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THE SECRETARY OF TRANSPORTATION
WASHINGTON, D.C. 20590

December 8, 1981

TO : Ed Meese
Jim Baker
Craig Fuller ✓

FROM : Drew Lewis
(Handwritten signature)

Enclosed is a somewhat detailed explanation of our recommendation to be discussed at the 5:45 p.m. meeting today. It would be helpful if you would have a chance to read this before our discussion. We will come prepared to discuss the reasoning for this recommendation.

Encl.

Implementation of a Policy Which Enables
Former Air Traffic Controllers to be Considered
Re-Eligible for Federal Employment

The implementation of a policy to enable former Air Traffic Controllers to be considered re-eligible for Federal employment should contain the following elements.

1. Removal of the automatic 3-year ban on re-employment;
2. Centralized review of the suitability of such employees for Federal employment by the Office of Personnel Management pursuant to normal OPM criteria including consideration of strike and strike-related activity; and
3. A determination of unsuitability for employment in any position with the Federal Aviation Administration.

The procedural and legal considerations underlying this policy are discussed in the attached memorandum. The specific concerns which have resulted in the recommendation of the particular elements outlined above are:

1. OPM has announced that all discharged Controllers are barred from all Federal employment for three years. The President has the legal authority to change OPM's determination. 5 U.S.C. § 3301. The effect of this change would be to place the former Controllers in a position similar to that of all others being considered for Federal employment and who must undergo a suitability determination prior to approval for hiring. This change can be done most authoritatively by Executive Order.

2. The President could under this same authority declare all former strikers re-eligible for Federal employment without a further suitability determination. However, this would remove the safeguard of further investigation by OPM to screen out persons who engaged in the kind of strike-related activity (e.g. violence, threats of harm, etc.), which justifies their continued bar from all Federal employment. Moreover, because the effect of such a declaration of re-eligibility would be to remove strike activity from consideration as a factor in determining an individual's suitability for Federal employment, it would establish a substantial Executive precedent that could impair the Executive's discretion in the event of future strike situations. Further, because federal law clearly bans strike activity and contemplates that an individual's engaging in strike activity impacts eligibility for Federal employment, the removal

of any consideration of such activity might be challenged as an abuse of Executive discretion. For these reasons, current OPM procedures and criteria for determining the suitability of any applicant for Federal employment should be used to investigate applications by former Air Traffic Controllers for a federal job or requests for general suitability determinations. The President's action would permit consideration of each individual's application on a case-by-case basis with attention to the nature of strike activity and resolve of the individual to refrain from future strike activity.

3. Individual applicants for Federal employment may be found generally suitable, but declared ineligible for employment in a certain job or by a certain agency where it is found that such employment would not promote the "efficiency of the [Federal] service." The impact of hiring these discharged individuals into all other government agencies cannot be determined at this time without the assistance of the further OPM investigation discussed above. However, it is firmly established that the rehiring of these employees by the FAA will impact adversely, not promote, the efficiency of this Agency's service. The discharged employees struck against the FAA and have attempted to justify their action on the basis of charges against FAA management and supervision. Meanwhile, the FAA has engaged in a substantial rebuilding effort, restructuring air traffic operations and hiring replacements to perform both the air traffic and clerical functions performed previously by the striking Controllers. The Controllers who refused to strike or who returned to work under the President's moratorium have worked in unprecedented harmony with FAA management and supervision to continue effective and safe air traffic operations. The FAA and its present employees oppose rehiring the Controllers. If the Controllers were rehired, it would impact on the morale of those who obeyed the law and remained at work. Further, because Controllers must work as a team, and are responsible for training developmental controllers and certifying trainees in all functional areas of air traffic operation, returning those who struck could jeopardize the effective operation of the system and hamper rebuilding efforts.

For those reasons, the President's Executive Order should make a specific exception from its general directive changing the automatic three-year debarment for the striking Controllers to the more normal procedure of permitting these individuals to make application for determination of their suitability for re-employment in the Federal Government, but with the specific declaration that such individuals are deemed by the President not to be suitable for re-employment at the Federal Aviation Administration.

M E M O R A N D U M

Re: Implementation of a Policy of Reeligibility for Federal Employment for Discharged Air Traffic Controllers

The Administration is considering whether to permit former air traffic controllers who were discharged for striking against the government to become eligible for federal employment other than in their former positions. Should it be decided to implement such a policy, it must be carefully planned and executed in order to insure both the legal defensibility of the action and the continued integrity of the air traffic control system. It is crucial that the action not be vulnerable to legal challenge which could ultimately result in judicially mandated reemployment of discharged strikers in their former positions. Nor should any executive action be subject to interpretation by the general public or the current FAA staff as a step leading to such rehiring.

The recommended method of implementing the policy would be through a Presidential executive order and accompanying public statement with the following elements. First, the removal of the three-year debarment to federal employment for discharged strikers which the Office of Personnel Management has stated would be applied "automatically". Second, with the lifting of the automatic debarment, discharged strikers' eligibility for federal employment would be determined under traditional suitability standards applied through established OPM procedures. Third, utilizing the "efficiency of the service" standard, express directions should be given to the Director of OPM and the FAA Administrator that discharged air traffic controllers will be deemed unsuitable for FAA employment.

Under 5 USC §3301, "the President may...prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service...." While the President has delegated general regulatory power over federal employment to the Director of OPM, the Chief Executive retains the inherent authority to amend or add to such a delegation as is consistent with §3301. A directive by the President on the suitability for federal employment of discharged air traffic controllers would be an exercise of this power. In effect, the President would promulgate a special suitability rule applicable to air traffic controllers who struck in August, 1981, which OPM would then enforce. It is suggested that an executive order on the issue would constitute the most authoritative exercise of Presidential power, and, thus, be most secure from judicial challenge.

In lifting the automatic three-year debarment enunciated by OPM, the President would not necessarily preclude the consideration of strike conduct in determining discharged air traffic controllers' suitability. Rather, strike behavior, as "misconduct in prior employment," 5 CFR §731.202(b)(1), could be considered by OPM, along with all other factors, to determine individual applicants' suitability. Further, the President's order need not require OPM to initiate suitability review of discharged air traffic controllers under any special procedure or added criteria. Rather, the order could adopt established suitability procedures, which would require the discharged strikers to request suitability determinations, either through applications for employment or post-termination requests for suitability review. 5 CFR §731.501.

The President's order and statement should unequivocally reaffirm that discharged air traffic controllers will not be returned to their former positions or any other employment with the FAA. It is important that the President justify this policy decision as one based on the "efficiency of the service" standard - the standard which defines the scope of Presidential authority under 5 USC §3301. Judicial review of suitability determinations has focused on their justification in terms of efficiency of the service, and, therefore, a Presidentially promulgated rule that discharged controllers are unsuitable for FAA employment must be rationally related to efficiency concerns.

Under OPM regulations, "efficiency of the service" is defined not only in terms of an individual's ability to perform his job, but also the effect an individual has upon others within the agency. 5 CFR §731.202(a). The President's decision not to return air traffic controllers to their former positions is justified by the adverse effect such reemployment would have upon the FAA's operational efficiency. This basis for the President's decision should be emphasized in the executive order. The President should expressly state that returning discharged air traffic controllers to the FAA would have a serious adverse effect upon other employees who properly chose to honor their oaths and continue working. It may be advisable to substantiate this concern for the employee relations climate at the FAA as it relates to the system's efficiency with a brief written report from the Administrator explaining the probable adverse effect of reemploying the strikers. Such a report should also substantiate the current operational adequacy of the system, in order to anticipate an argument that the "efficiency" of the system would be best served by reemploying the discharged controllers. Substantiating the President's decision through such background reports on the system's efficiency and articulating the decision in terms of efficiency concerns will best prepare for possible judicial challenge to the special executive action.

Further, because the decision not to rehire controllers to their former positions will be justified by the adverse impact upon FAA, it would be prudent to expand the ban to encompass any reemployment with the FAA. It would be difficult to justify the decision not to rehire into former positions, if the discharged controllers could exercise a similar adverse impact in other FAA positions.

The President's statement should not expressly state that the duration of the suitability bar to reemployment of air traffic controllers in their former positions is permanent. Use of the word "permanent" or other similar terms should be avoided because permanent debarment, even from a single agency or type of position, can engender statutory and constitutional problems. Moreover, it is implicit that any President's exercise of such discretion is for a duration coextensive with his term. Rather, the President could direct both the OPM Director and the FAA Administrator that it is his final decision that the controllers shall not be returned to employment at the FAA.

The foregoing implementation approach is not free from legal risks. A Presidential directive that discharged controllers will be deemed unsuitable for re-employment at the FAA can be judicially challenged as an arbitrary exercise of discretion or outside the Chief Executive's authority to regulate federal employment. However, such a legal attack can be raised against virtually any special Presidential action dealing with the controllers. Utilization of the OPM administered suitability procedures to implement the policy also can lead to legal challenges to allegedly discriminatory application of those procedures. This risk, however, appears outweighed by the benefit of utilizing established OPM suitability procedures for enforcing the statutory ban on employment of strikers. Any alternative approach for implementing the policy on rehiring discharged controllers would create similar and potentially more serious risks of legal challenge. An implementation method relying upon an executive order directing OPM suitability determinations provides the firmest legal basis for the Administrator to institute its policy.