

New HROI on Drugs and Alcohol

Hello NWP Members and Reps;

Welcome to LR Chronicles number 27. On July 1, 2008, the FAA placed into effect their new conduct and discipline order. This new order is entitled Human Resources Policy Manual (HRPM) “ER 4.1, Standards of Conduct.” In addition to the many changes to ER 4.1, the agency also made significant changes to their document entitled Human Resources Operating Instructions (HROI) “Table of Penalties (TOP)”, which among other things, increased the penalties for many of the offenses contained therein. At the same time, the agency instituted a brand new regulation that has a significant impact on all FAA employees, including those that do not hold a safety or security sensitive position. This new regulation is entitled Human Resources Operating Instruction (HROI) on “Drugs and Alcohol.” This edition of the LR Chronicles will focus on this new regulation as well as explain the intricacies of it and its impact on NATCA bargaining unit employees (BUEs).

To begin with, ER 4.1 has a specific section that is dedicated to drugs and alcohol. In its entirety, paragraph 15 states:

“15. Drugs and Alcohol:

- a. DOT Order 3910.1 provides information on the drug and alcohol program and specifically identifies those FAA positions designated as TDP’s. Also refer to Human Resources Operating Instructions (HROI) – Drugs and Alcohol, for further information.*
- b. The FAA is concerned with the decision of any employee who inappropriately or illicitly uses illegal and legal substances. Illegal substances include, but are not limited to, cocaine, marijuana, opiates, amphetamines and phencyclidine. Legal substances include alcohol, prescription and over-the-counter (OTC) medications. These substances can affect the employee’s work performance and/or conduct and have an adverse impact on the employee’s credibility. For instance, a person’s credibility could be seriously impacted when an employee is in the workplace, and although not drunk, still smells of alcohol. Often others do not wish to work around a person smelling of alcohol or do not trust the judgment or decision making skills of the employee.*
- c. As an employer with responsibility for aviation safety, the FAA is especially concerned when an employee’s actions could affect the safety or security of the National Airspace System (NAS) and/or the flying public. The confidence of the flying public depends upon absolute trust in the integrity of the air transportation system. FAA must be sure that employees are operating without the constraint of drugs or alcohol, or the consequences of such abuse, such as a hangover. Alcoholic beverages are prohibited on any FAA owned or leased property. Employees occupying Testing Designated Positions (TDP), who inappropriately or illicitly use substances, on or off the job, place their jobs in jeopardy. This*

includes arrest for drug and alcohol related crimes, such as driving under the influence (DUI). Employees must avoid this kind of off-duty behavior since it indicates irresponsibility and lack of judgment and is incompatible conduct while occupying a TDP. As stated in employee responsibilities, employees occupying safety-or security-sensitive positions must report an arrest for an alcohol or drug-related infraction before the start of their next scheduled work shift and, in addition, safety-sensitive employees must report such an infraction within 48 hours to the Regional Flight Surgeon. In addition, employees occupying safety-sensitive duties must immediately report to their manager any use of prescription and OTC drugs. The FAA will not allow any employee known to inappropriately or illicitly use substances to perform any safety-or security-sensitive duties until the FAA has determined that such an employee is no longer a risk to public safety or national security.”

More specifically, the agency’s new HROI on drugs and alcohol mirrors the Department of Transportation (DOT) regulation on “Drug-and-Alcohol-free Departmental Workplace”, otherwise known as DOT Order 3910.1. As you will see from the paragraphs that follow, there are specific requirements that the agency must follow regarding drugs and alcohol, as well as specific requirements and assurances to which an employee in this situation must adhere. For example, paragraph 2i of the agency’s new ER 4.1 states *“Immediately report known or suspected violations of law, regulations or policy through appropriate channels and fully participate in inquiries. For instance, this includes immediately reporting an operational error or deviation or reporting any personal violation that has the possibility or appearance of impacting on the employee’s position (e.g., employees occupying safety-or security-sensitive positions reporting an arrest for an alcohol or drug-related infraction before the start of their next scheduled work shift and, in addition, safety-sensitive employees must report such an infraction within 48 hours to the Regional Flight Surgeon.”*

Regarding the HROI on drugs and alcohol, there are specific procedures that the agency, as well as employees must follow in order to comply with the agency’s regulations, and also those of the DOT. As a matter of fact, the HROI on drugs and alcohol specifically states that *“this HROI is established to supplement DOT Order 3910.1 to provide for specific procedures pertinent to the FAA.”*

In accordance with the new HROI, there are eight (8) categories of alleged infractions, three (3) of which have no opportunity for rehabilitation and as such, may result in an employee’s removal from the federal service. Those are:

- Drug trafficking or refusal to comply with procedures during collection or testing;
- On-duty use or on-duty possession of illegal drugs; and
- On-duty use of alcohol (TDP Employees).

All three of these infractions state *“no opportunity to enter into a Treatment and Rehabilitation Program (TRP) or Last Chance Agreement (LCA) is afforded to any employee for an infraction in this paragraph.”*

The other five (5) alleged infractions all offer an opportunity to enter into a TRP and LCA. They are:

- Positive drug test in violation of DOT/FAA policy;
- Positive alcohol test in violation of DOT/FAA policy;
- Not ready for duty status;
- Abstinence period failures; and
- Off-duty misconduct by a Testing Designated Position (TDP) employee.

There is one last alleged infraction in this HROI that deals with “repeated misconduct/post-treatment and rehabilitation plan failures. *“Should any employee fall under this category, it will be up to the sole discretion of the Regional Flight Surgeon (RFS) to determine whether or not that employee has violated any abstinence requirement of a previous TRP or LCA.”* Should it be determined that an employee has violated any previous TRP or LCA, that employee will also be terminated. However, if an employee has a repeated misconduct that was previously on a TRP via a self-referral, they will receive a proposed termination notice with one final opportunity to enter into another TRP via a LCA.

There are five (5) key definitions with which to familiarize yourself regarding this HROI. Those definitions are:

Last Chance Agreement (LCA) – A LCA includes pertinent information that clearly defines the terms and conditions of the employee’s employment and that failure to comply will result in the implementation of a disciplinary/adverse action. The LCA is developed and monitored by the responsible management official. Only the management official may make changes to the LCA.

There are two (2) very important consequences of which everyone needs to be aware PRIOR to signing a LCA. The first consequence is that by signing and accepting the LCA, the employee will be agreeing to give up any and all appeal rights to which he/she is otherwise entitled in accordance with law and/or CBA. This includes filing a grievance or any other statutorily provided right for redress. This fact will be made clear and state as such with the LCA.

The second consequence in signing and accepting the LCA is the fact that regardless of the circumstances which led to the LCA, the employee will be agreeing to abstain from alcoholic beverages as well as any substance that contains alcohol for the remainder of their FAA career, even if the event that led to the LCA was a drug infraction.

Should an employee be offered a LCA and not accept the terms and conditions contained therein, and/or refuse to sign it, the proposed disciplinary/adverse action that was proposed will be implemented. This means that the removal of the employee from Federal service for a TDP employee.

There is a very important point to remember when dealing with a LCA or any interviews regarding a LCA. The FAA, at the regional level (HR in the Regional Office) more often than

not conducts these interviews telephonically with the employee. As such, this is considered a Weingarten meeting and as a result, the provisions of Article 6, Section 1 apply. The employee is entitled to Union representation if they request it and they have a reasonable fear that discipline may result from this interview. Since strict compliance with the LCA is required, it is important that the employee have a full and complete understanding of all the required elements presented in this meeting. The outcome for failure to comply with the LCA is removal from Federal Service. Therefore, this assures a direct nexus to discipline triggering the right to representation under Weingarten.

Treatment and Rehabilitation Plan (TRP) - The TRP includes a diagnosis, the employee's clinical status and the treatment and rehabilitation requirements that must be followed. With the single exception of a self-referral, the FAA affords an employee only one opportunity to enter and successfully complete an FAA/EAP approved and monitored TRP. The TRP is developed and monitored by the EAP in conjunction with the AAM Flight Surgeon. Only EAP or AAM may make changes to the TRP.

Triggering Event – This is behavior that proves to be a violation of an employee's LCA or TRP that results in implementation of the disciplinary/adverse action that had been held in abeyance.

Management Referral – Employees previously referred to EAP as a result of a drug and/or alcohol violation are considered management-referred employees. Repeated misconduct or a violation of a post-TRP may result in the initiation of a proposed removal based on the current infraction.

Self-Referral – Employees who self-identify themselves as an individual with a drug and/or alcohol problem and voluntarily seek the assistance of the EAP prior to being identified as someone who inappropriately uses alcohol or illegal drugs are considered self-referred employees. Also see Article 93 of the collective bargaining agreement (CBA).

There are five (5) very important issues to be discussed in this new HROI, especially concerning TDP/Safety-sensitive positions. Those are:

- Procedures for drug or alcohol violations;
- Off-duty misconduct by a TDP employee;
- Not-Ready-For-Duty Status;
- Repeated misconduct/post-TRP failures; and
- Prescription drugs and over-the-counter medications.

Procedures for Drug or Alcohol Violations:

The HROI provides specific guidance for the processing of drug and alcohol violations. In general, an employee receives a proposed disciplinary/adverse action notice with a specific time frame to reply. There are two (2) very important points to be made here. First, the specific timeframe to reply is contained in Article 10 of our CBA. In Section 5 b that notice is fifteen (15) days unless an extension for which to respond is agreed upon between the parties. Secondly, a probationary employee will receive no such notice or opportunity to respond. A

probationary employee will more likely than not just be terminated if the agency deems they have violated any provision of their conduct and discipline order or this HROI.

The notice issued to the employee informs them if he/she is eligible for a “ONE-TIME” opportunity to enter into a TRP, or prohibited from an opportunity for a TRP. An employee may be prohibited from an opportunity to enter into a TRP or LCA if they fall under one of the four (4) categories below:

- Drug trafficking or refusal to comply with procedures during collection or testing;
- On-duty use or on-duty possession of illegal drugs;
- On-duty use of alcohol; or
- Previously completed a LCA.

In the notice of proposed disciplinary/adverse action, the employee is also informed that participation in a TRP requires accepting the terms of a LCA. In the employee’s response to the proposed disciplinary/adverse action, it is required that he/she agree to and be willing to participate in a TRP and LCA. The decision notice advises the employee of the decision and states that the implementation of the disciplinary/adverse action is held in abeyance pending his/her successful completion of the TRP. When the employee signs that they voluntarily accept the terms and conditions of the LCA, the EAP and AAM officially develop the TRP. The decision notice also advises the employee that failure to adhere to the LCA or TRP will result in the implementation of the proposed disciplinary/adverse action.

Regardless of the fact that this new HROI states that the agency “may” place an employee in an “enforced leave status” should non-TDP duties not be available, the agency cannot force an employee, under the collective bargaining agreement (CBA), to take annual leave, except in accordance with Office of Personnel Management (OPM) regulations.

Off-duty misconduct by a TDP employee:

This particular provision of this new HROI is probably the biggest change and has the greatest affect on bargaining unit employees that are in a TDP. For example, the HROI states that *“the FAA must be entirely sure that employees are operating without the constraints of drugs or alcohol, or the consequences of such abuse, such as a hangover.”* The HROI further states that *“when the agency learns of an off-duty event covered by this paragraph, the employee is no longer eligible to self-refer to the EAP. Such misconduct includes, but is not limited to: (1) arrests for a driving infraction (DWI, DUI, etc) or refusal to submit to an alcohol test, (2) any other police matter, such as public intoxication, wherein the use of drugs or alcohol are noted in any police report or court documents, etc.”* The HROI goes on to state *“...a plea of no contest or other plea arrangement, as discussed in HROI, Table of Penalties offense number 43 a or b, is not cause for drug or alcohol misconduct to be excused.”*

Prior to this new HROI, the FAA has treated a first-time off-duty offense as a “no-harm, no foul” situation, in many instances, as long as the employee reported it to management under ER 4.1. However, with the implementation of this HROI and the changes to ER 4.1, this is no longer the case. The previous version of ER 4.1 stated that an employee was required to report *“...known*

or suspected violations of law.” This has changed and now an employee must “immediately report known or suspected violations of law...before the start of their next scheduled work shift.” Regarding the reporting prior to the start of their next scheduled work shift, the new HROI on Drugs and Alcohol requires that the report be made “but in any event, no later than 48 hours after the arrest.” This requirement does not appear in ER 4.1. The new ER 4.1 also now requires the employee to report the off-duty incident “to the Regional Flight Surgeon within 48 hours.”

The HROI also states that even for a single (first-time) off-duty incident, such as an arrest for an alcohol related driving infraction, *“the Regional Flight Surgeon will ensure that an assessment is conducted to determine whether the employee is a candidate for rehabilitation. A TDP employee will be temporarily assigned non-TDP duties, if available, pending action by the Regional Flight Surgeon. If such duties are not available, and the employee fails to request leave, then action shall be initiated to place the employee on enforced leave or indefinite suspension.”*

As part of this “assessment,” the Regional Flight Surgeon may, in some instances, require an employee to undergo a “Liver Enzyme Test” in order to determine whether or not the employee is at risk. Should you ever become aware of this occurring, please contact your RVP or LR Lead immediately.

If the Regional Flight Surgeon determines that the employee is not at risk and rehabilitation is not necessary, the employee will be issued a written admonishment that warns the employee that *“the conduct is unacceptable and not compatible with the behavior expected for an employee occupying a safety-or security-sensitive TDP. The employee must attend, at a minimum, an approved alcohol awareness education program. The admonishment informs the employee that any similar misconduct in the future will result in the issuance of a proposed removal notice.”*

If the Regional Flight Surgeon determines that the employee is at risk and rehabilitation is advisable, then *“the employee will be offered a TRP. If the employee declines this offer, a proposed removal will be issued informing the employee of an opportunity to enter into a LCA, which includes a one-time opportunity for a TRP.”* If the employee accepts the offer, the decision notice informs the employee that the proposed removal is held in abeyance pending successful completion of the TRP and LCA. If the employee declines the offer, the removal is implemented.

Please keep in mind that this action is ONLY for a single or first-time off duty event. Should an employee have two or more off-duty offenses, the procedure is the same as the first off-duty event except that there is no assessment by the Regional Flight Surgeon. The Agency will notify the employee of the proposed removal, and if the employee has not previously completed a TRP and LCA, then they will be offered that opportunity and the proposed removal will be held in abeyance pending successful completion of the TRP and LCA.

In the HROI, it explains what the Agency believes to constitute a second or repeated offense. It states in part *“if an employee is involved in an off-duty event, such as an arrest for a DWI/DUI, etc., and the employee was previously found to have already violated DOT Order 3910.1 based on a positive random drug or alcohol test or reasonable suspicion test, etc., conducted under the*

auspices of the DOT Testing Program, the DWI is considered a second violation of the DOT Order and the employee is not eligible to enter into a TRP or LCA.” This HROI also states that “the second violation can differ from the first infraction and still qualify as repeated misconduct.”

If it is determined that an employee has a second off-duty violation, action shall be initiated to remove a TDP employee. *“A TDP employee will be temporarily assigned to non-TDP duties, if available, pending decision on the proposed removal. If the employee fails to request leave, then the employee will be placed on enforced leave or indefinite suspension. The proposed removal notice informs the TDP employee of a one-time opportunity to enter into a LCA, which includes a one-time opportunity for a TRP. If the employee accepts the offer of the TRP and LCA, the decision notice informs the employee that the implementation of the disciplinary/adverse action is held in abeyance pending successful completion of the TRP and LCA. If the employee declines the offer of the TRP and LCA, the disciplinary/adverse action shall be implemented.”*

Not-Ready-For-Duty Status:

This portion of the HROI ONLY applies to safety-sensitive TDP employees. The HROI states that *“an on-duty TDP employee with a breath alcohol concentration equal to or greater than 0.02 but less than 0.04 on a confirmation alcohol test, conducted under the auspices of the DOT/FAA alcohol testing program is considered to have had a not-ready-for-duty infraction.”* For a first occurrence, this employee *“shall not perform his/her safety-sensitive duties for the remainder of their shift. The employee is not permitted to return to safety-sensitive duties until the start of their next regularly scheduled shift, provided that the shift occurs no sooner than 8 hours after the alcohol test was conducted. The employee may take accrued annual leave, compensatory time, credit hour or leave without pay in order to meet the 8-hour requirement.”* Additionally, an employee in this situation receives a written admonishment which explains to the employee that any future occurrences of a not-ready-for-duty status will result in a management referral to the EAP.

Should an employee have a subsequent occurrence of a not-ready-for-duty status, within 24 months of the first occurrence, the employee shall be dismissed from the worksite and charged AWOL for the remainder of the shift. The HROI also states that *“appropriate disciplinary action shall be initiated.”* In accordance with the FAA’s HROI Table of Penalties, the appropriate disciplinary action, for a second occurrence of the not-ready-for-duty status is a *“30-day suspension to removal”* and for a third occurrence is *“removal.”*

Repeated misconduct/post-treatment and rehabilitation program failures:

Management-Referral:

Under a management-referral, management has two options on how they may proceed with repeated misconduct or a post-TRP infraction, both of which lead to the removal of the employee. The first option allows management to implement the proposed removal that had been held in abeyance. The second option allows management to initiate a new action in cases

where there may be a different deciding official or in cases where the original case file may no longer be sufficiently intact.

Regardless of which option is chosen, the HROI states *“no opportunity to enter into a TRP or LCA is afforded to the employee for repeated misconduct or a post-TRP failure since the employee had already participated in a one-time opportunity for rehabilitation.”*

Self-Referral:

Should an employee that has previously self-referred have any repeated misconduct regarding drugs or alcohol, this repeated misconduct will result in the initiation of a proposed removal. *“This employee will be temporarily assigned non-TDP duties, if available, pending decision on the proposed removal. If non-TDP duties are unavailable, and the employee fails to request leave, the employee will be placed on enforced leave. The proposed removal action informs the employee of a one-time opportunity to enter into a LCA, which includes a one-time opportunity for a TRP. If the employee accepts the offer of a TRP and LCA, the decision notice informs the employee that the proposed removal is held in abeyance pending successful completion of the TRP and LCA. If the employee declines the offer of a TRP and LCA, the action is implemented.”*

For an employee that self-refers, the manager will NOT initiate action, i.e., proposed removal, of the self-referring employee provided that the employee agrees to enter into and adhere to the requirements and conditions specified in the FAA/EAP approved and monitored TRP. If the employee fails to adhere to any of the requirements and conditions set forth in the TRP, the employee is assigned non-TDP duties, if available, receives a proposed removal notice and is afforded one final opportunity for rehabilitation along with a LCA.

As you can see, an employee that self-refers actually receives two (2) opportunities at a TRP. Additionally, since the employee is not identified to FAA management when he/she self-refers, no LCA is necessary or will be issued. Only if the employee fails to adhere to any of the requirements and conditions set forth in the TRP, will he/she receive a LCA, along with another opportunity for a TRP.

Lastly regarding self-referral, contained within this HROI is a very important issue of which everyone needs to be aware. The HROI states *“on rare occasions, the potential exists that a self-referral may be changed to a management referral...when a reasonable argument can be made that an employee self-referred primarily because of an off-duty event.”* I certainly do not understand this sentence due to the fact that a self-referring employee is NOT *“identified to the agency on the first occurrence of such a self-referral!!*

Prescription Drugs and Over-the-Counter medications:

The FAA requires employees in any safety-sensitive duties to immediately report the use of prescription or over-the-counter (OTC) drugs to their manager. Failure to do so may result in a *“reprimand to a 10-day suspension”* for a first offense, to a *30-day suspension to removal* for a third offense. Additionally, a TDP employee is required to inform management when *“illness, injury or other medical conditions could affect the safe performance of their duties.”*

In this edition of the LR Chronicles, I have attempted to explain the most important portions of this HROI that affect all of us. I cannot stress enough that every single employee in the FAA needs to get a copy of the HROI and read it in its entirety. There may be other issues contained therein that may apply to a specific situation of which I have not covered. Therefore, if you occupy a TDP and/or security-or safety-sensitive position within the FAA, you need to read the entire HROI. The HROI on Drugs and Alcohol can be found on the NWP Regional website at <http://nwp.natca.net/labor.htm>

As you can see, the Agency has placed new requirements on its employees by the promulgation of the revised ER 4.1, Table of Penalties, and the new HROI on Drugs and Alcohol. These revised and new regulations affect all of us and as such, you need to be familiar with these requirements. If you are ever in doubt on whether or not you should report anything, please contact your FACREP, RVP or regional LR Lead and they will give you the assistance that you need.

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

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