relations Authority (FLRA) and the Merit Systems Protection Board (MSPB) have issued case law on this issue. First and foremost, there is a definite distinction between "*failure to follow instructions*" and "*insubordination.*"

According to the case law issued by the respective third Parties, there is a standard of proof that is required to sustain a charge of insubordination that is not required to sustain a charge of failure to follow instructions. That standard of proof is "intent." According to these decisions, "insubordination" is the "*willful and intentional refusal to obey an authorized order of a superior officer which the officer is entitled to have obeyed.*" It requires proof of intent: a state of mind that is generally proven by circumstantial evidence in the context of an insubordination charge. A charge of "failure to follow instructions" has no such requirement to prove "intent." To sustain a charge of "failure to follow instructions", only requires that "*proper instructions were given to the employee and that he/she failed to follow those instructions, regardless of whether or not the failure was intentional.*"

In the FAA, employees are required to abide by FAA regulation, Human Resources Policy Manual (HRPM) ER 4.1, Standards of Conduct. Under paragraph 2c of ER 4.1, FAA employees are required to "*respond promptly to, and fully comply, with directions and instructions received from their manager or other management officials.*" Additionally, in the FAA's Human Resources Operating Instruction (HROI), Table of Penalties, they have divided this issue into two

separate and distinct penalties. Under number 5, *“Failure or delay in carrying out orders, directions, assignments, instructions etc., given by a superior official, either permanently assigned or in an acting capacity”*, the associated penalties are:

- First offense – Reprimand to a 14 day suspension;
- Second offense – 14 day suspension to removal;
- Third offense – Removal.

Under number 6, *“Insubordination; refusal to carry out orders, directions, assignments, instructions etc., given by a superior official, either permanently assigned or in an acting capacity;”*, the associated penalties are:

- First offense – 14 day suspension to removal;
- Second offense – 30 day suspension to removal;
- Third offense – Removal.

The Agency’s administration of ER 4.1 and the table of penalties include a rather draconian interpretation of what constitutes a “second” or “third” offense. The agency considers a “second” and “third” offense as such, regardless of whether or not a previous action was even remotely related to any subsequent action. For example, if an employee received a discipline a year ago for inappropriate use of a Government credit card, then received a discipline for failure to follow instructions, the agency will consider that a second offense. NATCA is also concerned with how the Agency often uses the charge of “failure to follow instructions” to add to the list of infractions rising from a single event. For example, an employee who is charged with misuse of sick leave may also be charged with failure to follow instructions. The Agency supports this piling on of charges by alleging that the employee has been given instructions on the appropriate manner to utilize sick leave, thus, any failure to comply with the mandated process also constitutes a failure to follow orders. The Union has generally been successful in convincing third parties that such additional charges are unwarranted.

As stated above, there is a lot of case law from several different third parties that is extremely important in explaining the *“failure to follow instructions”* issue. I will outline a few examples below:

- “In order to sustain a charge of failure to follow or comply with orders or instructions, an agency must prove that; 1) a responsible agency official gave a clear and proper direction or order to an employee; and 2) the

employee failed to comply with the direction or order.” (Hamilton v. U.S. Postal Service, 96 FMSR 5357)

- “It is not necessary for an agency to prove willful intent to disobey a superior’s instructions or orders in connection with a charge of failure to comply or follow directions.” (Green v. Department of the Navy, 94 FMSR 5183)
- “The agency must be able to prove that a responsible superior gave clear and proper instructions or orders.” (Boscoe v. U.S. Department of Agriculture, 92 FMSR 5325)
- “The agency must be able to prove non-compliance with the superior’s instructions or directions.” (Rackers v. U.S. Department of Justice, 98 FMSR 5254)
- “A negligent disregard for a superior’s instructions can provide a valid basis for adverse action.” (Ware v. Department of Veterans Affairs, 97 FMSR 5374)

Regarding the more serious charge of “*insubordination*”, below is some of the case law:

- “Insubordination consists of willful and intentional refusal to obey an authorized order of a superior, which the superior is entitled to have obeyed.” (Refearn v. Department of Labor, 93 FMSR 5274)
- “Employees are generally obliged to follow orders or instructions first and raise any complaints or disputes after compliance.” (Leong v. Department of Veterans Affairs, 89 FMSR 5126)
- “Failure to comply with an order because of an inability to do so does not constitute insubordination.” (Yetman v. Department of the Army, 88 FMSR 5138)
- “Failure to comply with an order because of a disabling illness does not constitute insubordination.” (Mitchum v. Tennessee Valley Authority, 84 FMSR 5250)
- “A sincere, but unsuccessful attempt to comply with an order or direction does not constitute insubordination.” (Forgett v. Department of the Army, 90 FMSR 5329)
- “Failure to comply with an order because of the failure of equipment necessary to complete the task does not constitute insubordination.” (Allen v. Department of Agriculture, 88 FMSR 5208)
- “Failure to comply with an order or direction that is not sufficiently clear does not constitute insubordination.” (Drummer v. General Services Administration, 84 FMSR 5706)

- “Failure or refusal to comply with an order based on a conflicting interpretation of the provisions of a labor agreement can constitute insubordination.” (Sepulveda v. Department of the Interior, 88 FMSR 5383)
- “Mere expression or disagreement with a course of action or the suggestion of alternatives, in the absence of non-compliance with an order, does not constitute insubordination.” (Pritchard v. Department of Justice, 83 FMSR 5070)
- “Intent can be inferred from the actions-or lack of actions-in connection with an assignment or order.” (Redfearn v. Department of Labor, 93 FMSR 5274)
- “Unexcused or unjustified delay in completing an assignment can constitute insubordination.” (Ford v. Department of the Navy, 90 FMSR 5111)
- “Refusal to answer a supervisor’s questions in connection with a work assignment can constitute insubordination.” (Shaw v. Department of Agriculture, 98 FMSR 5373)
- “A refusal to attend or complete assigned training can constitute insubordination.” (Hayes v. Department of Agriculture, 82 FMSR 5089)
- “The deliberate or intentional disregard of standing policies or procedures can constitute insubordination.” (Brown v. Department of the Air Force, 95 FMSR 5182)
- “The failure or refusal to take a properly ordered fitness for duty examination can constitute insubordination.” (Abatecola v. Department of Veterans Affairs, 86 FMSR 5009)
- “A refusal to cooperate with a search order, even if based on a sincere conclusion that the search is improper, can constitute insubordination.” (Clark v. Department of the Navy, 84 FMSR 5254)
- “An employee does not have the right to disregard an order from an authorized supervisor, even if the supervisor is not in his chain of command.” (107 LRP 71367)

Notwithstanding the above case law, there are exceptions to the “obey now, grieve later” requirement. Generally, there are two exceptions to disobeying an instruction or order from an authorized supervisor. They are those that would:

- Place the employee in a clearly dangerous situation; or
- Cause the employee irreparable harm.

These two exceptions largely revolve around an employee’s safety and health. Arbitrators, administrative agencies, and the courts tend to look for extreme situations when allowing for an exception to the “work now, grieve later” doctrine.

Without such a risk to the health and safety of an individual, any failure to comply with an order may be viewed as inappropriate self-help on the part of an employee. Any concerns regarding the appropriateness of an order should be addressed through the Parties' collective bargaining agreement.

An employee faced with an order that he or she believes violates the contract or any relevant regulation has the option of filing a grievance. However, as employees engaged in a highly sensitive work, there is the potential for an individual employee to have professional concerns with an order given by a management official. There is a negotiated provision in our own CBA that is directly related to this issue. Article 65, Section 1 states *“The Parties recognize that the employees are accountable for ensuring that their performance conforms with established standards. However, in the event of a difference in professional opinion between the employee and the Agency, the employee shall comply with the instructions of the Agency and the Agency shall assume responsibility for their own decisions.”* This very provision and topic was the subject of an Arbitration Hearing approximately a year ago.

The Agency charged an employee with “inappropriate behavior”, rather than the more serious charges of “failure to follow instructions” or “insubordination.” The issue at Arbitration was framed as *“Whether the 5 day suspension issued to the grievant is for the efficiency of the service, in accordance with all laws, rules and regulations, and if not, what should be the remedy.”* The crux of the issue was that an employee allegedly used a loud and disrespectful tone with a supervisor when the supervisor told the employee to combine positions and to take a break. Additionally, the employee allegedly did not carry out the instruction.

The decision of the Arbitrator, after hearing all evidence and testimony, was that *“a preponderance of the evidence supports the conclusion that the grievant was guilty of inappropriate behavior as charged.”* The Arbitrator, in his decision, explained *“...when an employee is given instructions to do something, as in the case of the grievant, and the employee fails to obey the supervisor's instructions, a different set of circumstances exist.”* The Arbitrator also explains that this *“...runs counter to the general rule of work now, grieve later.”* The Arbitrator also weighed heavily on the language contained in Article 65, Section 1 in making his decision.

As you can see, although there are exceptions to the general rule of “work now, grieve later,” please remember that if the agency thinks that you have done something wrong, such as a violation of one of their orders or rules, they WILL discipline you for that alleged infraction. Once that disciplinary action is imposed,

you may have your day in court, but only after serving any discipline upon which the agency decides.

Article 65 is an excellent tool to use should you be faced with this particular situation. Article 65 is there for YOU, should you need it. In the very own words of the Arbitrator in the above case, *“Article 65, Section 1...means that once the agency (supervisor) gives instructions to an employee, the employee should obey the supervisor’s instructions even though there may be a difference in the professional opinion of the supervisor and the employee. It also means that if the employee obeys the supervisor’s instructions, the employee is not subject to disciplinary action if something goes wrong—the agency shall assume responsibility for their own decisions.”*

It is incumbent upon the employee to let the management official know that you disagree with an instruction or order. This can be done in several different ways. You can let the management official know, in the presence of a witness, that you disagree, or if no witness is available, follow the verbal disagreement up with an email or letter stating your disagreement and include the date, time and circumstances surrounding the situation with which you disagreed, but that you followed the order. You can also show your disagreement on a recorded line, such as a telephone or landline, for example, the relief briefing line. Once you have expressed your disagreement, you must then comply with the Agency’s instruction.

Ultimately, every FAA employee must be mindful of the orders and instructions provided by FAA management. The assumption, as a Federal employee, is that such orders and instructions will be met with compliance. If there is ever a question about compliance with an order, follow the “work now, grieve later” doctrine and then contact your NATCA representative.

If there are any questions, please feel free to contact me.

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